

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

CENTRAL EXCISE APPEAL NO. 111 OF 2015

Indo Swiss Embroidery Industries Limited,
a company registered under the
Companies Act, 1956, having factory at
Plot No. 2134/4, Near Dadra Check Post,
Dadra, (UT of D & NH)

..Appellant

Versus

Commissioner of Central Excise, Vapi,
4th floor, Adarsh Dham building,
Opposite Town Police Station,
Vapi 396 191.

..Respondent

Mr. Bharat Raichandani i/by Mr. Gaurav Agrawal for the Appellant
Mr. Pradeep S. Jetly for the Respondent.

**CORAM: ANOOP V. MOHTA AND
SMT.ANUJA PRABHUDESSAI, JJ.**

CLOSED FOR JUDGMENT : July 10, 2017

PRONOUNCED ON : July 17, 2017

JUDGMENT (Per Anoop V. Mohta, J.):

1 This is an Appeal under Section 35-G of the Central Excise Act, 1944 (for short, "Excise Act"). The Appellant has preferred this Appeal against final order dated 27.09.2013 passed by the Customs,

Excise & Service Tax Appellate Tribunal, Ahmedabad (The Appellate Tribunal) and prayed to quash and set aside the order on the following questions of law:

- (1) Whether, in the facts and circumstances of the present case, the Appellate Tribunal was correct in holding that the appellant is liable to pay interest when there is no provision in law for charging interest?
- (2) Whether, in the facts and circumstances of the present case, the Appellate Tribunal was correct in holding that the appellant has not agitated this issue and hence, the same cannot be gone into?

2 Heard finally by consent of the parties, therefore, this final judgment.

3 The relevant facts are as under:

The Appellant is inter alia, engaged in the manufacture of Embroidered Grey Fabrics falling under Chapter Sub Heading No. 5804.11 of the Central Excise Tariff Act, 1985 (Excise Tariff Act). The Central Excise Officers, Daman, summoned the appellant for

production of records. On scrutiny of the records, the central excise department alleged that the appellant had incorrectly classified the product under chapter heading No. 5804.11 as “Lace/Motif of Cotton” instead of chapter heading No. 5804.19 as “Embroidery”. The department was of the view that the appellant is liable to pay AED (TTA) @ 15% instead of 8% w.e.f. 20/08/1998 onwards.

4 The provision of law which is applicable is: Sub-section (3) of Section 3 of the Additional Duties of Excise (Textile & Textile Articles) Act, 1978 (ADE (T&TA) Act) and the same reads as under:

“Section 3 : Levy and Collection of additional duties :-

(1)

(2)

(3) The provisions of the Central Excise act, 1944 and the rules made thereunder, including those relating to refunds and exemptions from duties, shall, so far as may be, apply in relation to the levy and collection of the duties of excise leviable under this section in respect of any goods as they apply in relation to the levy and collection of the duties of excise on such goods under the Act or other rules.”

It is clear that Section 3(3) of the Excise Act adopts the provision of Central Excise and Salt Act relating to levy and collection including of refund and exemption from duty. There is no provision in this ADE

(T&TA) Act for imposing of penalty so contemplated under Section 11AC of Excise Act and the charge of interest provided under Section 11AB of Excise Act. The above provision, therefore, we have to keep in mind while deciding the issues so raised in the present Appeal.

5 On 02.05.2003, the appellant replied to the show cause notice and denied the allegations. On 31.03.2004, the Joint Commissioner, Central Excise, Vapi vide its order confirmed the entire demand of ADE (T&TA) of Rs.6,23,478/- along with interest under Section 11AB and imposed equal penalty amounting to Rs.6,23,478/- under Section 11AC of the Central Excise Act, apart from penalty of Rs.1,00,000/- under erstwhile Rule 173-Q of Central Excise Rules, 1994 (The Rules).

6 Being aggrieved, the appellant filed appeal before the Appellate Tribunal. The Appellate Tribunal vide Order dated 21.09.2005 held that the appellant is liable to pay the demand. However, the Appellate Tribunal remanded the matter back to the original authority to re-determine the penalty to be imposed under Section 11AC in light of the decision of the Apex Court in the case of

State of Madhya Pradesh vs. M/s. BHEL,¹. On 20.10.2006, however, vide its order, the Joint Commissioner of Central Excise, Vapi imposed same penalty on the appellant under Section 11AC of the Excise Act and the Rules.

7 Being aggrieved, the appellant herein filed appeal before the Commissioner of Central Excise (Appeals), Vapi. The Commissioner of Central Excise (Appeals) vide stay order dated 15.10.2007 directed the appellant to pre-deposit Rs.4,00,000/- as a condition to hear the appeal. The appellant filed an application for modification of stay order. The Commissioner of Central Excise (Appeals) rejected the appeal for non-compliance vide order dated 23.06.2008. On 07.11.2008, on appeal by the appellant, the Appellate Tribunal vide order directed the appellant to deposit 50% of the penalty amount i.e. Rs.3,12,000/- and remanded the case back to the Commissioner (Appeals) to decide the issue on merits.

8 On 27.02.2009, the Commissioner of Central Excise (Appeals) vide its order upheld the entire penalty again. On

1 1998 (99) ELT 33 (SC)

22.07.2009, on further appeal, the Appellate Tribunal, once again, vide its order remanded the matter back to the adjudicating authority to follow the directions contained in the earlier order passed by the Appellate Tribunal.

9 In the year 2010, 2011 and 2012, the adjudicating authority dropped the penalty under Section 11AC *ibid* vide order dated 29.03.2010 on the ground that there was no provision for confiscation or imposition of penalty under Section 11AC *ibid* for failure to pay AED (T & TA) which was levied under the provisions of the ADE (T&TA) Act. Consequently, the appellant filed an application seeking refund of pre-deposit of Rs. 3,12,000/- made in compliance of order dated 07.11.2008 passed by the Appellate Tribunal.

10 On 26.12.2012, however, its order the adjudicating authority sanctioned the refund of Rs.3,12,000/- but appropriated the same against interest amounting to Rs.8,45,446/- alleged to be payable by the appellant on AED (T & TA) of Rs.6,23,478/-.

11 Being aggrieved, the appellant filed appeal before

Commissioner of Central Excise (Appeals), Vapi, on the ground that in absence of statutory provision, no interest can be demanded from the appellant. However, vide order dated 11.04.2013, the Commissioner of Central Excise (Appeals) rejected the appeal filed by the appellant.

12 In 2013, being aggrieved, the appellant filed an appeal before the Appellate Tribunal. However, the Appellate Tribunal by impugned order (Exhibit "A") rejected the appeal on the ground that the appellant had not challenged order dated 21.09.2005, and hence, the same has become final. The appellant therefore cannot agitate the issue of interest. Hence, this Appeal.

13 Admittedly, Sections 11AC and 11AB of Excise Act have not been incorporated in the ADE (T&TA) Act. The counsel appearing for the Department/Respondent though endeavoured unable to pinpoint the incorporation of these Sections. In absence of any statutory provisions, it is settled that any demand of penalty (11AC) and/or interest (11AB) would be without jurisdiction and authority of law. It is settled that a clear statutory mandate requires for authority

to collect and/or raise demand of any tax and penalty and/or interest. In the absence of such provision, any demand in the present case, of penalty/interest is unauthorised, impermissible and unsustainable.

14 The learned counsel appearing for the Respondent submitted that the adjudicating authorities have, at every stage, confirmed the demand including of penalties and recovery of interest and, therefore, the issues have attained finality; the Appellant ought to have, at the relevant time, filed an Application for rectification of mistake; the same was not done and, therefore, such concurrent findings so given by the authorities need not be disturbed and/or interfered with in the present Appeal. We are not inclined to accept these contentions, even the reasoning given by the learned authorities while confirming the said demand of interest specifically in view of above provision of law and fact. There is no provision to collect such taxes and specifically when there is nothing pointed out nor any reason given by the authorities, how they have charged this interest referring to Section 11AB of the Act. If there is no provision and authority to raise such demand, the rectification application filed or not, in no way confirm the power to collect tax or penalty and/or

interest without the provisions of law and authority. There is no estoppel against the law. Such demand itself, as recorded, as we have noted after going through the reasons given by the authorities, was not based upon any facts and/or finding so recorded on the interest or penalty. The Supreme Court in many cases, specifically in *Collector of C. Ex., Ahmedabad v. Orient Fabrics Pvt. Ltd.*² expressly concluded that in the absence of any specific provision for any penalty and/or confiscation proceeding any imposition of this nature is unwarranted and without authority of law. It is reiterated that the authority has to be specific and explicit and expressly provided in view of law and Article 265 of the Constitution of India. The present case falls within the ambit of protection so provided for such law.

15 Additional factor in the present case is that all the authorities have confirmed the finding so arrived at about the interest, but without giving any reason to charge such penalty and/or interest referring to Sections 11AC and 11AB of Excise Act. Mere confirmation of such demand of penalty and/or interest by the authority, in the absence of provisions of law, as it goes to the root of the matter for

2 2003 (158) E.L.T. 545 (S.C.)

want of law and authority, is unsustainable and is required to be interfered with. The taxing provisions must be cleared and so also the charging Section and the mechanism to collect it. It needs to be construed strictly. [*Commissioner of Income Tax (Central)-I, New Delhi Vs. Vatika Township Private Limited*³ (5 Judges Bench).]

16 We have noted that the Appellate Tribunal while passing the order though dealt with Section 11AC of Excise Act, referring to Supreme Court judgment in *State of M. P. vs. BHEL (supra)*, set aside the demand of penalty by allowing the Appeal of the Appellant.

17 The Department itself, therefore, accepted the position of law and even set aside such imposition under Section 11AC by Additional Commissioner by order dated 29.03.2010. In view of above, the order passed by the Assistant Commissioner dated 26.12.2012 whereby order to refund the amount in view of above, but directed to appropriate the interest to be paid by the assessee (Appellant) under Section 11 of the Excise Act, is unsustainable. This is again contrary to the provisions of law. If interest is not payable for want of specific authority and provision, there is no question of appropriation of any amount towards any other refund. The order of recovery of interest at appropriate rate for delayed payment by invoking the provision of Section 11AB of Excise Act,

3 (2015) 1 SCC 1

therefore, is unjust, unclaimable as it is illegal. In view of above reasons, the confirmation of the same by the impugned order dated 27.09.2013 is also unsustainable and is required to be set aside. The Appeal is required to be allowed.

18 Therefore, the following order :

ORDER

- (i) Both the questions are answered in the Negative.
- (ii) Appeal is allowed in terms of prayer (b) which reads thus:

(b) that this Hon'ble Court be pleased to quash and set aside the Final Order No. A/11253/WZB/AHD/2013 dated 27.09.2013 passed by the Appellate Tribunal in Appeal No.E/11591/2013 (Exhibit A).

- (iii) No costs.

(ANUJA PRABHUDESSAI,J.)

(ANOOP V. MOHTA, J.)