IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI
COURT No. I

APPEAL Nos. E/993,997/2010
E/CO/30/2010

(Arising out of Order-in-Appeal No. AKP/71/NSK/2010 dated 11.3.2010 passed by Commissioner of Central Excise (Appeals), Nashik)

Commissioner of Central Excise, Nashik **Appellant**
Glenmark Pharmaceuticals Ltd.

Vs.

Glenmark Pharmaceuticals Ltd.
Commissioner of Central Excise, Nashik **Respondent**

Appearance:

Shri Ajay Kumar, Additional Commissioner (AR), for Revenue
Shri R.M. Patkar, Consultant, for appellant-assessee

CORAM:

Hon'ble Dr. D.M. Misra, Member (Judicial)
Hon'ble Mr. Sanjiv Srivastava, Member (Technical)

Date of Hearing: 05.09.2018
Date of Decision: 05.09.2018

ORDER No. **A/88277-88278/2018**

Per: Sanjiv Srivastava

Of the two appeals under consideration, one has been filed by the Revenue and one by the appellant party against order-in-appeal No. AKP/71/NSK/2010 dated 11.3.2010 passed by Commissioner of Central Excise (Appeals), Nashik.

2.2 The issue involved in the present case is with reference to the penalty imposed on the appellant party under Rule 25(1)(d) of the Central Excise Rules, 2002. The adjudicating authority had imposed a penalty of Rs.2,63,06,087/- which was reduced by the Commissioner (Appeals) to Rs.1 Crore.

2.3 The appellant party has challenged the order of the Commissioner (Appeals) imposing penalty of Rs.1 Crore whereas the Revenue is in appeal for the reason that the penalty has been reduced from Rs.2.63 crores to Rs.1 crore.

3.1 The appellant party had cleared the goods for the purpose of export after following due procedure from their factory. The goods instead of being taken to port directly for exportation were stored in their warehouse in Bhiwandi. These goods stored in warehouse were subsequently exported. The warehouse in Bhiwandi was not an approved warehouse by the Revenue. After completion of export, appellants would submit the proof of export.

3.2 In certain cases the proof of exports were not submitted within the prescribed time limits. On basis of the intelligence received revenue initiated an investigation in the matter and it was found that appellants have failed to produce proof of export against quite large number of ARE-I. During course of investigation statements various employees as detailed below were recorded. The facts about non submission of proof of export was admitted by the them in their statements. Appellants also paid the duty in respect of the goods covered by the ARE-1 against which proof of export was not submitted. The details of the payments made are enlisted in table below:

Sr. No	Year	Number of ARE-1 for which Proof of Export not submitted.	Duty Paid (Rs.)	Interest paid (Rs.)	Total amount paid (Rs.)
1.	2003-04	32	10,74,178	5,12,091	15,86,269
2.	2004-05	27	16,97,665	7,68,464	24,66,129
3.	2005-06	170	1,60,69,219	33,34,627	1,94,03,846
4.	2006-07	71	50,39,999	8,05,282	58,54,281
5.	Upto Sep 2007	74	24,25,026	3,17,581	27,42,607
	Total		**2,63,06,087**	**57,38,045**	**3,20,44,132**

3.3 Thus a show cause notice for imposition of penalty under Rule 25(1)(d) for allege contravention Rules 4, 6, 8, and 19(1) of the Central Excise Rules, 2002 read with Notification No.42/2001-CE(NT) dated 26.6.2001 and para 13.6 of Chapter 7 of CBEC's Manual, was issued to the appellant.

3.4 Appellants responded to the show cause notice stating that due to heavy rains on 26th July 2005, the entire area where the godown is situated in Bhiwandi was flooded, resulting in total loss of goods and various documents stored in the godowns. Thus various consignments stored in the godown awaiting export shipments could not be exported being fully damaged. Since all the documents maintained in the godown were also destroyed it took some time to ascertain the quantum of loss and pay the duty in respect of the goods cleared for export but not actually exported. They had no intention to evade the payment of duty. Further department was fully aware in respect of the goods cleared for export and related documents, hence they had not suppressed any facts from the revenue. Since they have not suppressed any facts from the revenue with intention to evade payment of duty, provisions of section 11AC should not be applicable to them. Further in terms of Rule 25(1)(d), penalty can be imposed only if the goods are confiscated. Since the conditions for imposition of penalty under rule 25(1)(d) and Section 11AC are not satisfied penalty should not beimposed on them.

3.5 The Assistant Commissioner adjudicating the case imposed penalty on the appellant stating that there was delay in payment of duty and the appellant has suppressed the fact of non-exportation of goods from the department. As the appellant has suppressed this fact, the Assistant Commissioner found that penalty can be imposed upon them under Rule 25(1)(d) of the Central Excise Rules.

3.6 The Commissioner (Appeals) has agreed with the contention of the Assistant Commissioner, however, reduced the penalty to Rs.1 crore.

4.0 We have heard Shri R.M. Patkar, Consultant, for the appellant party and Shri Ajay Kumar, Additional Commissioner (AR), for the Revenue.

5.1 Arguing for the appellant, the learned Consultant submitted that-

i. in the present case the goods were in fact cleared for exportation and were in the process of being exported when floods occurred in Mumbai leading to the non-exportation of the goods;
ii. agreeing to their failure to export the goods and submission of proof of export they have deposited the duty due;
iii. failure to export the goods and submit proof of export occurred because of the reasons beyond their control viz. natural calamity like flood. Also the delay in payment of duty on account of such failure was on this account only;
iv. in any case they have paid the entire duty in respect of these goods prior to issuance of show cause notice along with interest *suo motu*.
v. CESTAT has vide its Order No A/86414-86415/2018 dated 08.03.2018, remanded the

matter relating to remission of duty in respect of their goods cleared and stored in the warehouse outside the factory for further exportation destroyed in the flood for fresh determination;

vi. since they had no intention to evade payment of duty and all the facts in respect of exportation of the goods were in the knowledge of the department the appellant cannot be charged for suppression with intent to evade payment of duty for the purpose of penalty equivalent to duty under Rule 25(1)(d) of the Central Excise Rules read with Section 11AC of the Central Excise Act.

5.2 Arguing for the Revenue, learned AR submitted that-

i. in the present case the goods were cleared over a very long period of time starting from 2002-03 to September 2007. For the goods cleared over a period of nearly five years, the appellant had not submitted proof of export, or had paid duty in respect of the said ARE-1's;

ii. it was only subsequently that they paid the amount along with interest.

iii. the act of non-submission of proof of export within a period of six months from the date of clearance of the goods and nonpayment of duty due in respect of these goods immediately after the expiry of six months or any extended period allowed by the Assistant Commissioner cannot be condoned;

iv. in this case where delay is shown ranging upto five years, the appellant has knowingly contravened the provisions of Rules 4, 6, 8, and 19(1) of the Central Excise Rules, 2002 read with Notification No.42/2001-CE(NT) dated 26.6.2001 and para 13.6 of Chapter 7 of CBEC's Manual;

v. the goods which were cleared for export were stored in a godown, which was never in the knowledge of the department as this godown at Bhiwandi was never approved by the Revenue;

vi. for all these contraventions, the Assistant Commissioner was justified in imposing penalty equivalent to the duty short paid;

vii. Decision of Hon'ble Supreme Court in the case of *UOI vs. Dharmendra Textile Processors – 2008 (231) ELT 3 (SC)* and the decision of the Hon'ble Madras High Court in the case of *CC(E),Chennai-I vs. Bansal Industries – 2007 (207) ELT 346 (Mad.)*. also support the imposition of penalty;

viii. Hon'ble Supreme Court has in the case of *Punjab Tractors Ltd. vs. CCE – 2005 (181) ELT 380 (SC)* held that the appellant will undoubtedly be liable to pay penalty as prescribed under the rules for admitted violations too;

ix. the departmental appeal for restoration of penalty as imposed by the Assistant Commissioner be allowed and the appeal filed by the appellant party be rejected.

5. We have considered the submissions made by both the sides.

6.1 The issue is in a narrow compass with regard to the quantum of penalty to be imposed upon the appellant for their failure to export the goods cleared without payment of duty under bond for exportation.

6.2 It is an admitted fact that the goods were cleared after following due procedure in law and were after clearance stored in their godown located in Bhiwandi. From the Bhiwandi godown these goods were to be further transported for exportation from the relevant port. However, certain goods could not have been exported and proof of export in respect of some goods (ARE-1) were not submitted by the appellant within the prescribed time.

6.3 From the facts as narrated in the show cause notice and order in original we are not in agreement with the submission of the appellant that they had paid the duty along with interest on their own volition. It was only when the investigations were started against them that they paid the amount due.

6.4 A detailed chart has been annexed to the show cause notice giving details of the date of exportation in which case proof of export had not been submitted. From the said chart the details of payment made are extracted in the table in para 3.2 supra.

6.5 It is seen that the appellant has been regularly not submitting the proof of export as required under law. The delay in effecting the exports or not exporting the goods cannot be just on account of floods as claimed by the appellant. Commissioner (Appeal) has in his order para 14 observed "*14 ..... From the records it is seen that the appellant had paid duty in respect of goods exported during the period from 2003-04 upto September 2007. The argument of appellant that the goods were destroyed due to occurrence of flood on 26.05.2005 is of no help to them for the goods cleared for export during the period from 2003-04, 2004-05 and also after 26.05.2005 till September 2007. The appellants had not only failed to export the goods within six months, but they also did not bother to apply to divisional DC/AC for granting extension of time for export of goods. Not to talk of request for extension, the appellant did not even intimate to the DC/AC about non export of goods. This is not only* *contravention of rules but total disregard to the conditions prescribed to avail the facilities extended to the exporter. Certainly but for departmental investigation, the duty involved in non-export goods would have remained unrealized…..”*

6.6 We are not impressed by the arguments of the appellant party to the effect that they have complied with the provisions of the law by making good payment of duty subsequently and the delay was on account of natural calamity. We are convinced that by doing so, the appellant has contravened various provisions of the Central Excise Rules as referred to in the order of the Assistant Commissioner and the Commissioner (Appeals). We hold that penalty is imposable on the appellant under Rule 25(1)(d) of the Central Excise Rules.

6.8 We also take note of the decision of the Tribunal supra in the case of appellant themselves remanding the matter for allowing remission of duty in respect of the goods cleared for export but destroyed in flood. However said order cannot be applicable in respect of the goods cleared for export from the factory of appellant after 26.05.2005 the date when flood occurred. Since contraventions have been committed by the appellant’s in respect of the goods cleared even after the occurrence of floods, appellants cannot take shelter under the said order for the entire period of contravention.

6.7 Export under rule 19 of Central Excise Rules, 2002 is a well documented process. It cannot be the case of the department that the appellant had clandestinely cleared the goods for exportation from their manufacturing unit. These goods have been cleared after following due process and preparation of relevant documents. The export should have been properly accounted for and properly monitored by the Revenue also. In case of delay in submission of proof of export, Revenue itself should have asked for recovery of duty in terms of the bond executed. In case they have failed to monitor the submission of proof of export, the appellant cannot be saddled with the responsibility of suppression of fact. If the number of export was not given within six months, the department should have sought for the relevant information from the appellant, and demanded the duty immediately in case appellants had not sought extension of time for submission of proof of export. In case of failure, in asking the said information and demanding the duty in time the appellant cannot be charged with suppression with intent to evade payment of duty for the purpose of invocation of Section 11AC of the Central Excise Act,

1944. In the case of failure to export the goods the duty along with applicable interest is required to be paid/ recovered from the appellant in terms of the bond/ LUT executed by them for effecting exports under Rule 19.

6.8 In case of Punjab Tractors, Hon'ble Supreme Court has held "***5.****The learned Counsel appearing on behalf of the respondent department, however, contends that this might tantamount to condoning the violation of the excise rules by assessee with impunity. We make it clear that for the admitted violation, the appellant will undoubtedly be liable to pay the penalty as prescribed under the rules for such violation."*

6.9 Since contraventions have occurred, we hold that penalty under Rule 25(1)(d) would be imposable but not equivalent to the amount of duty short paid. In the case of *Rajasthan spinning and Weaving Mills - 2009 (238) ELT 3 (SC)*, the Hon'ble Supreme Court has explained the decision in case *Dharmendra Textile Processors,* supra referred to by the learned Authorized Representative stating that mandatory penalty under Section 11AC can be invoked only when the ingredients for invoking extended period are available which we do not find in the present case. The relevant extracts of the Hon'ble Supreme Court judgment in *Rajasthan Spinning and Weaving Mills* are reproduced below:-

*"**16.** The other provision with which we are concerned in this case is Section 11AC relating to penalty. It is as follows :*

***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 wilful 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 shall 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 purpose 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;

(1) 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.]

17. *The main body of Section 11AC lays down the conditions and circumstances that would attract penalty and the various provisos enumerate the conditions, subject to which and the extent to which the penalty may be reduced.*

18. *One cannot fail to notice that both the proviso to sub-section 1 of Section 11A and Section 11AC use the same expressions : "....by reasons of fraud, collusion or any wilful 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,...". In other words the conditions that would extend the normal period of one year to five years would also attract the imposition of penalty. It, therefore, follows that if the notice under Section 11A(1) states that the escaped duty was the result of any conscious and deliberate wrong doing and in the order passed under Section 11A(2) there is a legally tenable finding to that effect then the provision of Section 11AC would also get attracted. The converse of this, equally true, is that in the absence of such an allegation in the notice the period for which the escaped duty may be reclaimed would be confined to one year and in the absence of such a finding in the order passed under Section 11A(2) there would be no application of the penalty provision in Section 11AC of the Act. On behalf of the assessees it was also submitted that Sections 11A and 11AC not only operate in different fields but the two provisions are also separated by time. The penalty provision of Section 11AC would come into play only after an order is passed under Section 11A(2) with* *the finding that the escaped duty was the result of deception by the assessee by adopting a means as indicated in Section 11AC.*

19. *From the aforesaid discussion it is clear that penalty under Section 11AC, as the word suggests, is punishment for an act of deliberate deception by the assessee with the intent to evade duty by adopting any of the means mentioned in the section.*

20. *At this stage, we need to examine the recent decision of this Court in Dharamendra Textile (supra). In almost every case relating to penalty, the decision is referred to on behalf of the Revenue as if it laid down that in every case of non-payment or short payment of duty the penalty clause would automatically get attracted and the authority had no discretion in the matter. One of us (Aftab Alam, J.) was a party to the decision in Dharamendra Textile and we see no reason to understand or read that decision in that manner. In Dharamendra Textile the court framed the issues before it, in paragraph 2 of the decision, as follows :*

"2. A Division Bench of this Court has referred the controversy involved in these appeals to a larger Bench doubting the correctness of the view expressed in Dilip N. Shroff v. Joint Commissioner of Income Tax, Mumbai & Anr. [2007 (8) SCALE 304]. The question which arises for determination in all these appeals is whether Section 11AC of the Central Excise Act, 1944 (in short the "Act') inserted by Finance Act, 1996 with the intention of imposing mandatory penalty on persons who evaded payment of tax should be read to contain mens rea as an essential ingredient and whether there is a scope for levying penalty below the prescribed minimum. Before the Division Bench, stand of the revenue was that said section should be read as penalty for statutory offence and the authority imposing penalty has no discretion in the matter of imposition of penalty and the adjudicating authority in such cases was duty bound to impose penalty equal to the duties so determined. The assessee on the other hand referred to Section 271(1)(c) of the

Income Tax Act, 1961 (in short the IT Act') taking the stand that Section 11AC of the Act is identically worded and in a given case it was open to the assessing officer not to impose any penalty. The Division Bench made reference to Rule 96ZQ and Rule 96ZO of the Central Excise Rules, 1944 (in short the "Rules') and a decision of this Court in Chairman, SEBI v. Shriram Mutual Fund & Anr. [2006 (5) SCC 361] and was of the view that the basic scheme for imposition of penalty under section 271(1)(c) of IT Act, Section 11AC of the Act and Rule 96ZQ(5) of the Rules is common. According to the Division Bench the correct position in law was laid down in Chairman, SEBI's case (supra) and not in Dilip Shroff's case (supra). Therefore, the matter was referred to a larger Bench."

After referring to a number of decisions on interpretation and construction of statutory provisions, in paragraphs 26 and 27 of the decision, the court observed and held as follows :

"26. In Union Budget of 1996-97, Section 11AC of the Act was introduced. It has made the position clear that there is no scope for any discretion. In para 136 of the Union Budget reference has been made to the provision stating that the levy of penalty is a mandatory penalty. In the Notes on Clauses also the similar indication has been given.

"27. Above being the position, the plea that the Rules 96ZQ and 96ZO have a concept of discretion inbuilt cannot be sustained. Dilip Shroff's case (supra) was not correctly decided but Chairman, SEBI's case (supra) has analysed the legal position in the correct perspectives. The reference is answered.........".

21. *From the above, we fail to see how the decision in Dharamendra Textile can be said to hold that Section 11AC would apply to every case of non-payment or short payment of duty regardless of the conditions expressly mentioned in the section for its application.*

22. *There is another very strong reason for holding that Dharamendra Textile could not have interpreted Section 11AC in the manner as suggested because in that case that was not even the stand of the revenue. In paragraph 5 of the decision* *the court noted the submission made on behalf of the revenue as follows :*

"5. Mr. Chandrashekharan, Additional Solicitor General submitted that in Rules 96ZQ and 96ZO there is no reference to any mens rea as in section 11AC where mens rea is prescribed statutorily. This is clear from the extended period of limitation permissible under Section 11A of the Act. It is in essence submitted that the penalty is for statutory offence. It is pointed out that the proviso to Section 11A deals with the time for initiation of action. Section 11AC is only a mechanism for computation and the quantum of penalty. It is stated that the consequences of fraud etc. relate to the extended period of limitation and the onus is on the revenue to establish that the extended period of limitation is applicable. Once that hurdle is crossed by the revenue, the assessee is exposed to penalty and the quantum of penalty is fixed. It is pointed out that even if in some statues mens rea is specifically provided for, so is the limit or imposition of penalty, that is the maximum fixed or the quantum has to be between two limits fixed. In the cases at hand, there is no variable and, therefore, no discretion. It is pointed out that prior to insertion of Section 11AC, Rule 173Q was in vogue in which no mens rea was provided for. It only stated "which he knows or has reason to believe". The said clause referred to wilful action. According to learned counsel what was inferentially provided in some respects in Rule 173Q, now stands explicitly provided in Section 11AC. Where the outer limit of penalty is fixed and the statute provides that it should not exceed a particular limit, that itself indicates scope for discretion but that is not the case here."

***23.** The decision in Dharamendra Textile must, therefore, be understood to mean that though the application of Section 11AC would depend upon the existence or otherwise of the conditions expressly stated in the section, once the section is applicable in a case the concerned authority would have no discretion in quantifying the amount and penalty must be imposed equal to the duty determined under sub-section (2) of Section 11A. That is what Dharamendra Textile decides."*

6.10 Since the provisions of section 11AC are not attracted in the present case, in our view, the ends of justice will be met if the penalty imposed is reduced to Rs.5,00,000/- (Rupees Five Lakh only).

7. Accordingly we dismiss the appeal filed by the Revenue and allow the appeal of the appellant party to the extent of reduction of penalty to Rs.5,00,000/-. The cross objections filed by the appellant party are disposed of accordingly.

(Pronounced in court)

(Dr. D.M. Misra)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)

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