

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
AHMEDABAD**

REGIONAL BENCH, COURT NO. 2

EXCISE APPEAL NO. 12005 OF 2016

[Arising out of OIO-DMN-EXCUS-000-COM-018-16-17 dated 27/07/2016 passed by
Commissioner of Central Excise and Service Tax-DAMAN]

SURENDRA B VERMA

Appellant

502-C Block, Amrut Kunj Society, Near Umabhavan,
Bhatar Road, Surat, Gujarat

Vs.

**COMMISSIONER OF CGST & CENTRAL EXCISE-
CGST & CENTRAL EXCISE SURAT**

Respondent

3rd Floor, Adarsh Dham Building, Vapi-Daman Road,
Opp. Vapi Town Police Station,
Vapi, Gujarat-396191

Appearance:

None appeared for the Appellant

Shri Himanshu P Shrimali, Superintendent (AR) for the Respondent

CORAM:

HON'BLE Dr. AJAYA KRISHNA VISHVESHA, MEMBER (JUDICIAL)

FINAL ORDER NO. 10563/2025

Date of Hearing : 17.03.2025

Date of Decision : 16.07.2025

This appeal is directed against the order-in-original dated 27th July, 2016 passed by the Commissioner of Central Excise and Service Tax-Daman, Vapi through which penalty was imposed on the appellant amounting to Rs. 30 lakhs under Rule 26 of Central Excise Rules, 2002.

2. The facts of the case in brief are that Karnavati Garments and Mattresses (100% EOU) located at Umbergaon was closed down in the year 2007. Shri Kiritkumar Chhotelal Modi was the proprietor of the said unit. Shri Sitaram Sharma was Manager cum Authorized Signatory of the said unit, handling and looking after day to day work of the unit relating to import as

well as export activities by shipping within the factory premises of the said unit. The said unit commenced the commercial and business activities including manufacturing and production of goods for export from July, 2001. The said unit was engaged in the manufacture of mattresses, cushions and readymade garments. Shri Surendra B. Verma, the appellant was involved in the working of the said unit as power of attorney holder.

2.2 The search operation by the Central Excise officer of Valsad Commissionerate was carried out on 14th February, 2003 in the said unit. The Panchnama was drawn on 14th February, 2003 in the presence of Shri Sitaram Sharma who was the Manager cum Authorized Signatory. During the course of stock verification of finished goods and raw material, certain shortages were found in the finished goods and raw material. The manager of the unit admitted that they have sold the goods in the open market without payment of duty as per the instructions of the appellant.

2.3 The statement of Manager Shri Sita Ram Sharma was recorded on 14.02.2003 by the department wherein he informed the department that the said unit will pay the duty on the said goods which were cleared without payment of duty. The statement of the appellant was also recorded by the department on 20.02.2003 under Section 14 of Central Excise Act, 1944 in which the appellant informed that Shri Kiritbhai Modi is the proprietor of the said unit but only for the sake of name. The appellant and Shri Shyam Bihani are the proprietors of Systemic Corporation and Stylo Corporation are the actual owners of the unit. They are doing business jointly having share of 50% each. The appellant in his statement recorded on 3rd October, 2006, informed that all the exports and imports were handled and looked after by Shri Shyam Bihani and other day to day activities regarding the exports and

imports were looked after by the manager Shri Sitaram Sharma. The appellant was stationed at Surat. The appellant informed that he was not responsible for the shortages and for clandestine removal of finished goods from the said unit without payment of duty sold in the open market as found by the department on verification. The appellant vide his letter dated 9th October, 2006 submitted a copy of Memorandum of Understanding executed by the appellant with Shri Shyam Bihani to the department. The appellant never signed any documents relating to import or export and never signed any cheque for discharging the payment liability towards purchase of raw material, indigenously as well as imported from a foreign country. A show cause notice dated 31st October, 2006 was issued to the unit.

2.4 The show cause notice was adjudicated by the Adjudicating Authority/ Commissioner and penalty of Rs. 30 lacs was imposed under Rule 26 of Central Excise Rules, 2002 on Shri Surendera B. Verma the appellant. Feeling aggrieved from the impugned order dated 27.07.2016, the present appeal was filed before this Tribunal.

2.5 In the grounds of appeal, the appellant has stated that the case of the department for imposition of penalty on the appellant is based on two documents namely general power of attorney issued in favour of the appellant by the proprietor of Karnavati Garments and Mattresses (100% EOU) Umbergaon in the year 2001 and Memorandum of Understanding dated 22nd November, 2001 executed by the appellant with Shri Shyamlal Bihani and Shri Mahendra Verma. No general power of attorney was ever issued by the Proprietor of the said unit in favour of the appellant either in the year 2001 or 2002 or upto 31st December, 2003, the date on which the said unit was finally closed down by the proprietor of the unit. The

department did not have any general power of attorney available in their record at any given time from the stage of carrying out the investigation commencing from 14th February, 2003 and upto the stage of passing and issuing the order-in-original dated 27th July, 2016 said to have been issued by the proprietor of the said unit in 2001. The general power of attorney was not in existence since it was never issued by the proprietor of the said unit. In the show cause notice dated 31st December, 2006 and in the impugned order-in-original dated 27th July, 2016, no specific date of the general power of attorney was issued has been mentioned and no such date has been mentioned when it was given to the department and when the department took it on record for accepting Shri Surendra Verma as an Authorised Signatory. Therefore, Shri Surendra B. Verma, the appellant, did not have any general power of attorney having been issued by the proprietor Shri Kirit Kumar Chhotelal Modi of the said unit, consequent upon which, it was never submitted and filed with the department and the appellant did not have any *locus-standi* in the said unit in terms of the provisions contained under Rule 2 (c) of the Central Excise Rules, 2002. Penalty under Rule 26 of the Central Excise Rules, 2002 cannot be imposed on the appellant since the appellant was neither the proprietor nor his Authorized Agent.

3. The learned Counsel for the appellant has also mentioned in the 'written submissions' that memorandum of understanding dated 22nd November, 2001 was not a valid legal document to attract imposition of penalty on the appellant under Rule 26 of Central Excise Rules, 2002. Memorandum of Understanding was never submitted and filed with the appropriate authority or court of law under whose jurisdiction, the 100% EOU unit was situated and located, at Umbergaon. MOU was never submitted and filed with any bank located anywhere in the country including

Umbergaon Gujarat. MOU was never submitted and filed with any of the Central Excise and Customs department / Authority anywhere in the country including Umbergaon Gujarat upto 9 October, 2006. Even department was not aware about the existence of any memorandum of understanding (MOU). The said unit was finally closed down on 31st December, 2003 whereas copy of MOU was given to the department by the appellant on 9th October, 2006 after the lapse of 3 years from the date of closure of the said unit. In fact, MOU in question was just a private document and nothing else since the same was never submitted and filed with any Central Government Department or Authority and it has no evidentiary value in the Court of law.

3.1 It has also been mentioned in 'written submissions' that appellant is not responsible for the evasion of duty on the finished goods which were not exported but clandestinely cleared and sold in the home / domestic market without payment of any duty by the said unit.

3.2 Learned counsel for the appellant also argued that the provisions contained under Rule 26 of Central Excise Rules, 2002 are not applicable to the case of the appellant for imposition of any penalty. It has been argued by the learned Counsel for the appellant that penalty under Rule 26 of Central Excise Rules, 2002 cannot be imposed on each and every person since the said Rule covers only certain category of persons who can be prosecuted within the framework of provisions as laid down under Rule 26 of Central Excise Rules, 2002. It has been prayed by the appellant that the impugned order-in-original dated 27th July, 2016 be set aside and the amount of deposit made by the appellant which is to the tune of Rs. 2,25,000/- may be allowed to be refunded to him.

4. The learned AR on the other hand argued that the impugned order has been passed in accordance with rules and no interference is required in the said order. He has filed a copy of decided case Excise Appeal No. 10545 of 2016 **M/s. Divyangbhai J. Shah vs. C.C.E. Ahmedabad** in which this Tribunal has held that in view of the overall facts of the matter and quantum of cash stated to be found and explicit knowledge of offending goods not being on record on the part of the appellant, there is a case made out for lesser penalty and the penalty was reduced from 5,50,000/- to Rs 1,25,000/-.

5. I have heard the learned AR for the department and perused the synopsis and written submission submitted on behalf of the appellant.

5.1 The first submission of the appellant is that the impugned show cause notice was issued on 31.10.2006 whereas the Order-in-Original was issued on 27.07.2016 and it was communicated to the appellant on 31.08.2016. As the Order-in-Original has violated sub-Section (11) of Section 11A of Central Excise Act, 1944, the show cause notice as well as the Order-in-Original are liable to be quashed. It has been submitted by the appellant that Order-in-Original was received by the appellant after expiry of 9 years and 10 months since the show cause notice was issued, whereas the sub-Section (11) of Section 11A of Central Excise Act, 1944 stipulates the condition on the department for issue of adjudicating order within one year from the date of issue of show cause notice to the noticee. The appellant has cited law laid-down in **Siddhi Vinayak Syntax Pvt. Limited vs. Union of India** reported in 2017 (352) ELT 455 (Guj.) in which the Hon'ble Gujarat High Court quashed the show cause notice as well the Order-in-Original passed by the Commissioner of Central Excise Ahmedabad. I do not agree with the

contention of the appellant. In para 24 of the above mentioned ruling of **Siddhi Vinayak Syntax Pvt. Limited**, the Hon'ble High Court has stated that sub-Section (11) of Section 11A of Central Excise Act, 1944 gives an indication as to the legislative intent, namely that as far as may be possible the amount of duty should be determined within the above time frame i.e. six months from the date of the notice in respect of cases falling under sub-Section (4) or sub-Section (5). When the legislature has used the expression –'where it is possible to do so', it means that if in the ordinary course, it is possible to determine the amount of duty within the specified time limit for the reason that the adjudicating authority for several reasons may not be in a position to decide the matter within the specified time frame, namely, a large number of witnesses may have to be examined, the record of the case may be very bulky, huge workload, non-availability of an officer etc. which are genuine reasons for not being able to determine the amount of duty within the stipulated time frame. However, when the matter is consigned to the call book and kept in cold storage for years together, it is not on account of it not being possible for the authority to decide the case but on grounds which are extraneous to the proceedings. I am of the view that after taking into consideration the peculiar facts of this case and the nature of the evidence collected by the department, it does not seem proper to set-aside the impugned Order-in-Original merely on the ground of delay. Further, the appellant and the other Managers of the unit were provided opportunity of personal hearing by the Department several times but they did not respond. At page 19, para-3 of the Order-in-Original, the Commissioner has stated that in the interest of natural justice, the noticee and the co-noticees were asked to file their submission and attend personal hearing in the matter fixed on 08.04.2015 but no one appeared for personal hearing on the given date. Subsequently, the personal hearing was fixed on

07.07.2015, 25.08.2015 and 27.11.2015. The personal hearing letters sent to the noticees were returned undelivered. The personal hearing letter dated 13.01.2016 was forwarded to the JAC, Central Excise Division-Umbergaon to deliver the same to the noticee and co-noticee. The JRO vide letter dated 22.01.2016 informed that since the premises were closed, the personal hearing notices of the noticee and co-noticee have been pasted at the given address under Panchnama dated 21.02.2016. Another personal hearing letter dated 16.02.2016 was issued to the noticee and co-noticees but neither any response received from their side nor any one appeared.

5.2 The second plea raised by the appellant is that Karnavati Garments and Mattresses (100% EOU) was a Proprietorship Firm/ Company and it was looked after, handled and supervised for day today operations of the firm's business by the proprietor. The appellant was directly not involved in evasion of Customs and Central Excise duty, therefore, it is evident that there was no question of the loss of revenue to the government on account of any malafide action on behalf of the appellant. I do not agree with the above submission of the appellant. The Commissioner has stated in Order-in-Original at page 25, para 8 that regarding imposition of personal penalty on Shri Surendra B. Verma, General Power of Attorney holder of the noticee and Shri Shyamlal T Bihani, proprietor of M/s. Systematic Corporation and M/s. Styale Corporation, it is established that both of them were instrumental in execution of the plan to defraud the government. I find that both of them were having knowledge about the provisions of 100%EOU and even then had misused the concession given by the government with intent to evade payment of duty by creating a paper trail for the movement of finished goods. I also find that Shri Surendra B. Verma, General Power of Attorney holder of the noticee and Shri Shyamlal T Bihani, proprietor of M/s

Systematic Corporation and M/s Styale Corporation actively participated to abuse the law of the land and continued to partake in execution of offence, commissioned in collusion with Shri Kirtikumar Chhotelal Modi, Proprietor of the noticee and Shri Sitaram Sharma, over all in charge cum Authorised Signatory of the noticee. I find that Shri Mahendra B. Verma was also beneficiary in form of remuneration from the noticee as is evident from the Memorandum of Understanding dated 22.11.2001 submitted by Shri Surendra B. Verma vide letter dated 09.10.2006. Accordingly, I find that Shri Kirtikumar Chhotelal Modi, Proprietor, Shri Sitaram Sharma, over all in-charge cum Authorised Signatory, Shri Surendra B. Verma, power of attorney holder for the noticee, Shri Mahendra B. Verma and Shri Shyamlal T. Bihani, Proprietor of M/s Styale Corporation & Systematic Corporation, all are responsible for diversion of finished goods illicitly into the Domestic Tariff Area in violation of Exim Policy, Customs Act, 1962 and Central Excise Act, 1944 without payment of appropriate Central Excise duty and production of forged documents as proof of exports and warehousing and thereby all of them had committed an offence of the nature as described in Rule 26 of Central Excise Rules, 2002 rendering themselves liable for penal action under said Rule 26 of Central Excise Rules, 2002.

I agree with the conclusion arrived at by the learned Commissioner in the Order-in-Original.

5.3 The next submission of the appellant is that Memorandum of Understanding dated 22.11.2001 was not a valid legal document to attract penal action on the appellant under Rule 26 of Central Excise Rules, 2002. It has been submitted by the appellant that Memorandum of Understanding was executed on 22.11.2001 and it was notarized on 09.12.2001. It was

executed by the appellant with Shri Shyam T. Bihani and Shri Mahendra B. Verma and it was a private document because it was never submitted and filed with proper authority or Court of law nor it was submitted in any bank. It was not even submitted with Central Excise or Customs department authorities. This Memorandum of Understanding was given to the department by the appellant only on 09.10.2006. I do not agree with the above submissions made by the appellant. Merely because the Memorandum of Understanding was not submitted earlier before any Court of law, Bank or Customs and Central Excise authorities, inference cannot be drawn that Memorandum of Understanding is a private document or non-operative or a void document. The Memorandum of Understanding was submitted by the appellant Shri Surendra B Verma vide letter dated 09.10.2006 therefore, the learned Commissioner has rightly taken it into consideration as a valid legal document and the submission of the appellant cannot be accepted that Memorandum of Understanding cannot be relied upon while fixing liability on the appellant.

5.4 The next submission of the appellant is that he is not responsible for evasion of duty on the finished goods not exported but cleared and sold in the home/ domestic market without payment of duty clandestinely by the unit and the provisions contained under Rule 26 of Central Excise Rules, 2002 are not applicable to the case of the appellant for imposition of penalty. I do not agree with the above contention of the appellant as mentioned above. On the basis of evidence collected by the department, the Commissioner came to the conclusion that in view of the statement dated 20.02.2003 and 03.10.2006 of Shri Surendra B. Verma and Memorandum of Understanding produced by Shri Surendra B. Verma, it appears that Shri Shyamlal T. Bihani alongwith Shri Surendra B. Verma were

not only handling the affairs of the appellant firm but M/s. Karnavati Garments and Matresses, Umbergaon was in fact owned by them and Shri Kiritkumar Chhotelal Modi was a dummy proprietor created by them.

5.5 The Commissioner has stated in the impugned Order-in-Original at page 17 para 2.28 that Shri Surendra B. Verma vide his statement dated 20.02.2003 and 3.10.2006 had admitted that the proprietor of the unit i.e., Shri Kiritkumar Chhotelal Modi was proprietor for namesake and the Memorandum of Understanding dated 22.11.2001 produced by Shri Surendra B. Verma vide his letter dated 09.10.2006 clearly shows that the affairs and profits were at the helm of only two persons namely Shri Surendra B. Verma and Shyamlal T. Bihani. The Memorandum of Understanding produced by Shri Surendra B. Verma also shows that Shri Mahendra B. Verma was also a beneficiary in form of remuneration from the noticee. All these persons alongwith Shri Kiritkumar Chhotelal Modi being Proprietor, are responsible for diversion of finished goods illicitly into the Domestic Tariff Area in violation of Exim Policy, Customs Act, 1962 and Central Excise Act, 1944 without payment of appropriate Central Excise duty and they produced forged documents as proof of exports and warehousing.

6. In view of the above discussion, I have come to the conclusion that the impugned Order-in-Original has been passed in accordance with relevant provisions of Central Excise Act, 1944 and Central Excise Rules, 2002 and no illegality or irregularity has been committed by the Commissioner in passing the impugned order. The order is reasonable and has been passed after correct appreciation of evidence collected by the Revenue against the

appellant. Therefore, the impugned Order-in-Original is liable to be confirmed and the appeal is liable to be dismissed.

Consequently, the appeal is dismissed.

(Order pronounced in the open court on 16.07.2025)

(Dr. AJAYA KRISHNA VISHVESHA)
MEMBER (JUDICIAL)

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