

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI
PRINCIPAL BENCH - COURT NO. II

Excise Appeal No. 51269 of 2019 (SM)

(Arising out of Order-in-Appeal No. JOD-EXCUS-000-COM-0013-18-19 dated 26.02.2019 passed by the Commissioner, CGST & Central Excise, Jodhpur.)

M/s Arun Joshi

Appellant

101, Vihang Vihar,
Bhakti Mandir Marg,
Hariniwas Circle, Thane (W)
Maharashtra-400602

VERSUS

**Commissioner of Central Goods
And Service Tax, Customs and
Central Excise, Jodhpur I**

Respondent

G-105, New Industrial Area,
Opp. Diesel Shed, Basni
Jodhpur, Rajasthan-342001

WITH

Excise Appeal No. 51270 of 2019 (SM)

(Arising out of Order-in-Appeal No. JOD-EXCUS-000-COM-0013-18-19 dated 26.02.2019 passed by the Commissioner, CGST & Central Excise, Jodhpur.)

M/s Dinesh Kumar Sen

Appellant

C/O, M/s Shree Raj Masala P Ltd
8-A, Shakti Nagar,
Paota, C, Road,
Jodhpur, Rajasthan-342006

VERSUS

**Commissioner of Central Goods
And Service Tax, Customs and
Central Excise, Jodhpur I**

Respondent

G-105, New Industrial Area,
Opp. Diesel Shed, Basni
Jodhpur, Rajasthan-342001

WITH

Excise Appeal No. 51271 of 2019 (SM)

(Arising out of Order-in-Appeal No. JOD-EXCUS-000-COM-0013-18-19 dated 26.02.2019 passed by the Commissioner, CGST & Central Excise, Jodhpur.)

M/s Kailash Joshi

Appellant

C/O, M/s Shree Raj Masala P Ltd

8-A, Shakti Nagar,
Paota, C, Road,
Jodhpur, Rajasthan-342006

VERSUS

**Commissioner of Central Goods
And Service Tax, Customs and
Central Excise, Jodhpur I**

Respondent

G-105, New Industrial Area,
Opp. Diesel Shed, Basni
Jodhpur, Rajasthan-342001

AND

Excise Appeal No. 51272 of 2019 (SM)

(Arising out of Order-in-Appeal No. JOD-EXCUS-000-COM-0013-18-19 dated 26.02.2019 passed by the Commissioner, CGST & Central Excise, Jodhpur.)

M/s Manoj Kumar Sen

Appellant

C/O, M/s Shree Raj Masala P Ltd
8-A, Shakti Nagar,
Paota, C, Road,
Jodhpur, Rajasthan-342006

VERSUS

**Commissioner of Central Goods
And Service Tax, Customs and
Central Excise, Jodhpur I**

Respondent

G-105, New Industrial Area,
Opp. Diesel Shed, Basni
Jodhpur, Rajasthan-342001

APPEARANCE:

Mr. Stebin Mathew, Advocate for the Appellant

Ms. Tamanna Alam, Authorised Representative for the Respondent

CORAM:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)

FINAL ORDER NO. 50613-50616 / 2022

Date of Hearing: 13.07.2022

Date of Decision: 13.07.2022

ANIL CHOUDHARY:

The issue involved in these appeals is whether the appellants

who are the co-noticees in the common show cause notice, whether they are entitled to benefit of conclusion of proceedings under Section 11A (1A) r/w *proviso* to sub Section 2 of Section 11A.

2. The brief facts are that revenue investigated with regard to evasion of duty with respect to the two manufacturers namely Shree Raj Pan Masala Pvt Ltd & M/s Shree Raj Exports Pvt Ltd. Pursuant to investigation, Show cause notice dated 23/03/2009 was issued demanding duty from Shree Raj Pan Masala Pvt Ltd. Other persons were also made co-noticees being the directors, (who are the present appellants) of Shree Raj Pan Masala Pvt Ltd. and also some other persons being transporters etc. The SCN was adjudicated and duty liability was confirmed on Shree Raj Pan Masala Pvt Ltd and also penalty was levied on the manufacturer. Penalty was also imposed on these co-appellants/noticees. The matter had reached before this Tribunal in earlier round, being Appeal No. E/2338/2011 alongwith other appeals, including appeals by the present appellants. A Division Bench of this Tribunal *vide* final order No. 54326–54333/2017 dated 23/06/2017 observed that the appellant Shree Raj Pan Masala Pvt Ltd is not contesting the demand on merits and it was pointed out that they have paid 1.25 crores before issuing of show cause notice. The appellant had further prayed for consideration of benefit of closure under the newly inserted provisions of sub-Section (1A) in Section 11A r/w the proviso under sub-Section 2 to Section 11A (by Taxation Laws Amendment Act, 2006 w.e.f. 30/07/2006). This tribunal allowed the appeal by way of remand observing as follows: –

“5. We note that the said provisions are available during the relevant period in respect of the main

appellant/ assessee. Admittedly, as the appellant did not make specific plea regarding the said legal provision no finding was recorded on this by the original authority. Considering the above admitted facts, we find it fit and proper to set aside the impugned order and remand the matter to the original authority to examine the legal provisions as inserted in 2006 in Section 11A and their applicability to the main appellant/assessee as well as to other noticees in the present proceedings. The Original authority shall verify the facts of payments and the applicability of the benefit of deemed closure of proceedings, to M/s Shree Raj Pan Masala Pvt. Ltd. and other co-noticees. The original authority shall order the closure of proceedings on satisfactory examination of the fulfillment of the conditions, as per the legal provisions stated above. In case in respect of any of the appellants/ co-noticees, the said provision is not applicable order to that effect with reasons shall be issued. The appellants shall be given an opportunity to present their side of the case during the proceedings. Accordingly, we set aside the impugned order and remand the matter for a fresh consideration of the legal issue as mentioned above and to pass the orders in terms of the above provisions. The appeals are disposed of by above terms.”

3. Pursuant to remand the learned Commissioner passed the impugned order-in-original dated 07/02/2019 by which, he has been pleased to accept the conclusion of the proceedings in respect of the main party – manufacturer Shree Raj Pan Masala Pvt Ltd, observing as follows;

Quote

“22. I observe that out of above 25 noticees, only 7 had filed appeal before Tribunal. I further observe that Show cause Notice under proviso to section 11A was served only for

confiscation of seized goods including packing materials/raw materials used for concealment under provisions of rule 25 of Central Excise rules, 2002 read with Section 119 of the Customs Act as made applicable to the Central Excise matters also vide Notification No. 68/63-CE dated 4.5.1963. Thus, notice under proviso to section 11A was not issued to anyone else.

For rest of the noticees, the SCN was issued either for confiscation of trucks under section 115 of the Customs Act, 1962 as made applicable to the Central Excise matters also vide Notification No. 68/63-CE dated 4.5.1963, or for imposing penalty under rule 26 for keeping/ concealing/ selling the excisable goods. Thus, from careful study of above provisions, I observe that in the present matter the notice covered under the purview of the wordings "such person and other persons" is only M/s Shree Raj Pan Masala Pvt Ltd, who was issued show cause notice under section 11A and who had paid the duty along with interest and Penalty before the SCN. I further find that notice no. 1 had paid Rs. 1,00,00,000/-+Rs. 25,97,575/-= Rs. 1,25,97,575/- during the investigations, much before the issue of SCN. Further, Additional Commissioner, Central Excise Commisionerate, Jaipur-II in a different case vide his Order-in-Original No. 221/CE/JP-II/2011-ADC dated 19.04.2011, in respect of M/s Shree Raj Pan Masala Pvt. Ltd., Jodhpur, has already appropriated Rs. 21,48,030/- (out of the amount of Rs. 1,00,00,000/- deposited by them vide GAR-7 challan dated 15.4.08). Thus, the remaining amount available is Rs. 1,04,49,545/- (Rs. 1,25,97,575/- (-) Rs.21,48,030/-) for adjusting in Govt. Account against their above liability. I observe that this amount of Rs. 1,04,49,545/- would fully cover the demand of Rs. 59,77,881/-(duty) + Rs. 14,94,470/- (25% penalty) + Rs. 26,532/- (Interest)= Rs. 74,98,883/- hence I find that the proceedings initiated under the provisions of Section 11A against the notice no. 1 can be concluded on payment of 25% penalty only as requested by the notice before the Hon'ble

Tribunal.”

Unquote

4. As regards the other co-noticees including the present appellants who are the directors of Shree Raj Pan Masala Pvt Ltd, the learned Commissioner observed that show cause notice was issued on them for imposition of penalty under Rule 26 of Central Excise Rules 2002. Further observed that the SCN was for confiscation served on Shree Raj Pan Masala, under Rule 25 of Central Excise Rules, r/w Section 119 of the Customs Act, r/w Rule 26 of Central Excise Rules, and not under Section 11A of the Central Excise Act. Thus, the matter regarding confiscation of the seized goods under Rule 25 read with Section 119 of the Customs Act, is not covered under the scope of *proviso* to Section 11A(2) of the Central Excise Act. Similarly, imposition of penalty under Rule 26, upon the co-noticees was made for their involvement in transporting/removing/depositing/keeping /concealing /selling of those excisable goods which are liable for confiscation, is also not covered under the scope of *proviso* to Section 11A (2) of the Central Excise Act. Hence, conclusion of proceedings, in respect of these appellants is not acceptable under the scope of Section 11A (1A) r/w *proviso* under sub-Section 2 to Section 11A. The learned Commissioner also placed reliance on the ruling of a co-ordinate Bench of this Tribunal in CCE vs. Anand Agrawal 2013 288 ELT 90.

5. Being aggrieved, the appellants are before this Tribunal. Learned Counsel for the appellants *inter alia* urges that the learned Commissioner have erred in not accepting conclusion with respect to the present appellants, and in restricting the conclusion of proceedings with respect to the main appellants—manufacturer M/s Shree Raj Pan

Masala Pvt Ltd. The learned Counsel points out that the provisions of Section 11A particularly, *proviso* to sub-Section 2 provides -that if such person (from whom the duty is demanded) has paid the duty in full together with interest and penalty under sub-Section (1A), the proceedings in respect of 'such person' and 'other persons' to whom notices served under sub-Section (1) shall, without prejudice to the provisions of Section 9, 9A and 9AA be deemed to be conclusive as to the matters stated therein.

6. Thus from a plain reading of the provisions of Section 11A, it is evident that the closure is applicable not only to the manufacturer (such person) but also to other persons/co-noticees like directors, transporters, employees, etc etc.

7. Learned Counsel for the appellant also placed reliance on the ruling of the Division Bench of this Tribunal in the case of Orbit Jewellers Vs. Commissioner of Customs 2016 338 ELT 620 wherein, under similar facts and circumstances, as the court below had not allowed closure in respect of the co- noticees/appellants, this Tribunal considering the CBEC Circular No. 831/8/2006– CEX dated 26/07/2006 have held as follows;

“12. On going through the proviso to said Section, we find that the said section is a beneficial piece of legislation with intention to reduce the litigation proceedings where the noticee satisfies the condition of the said section. As has already been observed that the said provision of law provides deeming concept of closure of the proceeding except the proceeding under provision of Sections 135, 135A and 140 on full compliance of the main clause of Section 28(1A). There is no dispute about the fact that the appellants have satisfied the contents of the said section. In such a scenario, the proceedings are required to be deemed as concluded thus not allowing the adjudicating authority to proceed ahead with the adjudication of the other aspects which may be involved in the proceeding. The language of the said section is unequivocal in ordaining that in such scenario the proceeding in respect of such person and all other persons also, shall be deemed to be conclusive as the matters stated therein. The expression “proceeding” stands interpreted by the Hon’ble Supreme Court in the case of P.L. Kantha Rao and others v. State of A.P. and others -

(1995) 2 Supreme Court Cases 471 wherein it was observed that the word “proceeding” engrafted in Section 29 of the A.P. Administrative Tribunal must be understood in a broader perspective. The word “proceeding” would depend upon the scope of the enactment wherein the expression is used with reference to a particular context where it occurs. The proviso to Section 28(1A) uses the expression “proceeding” which in our view is required to be understood in broader manner keeping in view the legislative intention. Legislative intent is clear from the Circular No. 831/8/2006-CX, dated 26-7-2006 issued by the Board. Relevant paragraph is reproduced below :

2. Section 11A of the Central Excise Act, 1944 has been amended to introduce an optional scheme for enabling voluntary payment of duty by assessees, in full or in part, in cases involving fraud, misstatement etc. along with interest and 25% of the duty amount as penalty within 30 days of the receipt of the show cause notice thereby dispensing with the rigours of adjudication procedure. This is an additional facility given to the Trade to settle the dispute at an early stage to reduce litigation and also aid in collection of tax dues more expeditiously. The scheme is optional and not compulsory. The assessee has the further option of using the proposed facility in full or in part. In case of part payment, the remaining amount will be subject to regular proceedings as per the law.

As is clear from the above reproduced portion, the facilities stand extended to the assessees to deposit the dues within a period of 30 days so to as to settle the dispute at an early stage and to reduce further litigation. Though the said Circular stands issued in the context of the amended provision of Section 11A of the Central Excise Act, 1944, the same would equally apply to the identically amended provision of Section 28. We find that the Tribunal has taken note of the said provision as also the Board's Circular in various decisions and has categorically held that on compliance with the amended provision, as regards the deposit, no further proceeding can continue before the adjudicating authority. Reference can be made to the Tribunal decision in the case of Sonam Clock Pvt. Ltd. v. C.C.E., Rajkot - 2012 (278) E.L.T. 263 (Tri.-Ahmd.) as also to another decision of the Tribunal in the case of C.C.E., Vapi v. Technovynyl Polymers Limited -2013 (298) E.L.T. 50 (Tri.-Ahmd.). Further in the case of C.C.E., Raipur v. Abir Steel Rolling Mills - 2013 (296) E.L.T. 90 (Tri.-Del.), it was held that facilities provided in terms of the provision of Section 11A were to settle the tax dispute immediately besides aiding in expeditious collection of dues. The proviso to Section 11A(2) of the Central Excise Act, 1944 is to the effect that proceedings in respect of “such person and other persons” to whom the notice is served, deemed to be conclusive on discharge of duty liability along with interest and 25% of penalty. By referring to the provision of Section 13 of General Clauses Act, 1897, it was observed that the words “other persons” used in said Section are to include co-noticees/persons linked with allegation of contravention of Central Excise Rules, 1944. By observing so, the Tribunal rejected the Revenue's stand that the proceeding for imposition of separate penalty under Rule 26 would continue. It was held that adopting Revenue's stand would amount to making words “other persons” redundant. The proceedings against the main noticee having been concluded, there was no sense in continuing proceedings under Rule 26 against other persons. To the same effect is another decision of the Tribunal in the case of C.C.E., Raipur v. Jay Prakash

Agarwal – 2013 (297) E.L.T. 554 (Tri.-Del.). By taking note of the Board Circular No. 831/8/2006-EX, dated 26- 7-2006 it was observed that the same clarifies intention of the legislature so as to give opportunity to manufacturer to settle the duty dispute immediately on receipt of show cause notice thereby avoiding litigation.

13. Though we note that the above decisions were mainly in the context of the Central Excise provisions but Section 11A of the said Act is *pari materia* to Section 28(1A) of the Customs Act. As such, the ratio of the above decisions would squarely apply to the facts of the present cases also.

14. We further note that proviso to Section 28(1A) uses the expression “as to the matter stated therein”. This will lead to *simpliciter* reference to all the matters stated in the show cause notice, including the proposal to confiscate the seized goods. The same would not survive once there is compliance with the provision of Section 28(1A). The said section makes exception only to the applicability of the Sections 135, 135A and 140 in which case the proceedings under the said section can only be held as not concluded. To accept Revenue’s stand would amount curtailing the sweep of said proviso and by adopting artificial interpretation to defeat the statutory intention. It is well settled law that the legislative intent, extending certain beneficial provision to the assessee, should not be made frivolous by interpreting the provision in a particular manner other than the one which reflects upon such intent.

16. In view of our above analyses inasmuch as we agree with the *Id.* Advocate appearing for the appellants that M/s. Omkar Jewellery and M/s. Orbit Gold having deposited the full amount of duty, interest and 25% of the penalty, no further proceedings were required to be continued in terms of the provisions of Section 28(1A), the first proviso to Section 28(1A), the impugned order has no leg to stand. The same is accordingly set aside. All the appeals are allowed with consequential relief to the appellants.”

8. Thus it is further urged that the Division Bench have distinguished and overruled the ruling of the Single Bench of this Tribunal in the case of Anand Agarwal (*supra*) and have clearly held that the benefit of conclusion, once it is extended to the manufacturer/such person, is also available to the co-noticees/appellants/other persons. Accordingly, prays for allowing the appeals with consequential relief.

9. Learned Authorised Representative for revenue relies on the impugned order.

10. Considering the rival contentions, I find that there is no ambiguity in the provisions as contained in Section 11A (1A) *r/w* proviso to sub-Section (2). Admittedly, in the facts of the present

case, the manufacturer – Shree Raj Pan Masala Pvt Ltd have deposited the duty alongwith interest and penalty (as stipulated), during investigation before issue of the show cause notice. Further, the benefit of conclusion has been granted by the learned Commissioner to the manufacturer- Shree Raj Pan Masala Pvt. Ltd. I further find that the learned Commissioner have failed to consider the scope and purport of the words used in the statute “other person”. The statute clearly provides that the benefit of conclusion shall be applicable in respect of ‘such person’, that is the manufacturer or the person of whom duty is demanded and ‘other persons’ which refers to co-noticees like directors, transporters, godown keepers, employees etc. Thus, following the interpretation given by the Division Bench of this Tribunal in the case of Orbit Jewellers (supra), I hold that these appellants are also entitled to the benefit of conclusion in terms of the *proviso* to sub-Section 2 r/w sub-Section (1A) of Section 11A of the Central Excise Act.

10. In view of my findings and observations, all these appeals are allowed and the impugned order is set aside, so far these appellants are concerned. The appellants shall be entitled to consequential benefits in accordance with law. Appeals allowed.

(Dictated in open Court)

Anil Choudhary
Member(Judicial)

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