CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL AHMEDABAD

REGIONAL BENCH, COURT NO. 3

EXCISE APPEAL NO. 12561 OF 2014

[Arising out of OIO-VAP-EXCUS-000-COM-086-13-14 dated 24/03/2014 passed by Commissioner of Central Excise, Customs and Service Tax-VAPI]

GHCL LIMITED **Appellant**
191-192, Mahala Falia,
Bhilad, Valsad, Gujarat

Vs.

C.C.E. & S.T.-Vapi **Respondent**
4th Floor, Adharsh Dham Building,
OPP. Town Police Station, Vapi-Daman Road,
Vapi, Gujarat-396191

WITH

EXCISE APPEAL NO. 12585 OF 2014

[Arising out of OIO-VAP-EXCUS-000-COM-086-13-14 dated 24/03/2014 passed by Commissioner of Central Excise, Customs and Service Tax-VAPI]

JAYESH MANTRI **Appellant**
Senior Manager Of M/s, Ghcl Limited,
191-192, Mahala Falia, Bhilad,
Valsad, Gujarat

Vs.

C.C.E. & S.T.-VAPI **Respondent**
4th Floor, Adharsh Dham Building,
OPP. Town Police Station, Vapi-Daman Road,
Vapi, Gujarat-396191

Appearance:
Shri Anand Nainawati, Advocate for the Appellant
Shri Ajay Kumar Samota, Superintendent (AR) for the Respondent

CORAM: **HON'BLE MR. RAMESH NAIR, MEMBER (JUDICIAL)**
HON'BLE MR. C. L. MAHAR, MEMBER (TECHNICAL)

FINAL ORDER NO. 12657-12658/2024

Date of Hearing : 08.07.2024
Date of Decision : 08.11.2024

C L MAHAR

The brief facts of the matter are that the appellant are engaged in manufacturing of cotton made textile articles and cotton blended processed fabrics falling under chapter heading 63041910, 52082270 and 52101900 of the first schedule to the Central Excise Tariff Act, 1985. The appellant have been exporting the finished product under DEPB scheme prior to 31st March, 2008. The appellant decided to export goods manufactured by them namely Grey Fabric and other manufacture goods availing benefit under duty drawback scheme that effect from 01.04.2008 following the procedure under Customs, Central Excise duty and service tax (drawback) Rules, 1995 . The drawback is admissible on the exported goods and the conditions that no Cenvat Credit of input and input services is availed in respect of the goods exported.

2. The appellant vide their letter dated 28.04.2008 intimated the department that they have started exporting goods with effect from 01.04.2008 under claim for duty drawback and they have reversed Cenvat Credit on the stock of raw material, stock under process etc. lying as on 31.03.2008. The appellant has also enclosed a calculation sheet of the reversal of the Cenvat Credit as well as the stocks of the various raw materials, semi-finished and finished goods along with their letter dated 28.04.2008.

3. The department during the course of an audit of the financial records of the appellant for the period of December 2010 to April 2011, has contended that appellant have short reversed the Cenvat Credit on the duty involved on dyes and chemicals, furnace oil, packing materials used on the finished goods exported under duty drawback scheme. On the basis of above contention the department had issued a show cause notice dated 29.03.2013 demanding Cenvat Credit of Rs. 59,21,429/- invoking the provisions of section 11A(4) of Customs, Excise Act, 1944 read with Rule 14 of the Cenvat Credit Rules, 2004 invoking the provisions of demanding duty under extended time proviso to Section 11A of Customs, Excise Act, 1944.

4. Shri jayesh mantri (appellant) was also show caused as to why a penalty should not be imposed on hand under the Rule 15 (2) of the Cenvat Credit Rules, 2004.

4.1 The learned advocate appearing for the appellant has submitted that for the process of sizing, colour & chemicals, the department at Sl. No. 5 of Annexure- J the show cause notice has determined the total cost as Rs.8.66 per meter. The department on the basis of cost audit report has determined that total 444740 Kg. of sizing chemicals valued at Rs.3.48.98,789/-and 2685960 Kg. of colours and chemicals valued at Rs.20,60,59,092/- have been used to produce 27834521 meters of processed fabric. Thus, cost of sizing and colour and chemicals 240957881/27834521 Rs.8.66 per meter.

4.2 The aforesaid calculation by the department is incorrect inasmuch as process of sizing is not done on all the processed fabrics and done only in respect of that much quantity of yarn which is purchased by the Appellants and is subjected to process of weaving within the factory. The Appellants submit that only 7059069 meters of grey fabric is manufactured out of purchased yarn and subjected to sizing process and the remaining grey fabric is weaved outside the factory of the Appellants and no sizing chemicals were used on such grey fabrics by the Appellants. Since the demand has been raised by showing usage of sizing chemicals on all the grey fabrics, the demand of the department which includes cost of sizing even on that quantity of fabric which is not weaved in-house is incorrect and liable to be set aside.

4.3. It is therefore submitted, that while arriving at the actual value of reversal to be done in respect of processed fabrics the cost of sizing, it has to be taken individually as Rs.4.94 per meter and colour & chemicals for finishing at the rate of as Rs.7.40 per meter. The fact that cost of sizing chemicals is Rs.4.94 per meter and colour & chemicals is Rs.7.40 per meter is further affirmed by the Audit Report submitted by the appellant.

4.4 The cost of furnace oil consumed per meter has been determined on the basis of consumption of furnace oil worth Rs. 10,68,04,421/- for manufacturing 27834521 of meters of processed fabric comes to Rs.3.84 per meter.

4.5 The following details of stock as on 31.3.2008 has been provided in the impugned show cause notice:

Particulars	Stock
Grey Fabric Manufactured : a) Grey Fabric Mfgd. by Yarn on which sizing is done b) Weaved fabric at loom stage (undergone sizing process) by WIP of Sizing Yarn	1477794 Meters 62109 Kgs
Processed fabric lying in stock manufactured out of: a) Yarn purchased and grey fabric manufactured 1461583.00 Mtr. b)Grey purchased from outside & No Sizing is done on c) Grey received for processing on job work	498899.00 Mtr. 962683.00 Mtr. 412824.00 Mtr.
Made ups (Finished goods) including WIP a) Yarn purchase for Grey Fabric Manufactured 1418804.00 Mtr. b) Grey Fabric purchased from outside	484297.00 Mtr. 934507.00 Mtr.

4.6 Based on the above details of processed fabrics manufactured by the Appellants either at their factory or on job work basis or purchased from outside, the credit reversal done by the Appellants is correct and the entire demand of Rs.59,21.429/- is liable to be set aside.

(i) Demand of Rs.3.22,765/- on dyes and chemicals used in processed fabric (Own) lying with unit as on 31.3.2008 is not sustainable. There is no dispute as to the quantification of production details produced by the Appellants. The process of production stated by the Appellants also remains undisputed by the Ld. Commissioner. The L.d. Commissioner ought to have appreciated the fact that sizing is not required to be done on fabric purchased from outside or job work and Cenvat credit is required to be reversed only to the extent of Rs.21.88.589.55/-

(ii) Similarly the demand of Rs 3,13,166/-on dyes used in processed fabric (Job work) is not sustainable. The actual stock of processed fabric (job) was 412824 meters and therefore the actual reversal required to be done by the Appellants is 41284 x 7.40 x 16.48% i.e. Rs.5,03,447/-. However, the department has calculated reversal of Rs. 7,21,366/- on the basis of stock as per Cost Audit Report.

(iii) The Appellants submit that the actual reversal required to be done by the Appellants is Rs.5,03,447/- and thus the short reversal accepted by the Appellants is only to the extent of Rs.95,247/-

(iv) Demand of Rs.79,477/- on dyes and sizing chemicals used in made ups lying as on 31.3.2008 is not sustainable. Out of a total of 1418804 meters of Made-Ups (finished), 484297 meters of Made-Ups were manufactured out of grey fabric manufactured in-house and 934507 meters of Made-Ups were out of purchased grey fabric. Therefore, the department erred in applying cost of sizing and colour & chemicals on the total quantity.

(v) Demand of Rs.5,15,857/- on Made-Ups (WIP) is not sustainable the calculation was done by the Appellants before or after the audit is irrelevant. The Appellants have arrived at the amount of Rs.11,60,182/- based on the 733908 meters of Made-Ups(WIP) lying in stock as on 31.03.2008 as against the stock of 987571 meters of closing stock alleged by the department.

(vi) Demand of Rs.7,10,002/- on furnace oil is not sustainable. Out of 1461583 meters, 498899.23 meters of fabric in stock is of own loom and balance 962683.77 meters of fabric is of purchased grey fabric. The consumption of Furnace Oil per meter of own loom is Rs.3.84 per meter and for purchased grey fabric it is Rs.2.50 per meter. Therefore, the department has erred in applying uniform rate of 3.84 per meter for both the types of fabric.

(vii) Demand of Rs. 10,06,655/- on packing material is also liable to be set aside. The Appellants have availed Cenvat credit of packing material only on that quantity of goods which have been used in the manufacture of dutiable goods. No Cenvat credit has been availed on packing material used for the manufacture of exempted goods. Demand of Rs. 12.64,748/- on packing material is also liable to be set aside.

(viii) Demand of Rs.8,96,744/- is not sustainable. No credit was availed during the year 2008- 2009 on any goods exported under claim for drawback. The department cannot demand reversal of credit mechanically. The burden is on the department to prove that credit has been taken on goods exported under claim for drawback.

5. The Entire demand is barred by limitation

The Appellants submit that w.e.f. 28.4.2008 they decided to export their goods under claim for Drawback in respect of all goods exported. The Appellants intimated the department about the aforesaid fact vide their letter dated 28.4.2008 with details of Cenvat Credit reversals.

Thus, on 28.4.2008 itself the department was aware of the fact that the Appellants are clearing goods for export under claim for drawback (without Cenvat). The department is also aware of the fact that the Appellants were availing credit of excise duty paid on inputs, capital goods and input services. The department was also aware of the law that one of the conditions to avail drawback is that no drawback is claimed in respect of inputs used in the manufacture of goods exported.

Thus, all relevant facts were well within the knowledge of the department. It is now well settled legal position that when facts are known to both parties, the allegations of suppression can not sustain. The Learned advocate has placed reliance is placed on the following decisions:

a) Continental Foundation Jt. Venture Vs. CCE 2007 (216) ELT 177 (S.C)
b) CCE Vs. Pioneer Glass Works 2006 (197) ELT 308 (S.C)
c) Anand Nishikawa Co. Ltd. Vs. CCE 2005 (188) ELT 149 (S.C)

6. We have also heard the learned department representative who has reiterated the findings as given in the order-in-original dated 24.03.2014.

7. We have heard both the sides, we feel that in this matter before proceedings further on the merit of the case. The issue whether demand is barred by period of limitation or not is to be decided first. From the facts of the matter it emerges that appellant has informed the department 28.04.2008 regarding the reversal of Cenvat Credit availed by them on various inputs like dyes chemicals, sizing chemicals, finishied yarn, packing material etc. They have also informed in the annexure to mentioned letter dated 28.04.2008 regarding the quantities of inputs, semi-finished goods, finished goods and amount of the Cenvat Credit which have been reversed by them to the department, while shifting from DEPB scheme of export to duty drawback scheme. We find from the audit report that the appellant firm has regularly been audited by the department and alleged short reversal of the Cenvat Credit has been detected by audit party during the audit which took place between December-2010 to April-2011. We are of the considered view that the department was aware fully about the facts of the matter since 28.04.2008 as the appellant has informed them in detail regarding reversal of Cenvat Credit done by them on various inputs as mentioned in the annexure to their letter dated 28.04.2008. These facts categorically establish that it was well within the knowledge of the department regarding the reversal of Cenvat Credit by the appellant.

8. For invoking the extended time proviso of section 11A(4) Central Excise Act, 1994 read with Rule 14 of Cenvat Credit Rules, 2004, the elements of fraud, collusion, any willful misstatements, suppression of facts or contravention of the any of the provisions of this act or of the rules with an intention to evade payment of duty has to be made out. We find that in this case none of the above elements are available as the appellant has made it known to the department on 28.04.2008 regarding reversal of the Cenvat Credit which have been availed previously by them on certain inputs and goods under process. The impugned show cause notice came to be issued on 29.03.2013 invoking the extended time proviso under section 11A(4) of the central excise act 1994 read with rule 14 of the Cenvat Credit rule 2004 which is not legally sustainable we are therefore are of view that the show cause notice is hit by period of limitation and we hold that extended time proviso is not invokable in this case as the department was in know of facts since 28.04.2008. The show cause notice has been issued in the month of March, 2013 much beyond the normal period of limitation. We therefore hold that the impugned show cause notice as well as impugned order-in-original are bared by period of limitation, while holding this view we also take shelter of Hon'ble Supreme Court decision in case of M/s. Anand Nishikawa Company Ltd Vs. CCE reported under 2005 (188) ELT 149, the relevant extract of same is reproduced here below:-

> *"27. Relying on the aforesaid observations of this Court in the case of Pushpam Pharmaceutical Co. v. Collector of Central Excise, Bombay [1995 Suppl. (3) SCC 462), we find that "suppression of facts" can have only one meaning that the correct information was not disclosed deliberately to evade payment of duty, when facts were known to both the parties, the omission by one to do what he might have done not that he must have done would not render it suppression. It is settled law that mere failure to declare does not amount to willful suppression. There must be some positive act from the side of the assessee to find willful suppression. Therefore, in view of our findings made herein above that there was no deliberate intention on the part of the appellant not to disclose the correct information or to evade payment of duty, it was not open to the Central Excise Officer to proceed to recover duties in*

the manner indicated in proviso to Section 11A of the Act We are, therefore, of the firm opinion that where facts were known to both the parties, as in the instant case, it was not open to the CEGAT to come to a conclusion that the appellant was guilty of suppression of facts". In Densons Pultretaknik v. Collector of Central Excise (2003) (11) SCC 390], this Court held that mere classification under a different sub-heading by the manufacturer cannot be said to be willful mis-statement or "suppression of facts. This view was also reiterated by this Court in Collector of Central Excise, Baroda v. LMP Precision Engg. Co. Ltd. [2004 (9) SCC 7031.

28. However, in the case of LMP Precision Engg. Co. Ltd. (supra), this Court came to the conclusion that the manufacturer was guilty of "suppression of facts." In that decision, manufacturer did not make any attempt to describe the products while seeking an approval of classification list and in that background of facts, it was held that it amounted to "suppression of facts and therefore, Excise authorities were entitled to invoke proviso to Section 11A of the Act. It also appears from that decision that this Court also held that if any classification was due to mis-interpretation of the classification list, suppression of facts could not be alleged. From this judgment, it is therefore clear that since the Excise authorities had collected samples of the products manufactured by the appellant and inspected the products and the relevant facts were very much in the knowledge of the Excise authorities and nothing could be shown by the Excise authorities that there was any deliberate attempt of non-disclosure to escape duty, no claim as to "suppression of facts" could be entertained for the purpose of invoking the extended period of limitation within the meaning of proviso to Section 11A of the Act.

29. Similarly, in the case of Collector, Central Excise, Jamshedpur v. Dabur India Ltd. (2005 (121) ECR 129 (SC)], this Court held that the extended period of limitation was not available to the Department as classification lists filed by the Assessee were duly approved by the authorities from time to time. In that decision this Court followed its earlier judgment in O.K. Play (India) Ltd. v. Collector of Central Excise, Delhi-III (Gurgaon) [2005 (66) RLT 657 (SC)], held that in cases where classification lists filed by the Assessee were duly approved, the extended period of limitation would not be available to the Department.

30. For the reasons aforesaid, we are of the view that the CEGAT was not justified in holding that the extended period of limitation would be available to the Department for initiating the recovery proceedings under Section 11A of the Act on a finding that there was suppression of facts by the appellant Accordingly, it was not open to the Excise authorities to invoke proviso to Section 11A of the Act and therefore, the demand of the Revenue must be restricted to six months prior to the issue of notice dated 19-10-1995 instead *of five years. In view of this conclusion, it is not necessary for us to consider the question of applicability of the classification lists namely of 4008.29 and 4016.19 and the question of MODVAT facilities. Accordingly, in our opinion, CEGAT came to a wrong conclusion for wrong reasons and therefore, we allow this appeal and set aside the judgment and order of the CEGAT and restore the order of the Commissioner."*

In view of above facts and following the above decision of Hon'ble Apex Court we hold that the impugned order-in-original is without any merit and therefore we set aside the same.

9. Accordingly, the appeals are allowed.

(Order pronounced in the open Court on 08.11.2024)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(C. L. MAHAR)
MEMBER (TECHNICAL)

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