CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
Allahabad

REGIONAL BENCH - COURT No. I

Excise Stay Application No. 376 of 2012
in
Excise Appeal No. 367 of 2012
(Arising out of order-in-original No. 16/Commr./Lko/CX/2011-12 dated 28.09.2011 passed by the Commissioner, Central Excise & Service Tax, Lucknow).

Shri Rahul Chauhan, Director **.....Appellant**
M/s Musk Tobacco (India) Pvt. Ltd.,
Manpur (Nagaria), P.O. Neali
District – Kashi Ram Nagar (U.P.)

VERSUS

Commissioner, Central Excise **....Respondent**
7-A, Ashok Marg, Lucknow (U.P.)

WITH

Excise Stay Application No.379 of 2012
in
Excise Appeal No.370 of 2012
(Arising out of order-in-original No. 16/Commr./Lko/CX/2011-12 dated 28.09.2011 passed by the Commissioner, Central Excise & Service Tax, Lucknow).

Smt. Bushra Gupta W/o
Late Captain Rajkumar Gupta, **.....Appellant**
H-5, Maharani Bagh
New Delhi.

VERSUS

Commissioner, Central Excise **....Respondent**
7-A, Ashok Marg, Lucknow (U.P.)

WITH

Excise Stay Application No.381 of 2012
in
Excise Appeal No.372 of 2012
(Arising out of order-in-original No. 16/Commr./Lko/CX/2011-12 dated 28.09.2011 passed by the Commissioner, Central Excise & Service Tax, Lucknow).

Shri Shankar @ Shankar Pal Pradhan, **.....Appellant**
Village – Nangla Patia, P.O. Neoli
Distt – Etah, (U.P.)

VERSUS

Commissioner, Central Excise **....Respondent**
7-A, Ashok Marg, Lucknow (U.P.)

WITH

Excise Stay Application No. 382 of 2012
in
Excise Appeal No. 373 of 2012
(Arising out of order-in-original No. 16/Commr./Lko/CX/2011-12 dated 28.09.2011 passed by the Commissioner, Central Excise & Service Tax, Lucknow).

Shri Vidyut Gupta .....Appellant
H-5, Maharani Bagh, New Delhi.

VERSUS

Commissioner, Central Excise ....Respondent
7-A, Ashok Marg, Lucknow (U.P.)

AND

Excise Stay Application No.562 of 2012
in
Excise Appeal No. 508 of 2012
(Arising out of order-in-original No. 16/Commr./Lko/CX/2011-12 dated 28.09.2011 passed by the Commissioner, Central Excise & Service Tax, Lucknow).

Smt. Megha Gupta **.....Appellant**
W/o Upkaran Gupta
H-5, Maharani Bagh, New Delhi.

VERSUS

Commissioner, Central Excise **....Respondent**
7-A, Ashok Marg, Lucknow (U.P.)

APPEARANCE:

Sh. Vineet Kumar Singh, Advocate for the appellants.

Sh. Shashi Shekhar, Authorised Representative for the respondent.

CORAM:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. P. V. SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER Nos. **70141-70145 / 2022**

DATE OF HEARING: 01.06.2022
DATE OF DECISION: 25.08.2022

ANIL CHOUDHARY:

Heard the parties.

2. These appeals arise from common impugned order-in-original by which penalties have been imposed on these appellants under Rule 26 of the Central Excise Rules, which are as follows:-

1.	Rahul Chauhan (Director)	: Rs. 10,00,000/-
2.	Bushra Gupta	: Rs. 1,00,00,000/-
3.	Shankar Pal Pradhan	: Rs. 10,00,000/-
4.	Vidyut Gupta	: Rs. 1,00,00,000/-
5.	Megha Gupta	: Rs. 1,00,00,000/-

Further, duty was demanded from M/s Musk tobacco (India) Pvt. Limited with equal penalty under Section 11AC read with Rule 25. The appeal of M/s Musk Tobacco has been dismissed by this Tribunal by Final Order No. 50600-50608/2014 dated 14.02.2014 for not making pre-deposit. Thus, the issue reached finality insofar as the confirmation of demand of duty and imposition of penalty on M/s Musk Tobacco is concerned. These appeals were also dismissed along by the Final order dated 14.02.2014 but were later restored on 27.08.2018 by Final Order No. 60330 – 60333 of 2018. In these appeals, we are dealing with only the penalties imposed on the above five appellants under Rule 26 of the Central Excise Rules is concerned.

3. Brief facts of the case are that search was conducted by the Officers of Directorate General of Central Excise Intelligence (DGCEI) on 26.09.2007 at the premises of Musk Tobacco (India) Pvt. Ltd., (MUSK). The officers also searched residence of Shankar Pal Pradhan and Raghuwar Dayal (since deceased) and resumed some records; both were employed in 'Gupta Agricultural Farm', which belongs to Raj Kumar Gupta (since deceased). Besides these, the Officers also searched residence of Sh. Inderjeet Yadav, an employee

of R. K. Cigarettes and resumed records. Officers also visited other various premises. The officers resumed records from M/s Musk Tobacco also, however during investigation, records resumed from M/s Musk Tobacco were found in order.

4. During search in the factory of M/s Musk Tobacco the officers found 15000 loose cigarettes of "Perfect" Brand, value of Rs.4,000/-, unaccounted and the same were seized. The officers also seized certain quantity of cigarettes from Soron Railway Station Varanasi, Ganesh Trading Company, Baba Road Lines and from few other places and seized the same under the belief that the same has been cleared without payment of duty by M/s Musk Tobacco.

5. Statements of Shankar Pal Pradhan, Rahul Chauhan (Director) Vidyut Gupta, Raj Kumar Gupta (deceased), A. K. Saxena, Director (since deceased), Inderjeet Yadav and number of other persons were recorded. On the basis of records resumed from the premises of Shankar Pal Pradhan, Raghuwar Dayal, Inderjeet Yadav, investigation was conducted, statements were recorded and show cause notice dated 18.05.2010 was issued, demanding duty of Rs.7,74,09,518/- from M/s Musk Tobacco for the period 16.01.2007 to September, 2007. Show cause notice was also issued to these appellants (co-noticees) and others proposing penalty under Rule 26.

6. The appellants submitted their reply denying all the allegations. However, the ld. Commissioner of Central Excise confirmed the demand upon M/s Musk Tobacco besides interest and penalty, and also imposed penalty upon these appellants under Rule

26 of Central Excise Rules. The whole case is based upon the statements recorded and third party records. Shankar Pal Pradhan and Raghuwar Dayal were not available at the time of visit/search at their residence. Shankar Pal Pradhan denied the documents resumed and Raghuwar Dayal did not appear and was not traceable.

7. The case is based upon statements and records resumed from Inderjeet Yadav, Sipani J. K. of M/s J. K. Printers Kolkata and some others who are not concerned with M/s Musk Tobacco. Records resumed from third party are not connected with M/s Musk Tobacco. M/s Musk Tobacco was incorporated as Private Limited Company and was issued Certificate of Incorporation by the Registrar of Companies on 29.08.2002. At the time of incorporation of M/s Musk Tobacco (India) Pvt. Ltd., there were three Directors, whose names are as under:-

(i) Smt. Bushra Gupta - appellant
(ii) Smt. Megha Gupta - appellant
(iii) Sh. Kalanand Sharma

Out of them, Sh. Kalanand Sharma was the Executive Director and was looking after the working of M/s Musk Tobacco on day to day basis. Further, Mrs. Bushra Gupta, and Mrs. Megha Gupta were non-functional Directors and did not have any assigned role and /or concern relating to the day to day activity of M/s Musk Tobacco.

8. M/s Musk Tobacco obtained Central Excise Registration Certificate dated 11.12.2006 bearing Registration No. AADCM8618CXM001, for manufacture of Cigarettes. M/s Musk Tobacco was working under the provisions of Rule 6 of Central Excise

Rules, 2002 (as the manufacturing of cigarettes is under physical control of the Central Excise Department, and as per para 2.2 of Chapter-4 of CBEC's Supplementary Instructions in respect of Cigarettes, all the operations of cigarette manufacturing units are under physical control of the officers of Central Excise, including receipt of inputs, manufacturing and removal of goods from the factory premises under the strength of invoice, which is duly counter-signed by the Inspector or the Superintendent of Central Excise).

9. M/s Musk Tobacco commenced production w.e.f. June, 2007 and effected their first clearance w.e.f. July, 2007. This fact is corroborated by certificate dated 20.01.2012 issued by the Superintendent of Central Excise & Service Tax, Range - Kasganj, certifying that M/s Musk Tobacco is working under physical control of Central Excise Department under Rule 6 of Central Excise Rules, 2002 and commenced production w.e.f. June, 2007 and effected their first clearance in July, 2007.

10. Learned Counsel for the appellants urges as follows:-

10.1. **Smt. Bushra Gupta & Smt. Megha Gupta** – So far these appellants are concerned, they have initially subscribed to the Memorandum of Association of M/s Musk Tobacco (India) Pvt. Ltd., which was incorporated on 29.08.2002. As per admitted facts on record, that Smt. Megha Gupta resigned from M/s Musk Tobacco on 21.10.2005 and Smt. Bushra Gupta has resigned on 25.01.2007 from the post of Director of the said company. Thereafter, they have no concern with the activity and functioning of the said company.

Admittedly, M/s Musk Tobacco commenced production of cigarettes w.e.f. June, 2007 and effected their first clearance from July, 2007. Thus, these two appellants had no concern with the activities of M/s Musk Tobacco, particularly cigarette manufacturing, as they have resigned from the Directorship much before commencement of manufacture of cigarettes. It was further urged that there is no specific allegation against these appellants in the show cause notice. These appellants have been imposed with penalty under Rule 26 in a mechanical way, treating them to be Directors during the disputed period without application of mind. Even during the period when these appellants were Directors in M/s Musk Tobacco, they were practically non functional Directors, not looking after day-to-day activities. Accordingly, penalty imposed under Rule 26 is fit to be set aside.

10.2. **Sh. Vidyut Gupta** - So far this appellant is concerned, he was neither a Director nor an employee, nor was in anyway concerned or related with any activity of M/s Musk Tobacco. This appellant is son of Sh. Raj Kumar Gupta. His statement was recorded as he was staying in the same house at H-5, Maharani Bagh, New Delhi with Smt. Bushra Gupta (mother) and Smt. Megha Gupta (wife). In the course of investigation, on 2 -3 occasions his statements were recorded. From the extract of the statement quoted in the show cause notice, it is evident that the questioning have been in general, wherein he stated that he is not involved with the business activities of M/s Musk Tobacco and only answers to telephone calls received at the residence at New Delhi. On being asked as to how many cigarette companies are run by the family and where these are situated, he replied that the family has one factory at Manpur Nagari, P.O. Neoli at Etah District, which is yet to come in full operation. In answer to specific question, if he was involved in the day-to-day activities of M/s Musk Tobacco, he stated that he was not involved in day-to-day activities of M/s Musk Tobacco. He had also stated that he cannot comment on the day-to-day working of the company. It is further evident from the show cause notice that there is no proposal for imposing penalty on this appellant. Hence, the penalty imposed under Rule 26 on this appellant, in a mechanical manner is without application of mind. Accordingly, it is prayed that penalty under Rule 26 is fit to be set aside.

10.3. **Sh. Rahul Chauhan (Director)** - This appellant was one of the Directors in M/s Musk Tobacco. In the course of statement recorded, he had stated that the day-to-day activities are taken care of by the other Director - Sh. Ajay Kumar Saxena, and he is not aware with the same. It is observed in para 47 of the show cause notice that this appellant was not even aware as to how the raw material reached the factory and how the finished goods moved out. This appellant has stated that he along with Sh. Ajay Kumar Saxena had taken the factory premises on rent along with the machinery from Capt. R. K. Gupta, who is owner of the premises. He was not even knowing the quantum of cigarette which can be manufactured per hour by the cigarette mfg./ packing machine. Thus, there is nothing incriminating in the statement recorded of this appellant. Further, there is no involvement found of this appellant in any of the clandestine activity of the said M/s Musk Tobacco. It is further urged that as this appellant have not done any activity like removal of any excisable goods without payment of duty, transporting, concealing, selling or purchasing or dealing in excisable goods knowingly, having reason to belief that such goods are liable to confiscation. Thus, no penalty is imposable on him under Rule 26. Accordingly, ld. Counsel prays for allowing the appeal of this appellant with consequential benefits.

10.4. **Sh. Shankar Pal Pradhan** - The residence of this appellant was searched on 26.09.2007 by the officers, when this appellant was not present. Pursuant to search, this appellant was confronted with some documents like register, loose paper, files, blank invoices book, unnumbered blank bilty of M/s Maa Jagdamba Carrier (RUD No. 19 to 23). He explained the documents as being related to Indira Awas Yojna, which contain record of people who are of BPL category and entitled to free residence, toilet etc., from Gram Panchayat Officer. The documents also contains of details of birth/ death. So far recovery of blank paper, bill book, bilty book is concerned, he explained that his brother has grocery /shop and for use of paper in the grocery shop, had purchased these from the waste paper merchant, these are such papers only. Thus, he gave cogent reply with regard to the papers etc., found at his place. Accordingly, this appellant is also not involved in any of the activities like removal of excisable goods without payment of duty, transporting, concealing, selling or purchasing or dealing in excisable goods knowingly, having reason to belief that such goods are liable to confiscation under any of the provisions of Central Excise Act or Rules. Accordingly, it is urged that the penalty imposed on this appellant is also fit to be set aside.

11. It is further urged that, Revenue have also stated in the show cause notice that since Raj Kumar Gupta (deceased) is the owner of the factory premises, given on rent to M/s Musk Tobacco and also Sh. Ajay Kumar Saxena, Director (since deceased). However, the statement are exculpatory and nothing is coming out in his statement against these appellants. Revenue also recorded statement of some other persons, which do not implicate these appellants in any manner.

12. It is further urged that the whole case of revenue has been made on the basis of some third party records and statements. Neither the third party records have any evidentiary value nor the statements recorded during investigation, as the Adjudicating Authority have not examined any of the witness of revenue in the adjudication proceedings. Thus, in terms of Section 9D of the Act, these evidences are not reliable piece of evidence. It is further urged that the show cause notice is defective and bad for non-joinder of necessary parties. Admittedly, the factory of M/s Musk Tobacco was under physical control of the departmental officers. As per Rules 6 of Central Excise Rules, no clearance can take place except with prior assessment and approval of the Range Superintendent/ Inspector, posted for the purpose. Thus, in the allegation of clandestine removal, the officers of the department who were posted for physical supervision, are also necessary party.

13. Further it was urged that under the facts and circumstances, there is no case of clandestine production of 'perfect brand' cigarettes by M/s Musk Tobacco. Admittedly, M/s Musk Tobacco had obtained the right to manufacture 'perfect brand' Cigarettes from the 'brand owner' and thereafter, had filed intimation to revenue on 25.09.2007, that they are manufacturing on test basis. Thus, there is nothing clandestine in finding of 15000 loose cigarettes on the date of inspection of perfect brand on 26.09.2007. Further, as such cigarette had not attained the RG-1 stage (in finish condition for dispatch and storage), the seizure is bad.

14. It was further urged that the separate notice issued was by revenue for the seizure part, as regards proposal to confiscate the 15000 loose cigarettes found inside the factory, on the date of inspection. This Tribunal vide Final Order No. 71091-71094/2018 EX(SM) dated 08.06.2018, have allowed the appeal of M/s Musk Tobacco & others, setting aside the confiscation and penalty.

15. Opposing the appeals, Learned Authorised Representative for the Revenue have relied on the impugned order-in-original.

16. Having considered the rival contentions and upon perusal of the facts on record, we find that it is desirable to reproduce Rule 26 of Central Excise Rules, 2002, which reads as follows:-

> "26. **Penalty for certain offences**- [(1)] Any person who acquires possession of, or is in **any way concerned in transporting, removing, depositing, keeping, concealing, selling or purchasing, or in any other manner deals with, any excisable goods which he knows or has reason to believe are liable to confiscation under the Act or these**

rules, shall be liable to a penalty not exceeding the duty on such goods or rupees ten thousand, whichever is greater:

PROVIDED that where any proceeding for the person liable to pay duty have been concluded under clause (a) or clause (d) of sub-section (1) of section 11AC of the Act in respect of duty, interest and penalty, all proceedings in respect of penalty against other persons, if any, in the said proceedings shall also be deemed to be concluded.

(2) Any person, who issues-

(i) an excise duty invoice without delivery of the goods specified therein or abets in making such invoice; or

(ii)..... ....”

17. The case of the Revenue is that investigations revealed that M/s Musk Tobacco has manufactured and clandestinely removed cigarettes without paying duty. Accordingly, duty was demanded and penalty was imposed under Section 11AC on M/s Musk Tobacco. The appeal of M/s Musk Tobacco has been dismissed by this Tribunal and has attained finality. We have to now deal with only the penalties imposed on the five appellants herein. Now, we deal with the findings on record and the pleadings before us with respect to each and examine whether a penalty under Rule 26 on each of them can be sustained.

18. **Rahul Chauhan** - So far as this appellant is concerned, it is alleged that he along with Sh. A. K. Saxena (since deceased) were Directors of M/s Musk Tobacco, but they appeared to be without any financial base or working knowledge of the company. They were found enrolled in the pay roll of ‘Gupta Agricultural Farm’, Prop. Raj Kumar Gupta. It was appeared that Sh. Raj Kumar Gupta and his son were involved in the day-to-day affairs of M/s Musk Tobacco.

Although, this appellant and A.K. Saxena claimed to have taken the factory on lease from Sh. R.K. Gupta, but they could not substantiate this by producing documentary evidence. They avoided to appear several times in response to summons. It further appeared that they have left everything right from procurement of machine, raw material, printing of shell/ slider etc. to Sh. R. K. Gupta, which itself indicates one conclusion, that they were only Directors on papers. Thus, they appear to be name lenders for Sh. R. K. Gupta and family in manufacturing of cigarettes, leading to large-scale evasion of duty.

18.1. Having considered the allegations of Revenue, we find that no case of transporting, removing, depositing, keeping, concealing, selling or purchasing, or in any manner dealing with, any excisable goods, which he knows or has reason to believe are liable to confiscation under the Act or the rules thereunder, is made out. Accordingly, we hold that penalty under Rule 26 is not imposable on this appellant and accordingly we set aside the same.

19. **Smt. Bushra Gupta & Smt. Megha Gupta** – So far as these appellants are concerned, it has been alleged that these two were Directors of the company – M/s Musk Tobacco, when it was incorporated. -The two Directors are business women as per declaration in the Memorandum and Article of Association, and were required to ensure proper maintenance of books of accounts under Section 209 of the Companies Act, 1956. They were also supposed to ensure that Central Excise procedures were followed for production and the goods be cleared on payment of duty. As it appears that M/s Musk Tobacco is involved in evasion of duty, therefore, it appears that

these two Directors failed to ensure compliance of Central Excise law and thus by their act of omission and commission, has resulted in evasion of Central Excise duty and thus are held liable to penalty under Rule 26 of the Central Excise Rules.

19.1. Having considered the rival contentions, we find that there is no specific allegation against these two lady appellants. Admittedly, these appellants have resigned from the Directorship Smt. Bushra Gupta on 25.01.2007 and Smt. Megha Gupta on 21.10.2005. Thus, we find that these two Directors have resigned before commencement of production of cigarettes in June, 2007, which is not disputed. Thus, we hold that these two appellants had no role in transporting, removing, depositing, keeping, concealing, storing etc., as required for imposition of penalty under Rule 26 of the Central Excise Rules. Accordingly, we allow the appeals and set aside the penalty imposed.

20. **Sh. Vidyut Gupta** – So far as this appellant is concerned, it is alleged that he along with his father Sh. Raj Kumar Gupta has played an active role in setting up of factory/ procurement of machine, monitoring of payment, monitoring of raw material supply etc., It is also alleged that he along with Sh. R. K. Gupta have provided infrastructure, all the machinery etc., to M/s Musk Tobacco for manufacturing of cigarette, and were the persons behind functioning of M/s Musk Tobacco. - Majority of shares in M/s Musk Tobacco are held by Sh. Raj Kumar Gupta and his family. As they hold the majority shares the entire benefit derived from clandestine activity would accrue to them. Thus, M/s Musk Tobacco more or less

were family affairs of Sh. R. K. Gupta. This appellant has admitted of having provided the infrastructure and machinery to M/s Musk Tobacco for manufacture of cigarette. Further, the procurement of dye, printing of shell and slider at Gurgaon was looked after by Sh. Vidyut Gupta, which indicate his active participation in the affairs of M/s Musk Tobacco. Further, Sh. Rahul Chauhan and Sh. A. K. Saxena in their statement have stated that they have not paid any advance when they took over the factory, and have paid some amount of rent later on. They also stated that machines, maintenance, repair etc., were supervised by Sh. Vidyut Gupta. Further, Sh. Vidyut Gupta was also assisting in procurement of tobacco, the main raw material.

20.1. Having considered the rival contentions, we find that admittedly this appellant was neither a Director nor an employee of M/s Musk Tobacco. It appears that this appellant along with his father Sh. R. K. Gupta had provided the infrastructure and machinery for manufacture of cigarette to M/s Musk Tobacco. Further, they also gave guidance as and when required by the then Directors of M/s Musk Tobacco due to their experience in cigarette manufacturing. Considering the facts and circumstances and the documents on record, we find that this appellant was not involved in day-to-day affairs of M/s Musk Tobacco and further was not involved in transporting, removing, depositing, keeping, concealing, etc., of excisable goods. Accordingly, we set aside the penalty imposed on this appellant.

21. **Sh. Shankar Lal Pradhan** – It is alleged that this appellant was involved harbouring and safe keeping in records of

clandestine production, clearance and procurement by M/s Musk Tobacco. This appellant was working in 'Gupta Agricultural Farm' and appears to be involved with M/s Musk Tobacco, as many crucial documents on the functioning of the unit were available at his residence. Further, on being interrogated he has avoided and tried to distract with his evasive replies and thus have suppressed crucial information, which was in his knowledge. Thus, he has abetted in evasion of Central Excise duty by M/s Musk Tobacco.

22. Having considered the rival contentions, we find that this appellant is neither a Director nor an employee of M/s Musk Tobacco. Further, he is not connected either as a supplier or buyer of finished goods. Only he has provided space in his residence to store the documents of M/s Musk Tobacco, without any knowledge that this relates to clandestine production and removal by M/s Musk Tobacco. Further, this appellant has given a cogent explanation with regard to the documents, registers, loose papers etc. found at his residence that these are regarding 'Indira Awas Yojna' and birth/ death record of the Gram Panchayat. Further, stated that blank papers, bill book, bilty book have been purchased by his brother for use in his grocery shop from waste paper merchant. Such explanation has not been found to be untrue. Accordingly, we find that this appellant is also not liable to penalty under Rule 26 of Central Excise Rules as he has not done nor has been concerned in transporting, removing, depositing, keeping, concealing, etc., of excisable goods. Accordingly, we set aside the penalty imposed on this appellant.

23. In view of our observations and findings, we allow all these appeals and set aside the impugned order so far these appellants are concerned.

24. The ground taken as to, jurisdiction/power of the Additional Director General, DGCEI to issue show cause notice, is left open.

25. Appeals are allowed. Stay applications are also disposed off accordingly.

(Pronounced on 25.08.2022).

(ANIL CHOUDHARY)
Member (Judicial)

(P.V. SUBBA RAO)
Member (Technical)

Pant