CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
<u>WEST ZONAL BENCH AT AHMEDABAD</u>

REGIONAL BENCH – COURT NO. 03

Excise Appeal No. 1249 of 2011-DB
[Arising out of OIA-BC/174-175/SURAT-II/2011 passed by Commissioner (Appeals), Central Excise, Customs & Service Tax-Surat-ii]

M/s. Kiran Syntex Ltd ……..**Appellant**
1/234, Popat Street, Nanpura.
Surat, 395001, Gujarat

VERSUS

C.C.E. & S.T. Surat-ii **………Respondent**
New Central Excise Build.,Opp. Gandhi Baug,
Chowk Bazaar, Surat, 395001

WITH

Excise Appeal No. 1250 of 2011-DB
[Arising out of OIA-BC/174-175/SURAT-II/2011 passed by Commissioner (Appeals), Central Excise, Customs & Service Tax-Surat-ii]

Joy M Godiwala ……..**Appellant**
Director, M/s Kiran Syntex Ltd.
1/234, Popat Street, Nanpura.
Surat, 395001, Gujarat

VERSUS

C.C.E. & S.T. Surat-ii **………Respondent**
New Central Excise Build.,Opp. Gandhi Baug,
Chowk Bazaar, Surat, 395001

<u>APPEARANCE</u>:
Shri. W. Christian (Adv.) for the Appellant
Shri. T.K. Sikdar, Authorized representative for the Respondent

CORAM: HON'BLE MR. RAMESH NAIR, Member (JUDICIAL)
HON'BLE MR. RAJU, Member (TECHNICAL)

FINAL ORDER NO. <u>A/ 11124-11125 /2019</u>

DATE OF HEARING: 05.07.2019
DATE OF DECISION: 16.07.2019

RAJU

These appeals have been filed by M/s Kiran Syntex Ltd. against confirmation of Central Excise interest and penalty. Appeal has also been filed by M/s Joy M. Godiwala against penalty.

2. Ld. Counsel for the appellant pointed out that on visit by Revenue officers , it was found that certain amount of POY procured by

them from the suppliers duty free on the strength of CT-3 certificate was unaccounted in the factory premises. Consequently, revenue issued notice demanding duty on the material which was found unaccounted in the premises. Ld. Counsel pointed out that the revenue has sought to demand duty on the said goods under the proviso to section 3 treating the said goods as goods manufactured by the appellant. He pointed out that the said goods even by revenue's assertion are raw materials procured by the appellant duty free from others and hence demand of duty at rates applicable to goods manufactured by 100% EOU is not legal and proper. He relied on the decision of Tribunal in the following cases:

- CCE vs Suresh Synthetics 2007 (216) ELT 662 (SC)
- CC vs Kesar Marble & Granites 2012 (278) ELT 42 (Kar.)
- DGP Hinoday Industries Ltd. vs CCE 2017 (349) ELT 503

2.1 He also argued that in the instant case, the SCN is totally time barred as the Central Excise Officers visited the factory premises on 24.06.2003 and on the same day the statement of director was recorded. He pointed out that under such circumstances issuance of SCN on 12.02.2008 is clearly beyond normal period of limitation. He argued that in the current circumstances, section 11AC and Rule 25 cannot be invoked as the goods were not manufactured by appellant.

3. Ld. AR relies on the impugned order.

4. We have gone through rival submission. We find that the goods found unaccounted were raw materials procured by the appellant duty free on the strength of CT-3 certificate. The revenue has demanding duty treating the goods as goods procured by the appellant and applying rates applicable under proviso to section 3 of Central Excise Act, 1944. Ld. Counsel has relied on the decision of Hon'ble Apex Court in the case of Suresh Synthetics (Supra). In the said case the demand of customs duty was made in respect of clearances made by 100% EOU. In the instant case, the demand of central excise duty has been made and thus facts of the case are different. Ld. Counsel has also relied on the decision of Hon'ble High Court of Bombay in the case of Kesar Marble & Granites (Supra). We find that in the instant case also the demand of customs duty was raised whereas in the instant case, the demand of central excise duty was raised and thus facts are different. Ld. Counsel has also relied on the decision of Tribunal in the

case DGP Hinoday Industries Ltd. (supra). In the instant case, the SCN had quantified the illicit clearance on the strength of electricity records whereas the impugned order had re-calculated the quantum of illicit clearance on the basis of raw material consumed, the said procedure was held to be unaccounted. We find that in the instant case, the facts are significantly different, thus decision has no application in the instant case.

5. We find that Ld. Counsel has invoked limitation on the strength of fact that the revenue was aware of the non-accountal of raw material on the date of visit and SCN was issued much later. The impugned order rightly relied on the decision of Hon'ble High Court of Gujarat in the case of Neminath Fabrics Pvt. Ltd. 2010 (256) ELT 369 (Guj.) dated 22.04.2010 wherein it was held that mere knowledge of revenue is not sufficient if the factors necessary for invoking proviso to section 11A are otherwise present. In view of above argument relating to limitation is not acceptable. Ld. Counsel has also raised issue that section 11A and therefore Section 11AC, Rule 25 of Central Excise Rules cannot be invoked as the goods were not manufactured by the appellant. We do not find anything in section 11A which restricts its applicability to only manufacturer. Section 11A applies to any duty leviable.

5.1 Notification 1/95-CE dated 04.01.1995 prescribes to concession granting to 100% EOU. Clause D(ii) prescribes as under:

> *"(d) the user industry executes a bond with the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise (hereinafter referred to as Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise) in the prescribed form and for such sum as may be specified by that Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise, for the proper accountal of the receipt, storage and utilisation of such goods and to fulfil the export obligations and to comply with the conditions stipulated in this notification and the Export and Import Policy, and binding itself to pay on demand and an amount equal to the duty leviable on the goods and interest at the rate of 20% per annum on the said duty from the date of duty free procurement of the said goods till the date of payment of such duty, if*
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> *(ii) In the case of goods other than capital goods, such goods are not proved to the satisfaction of the Assistant Commissioner of Customs or Central Excise to have been used in connection with the production or packaging of goods for export out of India or cleared for home consumption within a*

> *period of one year from the date of procurement thereof or within such extended period as the Assistant Commissioner of Customs or Central Excise may, on being satisfied that there is sufficient cause for not using them as above within the said period, allow:"*

5.2 In the instant case, the appellant are failed to account for a certain quantity of raw material procured by them and consequently, they are liable to pay duty. It is seen that the proviso to section 3 applies only to goods manufactured or produced by a 100% EOU. It therefore cannot be applied to the said goods which were clearly not produced by the appellant. In these circumstances, demand of duty in terms of proviso to section 3 of Central Excise Act cannot be upheld. In terms of clause d(ii) of the notification 1/95 only an amount equal to the duty forgone while procuring the said goods under CT-3 can be demanded. In view of above demand to the extent exceeding the demand of duty forgone on procurement of said goods is set aside. Penalty is also consequently, revised under section 11AC to the re-quantified duty. It is seen that penalty of Rs. 2Lacs has been imposed on Sh. Joy M. Godiwala by the impugned order. We find that in the instant case there was diversion of significant quantity of material procured duty free under CT-3. Joy M. Godiwala was director of the unit and he had also admitted in his statement that all day to day activities of the unit including work related to central excise and customs was carried out as per his direction and instructions. In these circumstances, we find significant force to invoke rule 26 of Central Excise Rules and to impose penalty on Sh. Joy. M. Godiwala. In view of above, we partly allow the appeal of M/s Kiran Syntex and dismiss the appeal filed by Sh. Joy M Godiwala. The matter is remanded solely for qualification.

(Order pronounced in the open court on 16.07.2019)

(Ramesh Nair)
Member (Judicial)

(Raju)
Member (Technical)

Neha