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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066

SINGLE MEMBER APPEAL BRANCH

Date 12/09/2011

Appeal No. E/4085/2004 – SM[BR]

Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
M/S RAVI & CO.
557/27 (G)5, OM NAGAR, ALAMBAGH, LUCKNOW

M/S RAVI & CO. Appellant
Vs
C.C.E. LUCKNOW Respondent

I am directed to transmit herewith a certified copy of **Final order No. 597 / 2011-SM[BR]** dated 8.9.2011 passed by the Tribunal under **Section 35-C(1)of Central Excises Act, 1944**

Assistant Registrar
(SM Appeal Branch)

Copy to :

1. Respondent
C.C.E. LUCKNOW
7-A, ASHOK MARG, LUCKNOW

2. Adv. / Consult SHRI BIPIN GARG ADV.
B-1/1289-A, VASANT KUNJ NEW DELHI

3. C.D.R
4. Bar association. CESTAT. New Delhi
5. Director Publications. Customs. Excise. I.P. Estate. New
6. M/s Centax Publictions Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi -
7. Company Law Institute of India Pvt Ltd.,No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
8. Taxmann Allied Service Pvt Ltd., 59/32. New Rohtak Road. New Delhi -
9. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road, Ahmedabad-15
10. LAWCRUX Advisors Pvt Ltd. LAW House.1-8.Sector - 10. Faridabad 121003 (Harvana)
11. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
12. Office Copy
13. Guard file

Assistant Registrar
(SM Appeal Branch)

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI, PRINCIPAL BENCH NEW DELHI

Date of Hearing:01.06.2011
Date of decision:~~01.06.2011~~ 8/7/2011

Excise Appeal No.4085 of 2004-SM (BR)

[Arising out of Order-in-Appeal No.11-CE/APPL/LKO/04 dated 27.02.2004 passed by the Commissioner of Central Excise (Appeals), Lucknow].

M/s.Ravi & Co. Appellant

Vs.

CCE, Lucknow Respondent

For approval and signature:

Hon'ble Shri Rakesh Kumar, Member (Technical)

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1. Whether Press Reporters may be allowed to see CESTAT (Procedure) Rules, 1982.

2. Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?

3. Whether Their Lordships wish to see the fair copy of the Order?

4. Whether Order is to be circulated to the Departmental authorities?

Appearance: Rep. by Shri Bipin Garg, Advocate for the appellants.
Rep. by Shri Anil Khanna, SDR for the respondent.

CORAM: **Hon'ble Shri Rakesh Kumar, Member (Technical)**

FINAL Order No. 597/2011 SM (Br) /Dated:~~01.06.11~~ 8/7/2011

Per Rakesh Kumar

The facts giving rise to this appeal are, in brief, as under:-

1.1 The appellant are engaged in the manufacture of branded chewing tobacco chargeable to central excise duty under sub-heading No.2404.40 of the Central Excise Tariff. Smt. Chamela Devi is the Proprietor of the appellant firm and her husband, Shri Lalji Tiwari is the authorised representative of the appellant firm. On 1.7.99, when their factory was visited by the jurisdictional Central Excise Officers, 49.960 Kgs. of packed chewing tobacco was found in excess of the balance shown in the their production register and the same was placed under seizure. In course of search of the factory, a number of documents including bill book, a register titled "rent receipt register" and some loose papers were recovered, which according to the officers appeared to be containing datewise details of the clearances of chewing tobacco and hence the same were placed under seizure. Statement of Shri Lalji Tiwari, Authorised Signatory of the appellant firm and his wife, Smt. Chemala Devi was recorded on 14.07.99 under Section 14 of the Central Excise Act, 1944 wherein on being asked about the seized documents, he stated that the same were containing details about the sale of the branded chewing tobacco to various customers, during November, 1997 to July, 1999 period in respect of most of which, no duty had been paid. This statement of Shri Tiwari was corroborated by the statement dated 6.9.99 of Mrs.

Chamela Devi. It is on this basis that the show cause notice dated 10.11.99 was issued to the appellant as well as Mrs. Chamela Devi for –

(a) confiscation of 49.960 Kgs. of branded chewing tobacco found in excess of the recorded balance under the provisions of Rule 9(2) & 173 Q of the Central Excise Rules, 1944,

(b) recovery of central excise duty amounting to Rs.8,50,414/- in respect of alleged clandestine clearances of branded chewing tobacco without payment of duty during the period from Nov., 1997 to 1st July, 1999 along with interest on it at the applicable rate under Section 11 AB ibid; and

(c) imposition of penalty on the appellant firm under Section 11 AC of the Central Excise Act, 1944 and on Smt. Chamela Devi under Rule 209 A of the Central Excise Rules, 1944.

1.2. The above show cause notice was adjudicated by the Addl. Commissioner vide Order-in-Original no.56/ADC/IPL/2000 dated 31.10.2000 by which –

(a) the seized tobacco was ordered to be confiscated with option to redeem the same on payment of redemption fine of Rs.1500/-;

(b) duty demand of Rs.8,50,414/- was confirmed against the appellant ______________ under proviso to Section 11A (I) of the Central Excise Act along with interest on it under Section 11 AB; and

(c) while the penalty of Rs.8,50,414/- was imposed under Section 11 AC on the appellant firm, no penalty was imposed on Smt. Chamela Devi, Proprietor of the appellant firm.

1.3 The appellant firm filed the appeal before the Commissioner of Central Excise (Appeals), Lucknow against the Additional Commissioner's order, who under order dated 27.02.2004 dismissed the appeal. Against this order of CCE (Appeals), this appeal has been filed.

2. Heard both the sides.

2.1 Shri Bipin Garg, Advocate, ld. Counsel for the appellant pleaded that the duty demand of Rs.3,22,373/- is based on the bill book, that the bill book is actually an order book for booking the orders from the customers and the quantities and values mentioned therein are the quantities and the values of the branded chewing tobacco for which the orders had been placed, that what the Department calls the bills are actually order forms, that merely on the basis that the orders contained in the "bill book," it cannot be presumed that the goods covered by the such order forms had actually been sold to the parties mentioned therein, specially when no inquiry had been conducted with the customers mentioned in the order forms, that the duty demand of Rs.2,08,853/- is based on the entries in the register called "rent receipt register", that entries in this register do not pertain to clearances of branded chewing tobacco, that no admission in this regard had been made by Shri Lalji Tiwari in his statement and no inquiry whatsoever had been conducted with the so called customers whose names are mentioned, that in view of this, merely on the basis of the entries in the register, it cannot be presumed that the same pertained to the clearances of chewing tobacco and no duty demand can be raised, that duty demand of Rs.3,19,188/- is based on the entries in the loose sheets recovered from the factory premises, that it has been mentioned by Shri Lalji Tiwari in his statement that these loose sheets do not belong to them and the same may have been prepared by the labours doing the work at the factory on commission basis, that since no inquiry had been conducted with the persons, whose name figure in these loose sheets, it cannot be presumed that these loose sheets pertain to the clearances of branded chewing tobacco to the persons mentioned in the loose sheets, that in view of the above, the impugned order upholding the duty demand against the appellant is not sustainable, and that in any case, since the period of dispute is prior to May, 2001 and w.e.f. 11.5.2001, old Section 11 AB had been replaced by new Section 11 AB without any saving clause, in view of provisions of sub-Section (2) of new Section 11 AB, no interest on the duty can be demanded. Shri Garg also cited the judgement of the Tribunal in the case of **Dalmia Vinyls IP) Ltd. Vs. CCE, Hyderabad reported in 2005 (192) ELT 606 (Tribunal-Bang.)**, wherein it was held that the charges of clandestine manufacture and removal based on the private records, authenticity of which was doubted by the appellant, was not sustainable without any corroborative evidence and also the judgement of the Tribunal in the case of **DP Industries Vs. CCE reported in 2007 (218) ELT 242,** wherein it was held that merely on the basis of private records, allegation of clandestine clearances cannot be upheld and it has to be established beyond reasonable doubt and not on the basis of preponderance of probabilities.

2.2 Shri Anil Khanna, ld. Departmental Representative defended the impugned order by reiterating the findings of the Commissioner (Appeals) and emphasised that Shri Lalji Tiwari, Proprietor of the appellant firm and also the Authorised Signatory of the company, had been specifically asked about the documents recovered from the factory and he, in his statement dated 14.07.99 has admitted that these documents pertained to clearances of branded chewing tobacco, that subsequently, Smt. Chamela Devi in her statement dated 6.9.99 had expressed her full agreement with the statement dated 14.07.99 of her husband, that none of these statements recorded under Section 14 of the Central Excise Act, 1944 by a Gazetted Officer had been retracted, that the plea of the appellant that the "bill book" is actually an order book containing the orders, is incorrect, as on number of bills, the word 'order' is cut out and a number of bills also bear the signatures of the customers.

3. I have carefully considered the submissions from both the sides and perused the records. Sofar as the allegation of non-accountal of 49.960 kgs. of branded chewing tobacco under the provisions of Section 9(2) & 173Q of the Central Excise Rules is concerned, since there is no dispute that this much quantity of finished chewing tobacco had not been accounted for in the RG-12 Register and even at the time of personal hearing, this allegation has not been refuted, the Commissioner (Appeals)'s order with regard to confiscation of 49.960 kgs. of branded chewing tobacoo is upheld.

4. Next comes the question of duty demand of Rs.8,50,414/- against the appellant firm along with interest under Section 11 AB and also the question of penalty on them under Section 11 AC. The duty demand is on the basis of three categories of documents recovered from the factory premises-bill books of the appellant firm issued to their various customers, date wise entries in the register titled "rent receipt register" and date wise entries on the loose sheets. The recovery of these documents from the factory premises of the appellant firm on 1.7.99 is not disputed. Shri Lalji Tiwari, husband of the Proprietor, Smt. Chamela Devi and also the Authorised Signatory of the appellant firm, who was actually running the day-to-day business of this firm, was specifically questioned with regard to these

documents and he in his statement dated 14.07.99 has explained the entries in these documents and it has been accepted by him that these documents pertain to the sale of the chewing tobacco to their customers, which were without payment of duty. In his statement, he neither disputed the recovery of these documents from his factory nor did he disowned the same. The statement dated 14.07.99 of Shri Lalji Tiwari was affirmed by the statement dated 6.9.99 of Smt. Chamela Devi. None of these statements have been retracted by them. In view of this, it is difficult to accept the plea of the appellant that the bill book actually contained the orders forms regarding the supply orders placed by the customers. Similarly, it is also difficult to accept the appellant's plea with regard to the entries made in the register titled "rent receipt register" and the loose sheets, when Shri Lalji Tiwari in his statement dated 14.07.99 had explained the individual entries in these documents. In view of this, I uphold the findings of the lower appellate authority that entries in the bill book, Register titled "rent receipt register" and loose sheets pertained to the removal of finished goods without payment of duty and hence the duty demand based on the same has been correctly upheld. Since this is a case of clandestine removal, penalty under Section 11 AC and interest on duty under Section 11 AB would be attracted. I do not find any basis for the appellant's plea that in view of the substitution of Section 11 AB by a new Section 11 AB w.e.f. 11.05.2001, no interest would be chargeable in view of the provisions of Sub-section (2) of the new Section 11 AB, according to which the provision of this Section are not applicable to clearances made during the period prior to 11.05.2001, as the period of dispute in this case is prior to 11.05.2001, when the interest on short paid, short levied or erroneously refunded duty was linked to the short payment, short levy or erroneous refund having taken place on account of fraud, wilful mis-statement, suppression of facts, etc. on the part of the assessee and since, these elements are present in this case, the interest has been correctly demanded by the original adjudicating authority in Adjudication Order dated 31.10.2000, w.e.f. 1.5.2001, the scope of Section 11 AB had been expanded to include all cases of short levy, short payment or erroneously refund, irrespective of whether the short levy, short payment and erroneous refund had taken place due to wilful mis-statement, fraud, suppression of facts, etc, or otherwise and the provisions of sub-section (2) to new Section 11 AB cannot be interpreted to mean that that even in respect of the cases where short levy, short payment or erroneous refund was due to fraud, wilful mis-statement, suppression of facts, etc on the part of the assessee, interest could not be charged for the period prior to 11.5.2001, as giving such an interpretation would nullify the provisions of Section 11 AB, as the same stood during the period prior to 11.5.2001.

5. The appellant have cited the judgement of the Tribunal in the case of **DP Industries (supra),** wherein it has been held that merely on the basis of the private records, allegations of clandestine clearances cannot be upheld and it has to be proved beyond reasonable doubt and not on the basis of preponderance of probabilities. However, this view is contrary to the law laid down by the Hon'ble Supreme Court in the case of **Commissioner of Police, New Delhi Vs. Narender Singh reported in 2006 (4) SCC 265,** wherein, in para 12, the Hon'ble Supreme Court has held as under:-

> "12. It is not in dispute that the standard of proof required in recording a finding of conviction in a criminal case and in a departmental proceeding are distinct and different. Whereas in a criminal case, it is essential to prove a charge beyond all reasonable doubt, in a departmental proceeding, preponderance of probability would serve the purpose. (See *Kamaladevi Agarwal vs. State of W.B.*)

5.1 Hon'ble Supreme Court, in the case of **Collector of Customs, Madras vs. D. Bhoormull** reported in **1983 (13) E.L.T. – 1546 (S.C.)**, in which goods of foreign origin, alleged to have been illicitly imported into India, had been recovered from the premises of M/s Shah Rupaji Rikhaldas, Chennai and ownership of the goods had been claimed by one Shri D. Bhoormull claiming the goods to have been legally imported, but who never appeared before the Investigating

Officers with the necessary documents, while considering the question of liability of the seized goods for confiscation and of Shri D. Bhoormull for penalty under Section 167 (8) of the Sea Customs Act, 1878 (corresponding to Section 111 (d) and 113 (d) of Customs Act, 1962) laid down the following two important principles regarding the standard of proof in Departmental proceedings and the burden of proof -

(1) While the burden of proving that the goods to which the provisions of Section 178A of Sea Customs Act, 1878 (corresponding to Section 123 of the Customs Act, 1962) does not apply, is on the Department, the Department is not required to prove its case with mathematical precision to a demonstrable degree and all that is required is the establishment of such a degree of probability that a prudent man may, on its basis, believe in the existence of the fact is issue and the legal proof is not necessarily the perfect proof, but nothing more than a prudent man's estimate as to the probabilities of the case (para 30 of the judgment)

(2) Since it is exceeding difficult, if not impossible, for the prosecution to prove the facts which are especially within the knowledge of the opponent or the accused, it is not obliged to prove them as part of its primary burden. On the principle under lying Section 106 of the Evidence Act, the burden to establish those facts is cast on the person concerned and if he fails to

establish or explain those facts, an adverse inference of facts may arise against him, which coupled with the presumptive evidence adduced by the prosecution or the Department, would rebut the initial presumption of innocence in favour of that person and in the result prove him guilty. While presumption of innocence is, no doubt, presumption juris, but it may be successfully encountered by presumption of guilt arising from facts and circumstances, like recent unexplained possession of stolen property - though the latter is only a presumption of fact. Thus, the burden on the prosecution or the Department may be considerably lightened even by such presumption of fact arising in their favour. (para 32 of the judgment).

5.2 The Tribunal in case of **K. Janandharan Pillai vs. Collector of Custom, reported in 1988 (38) ELT – 647 (Trib.)**, relying upon the above judgment of Hon'ble Supreme Court in case of Collector of Customs, Chennai vs. D. Bhoormull (supra) and also on the Supreme Court's judgment in case of **Kaningo & Co. vs. Collector of Customs, Calcutta** reported in **1983 ELT – 1486 (S.C.)**, has held as under -

> "So far as trial proceedings are concerned, it is the axiomatic proposition of law that circumstantial evidence should point only to one hypothesis, namely, the guilt of the person and should be absolutely incompatible with the innocence of the person accused of an offence. But the effect of the said

decisions of the Supreme Court is that the standard of proof in criminal prosecution before a criminal court is different from the standard of proof before the adjudicating authority, where preponderance of probability would be a guiding factor and proof beyond reasonable doubt, relevant in criminal prosecution before a criminal court, cannot be bodily lifted and transported in adjudication proceedings, when consideration of probabilities would be the guiding factor".

5.3 Thus the standard of proof required in the Departmental proceedings under the provisions of the Customs Act, 1962 or Central Excise Act, 1944 or of the Rules made thereunder, for confiscation of goods, confirmation of demand for duty evaded, and imposition of penalty is the preponderance of probability. For establishing to be preponderance of probability, the adjudicating authority or the Tribunal has to evaluate the evidence of both the sides and decide what is most probable.

6. Keeping in view the principles regarding the standard of evidence required for proving the allegation of duty evasion in the departmental adjudication proceedings, in my view, the evidence on record in this case is sufficient to establish the preponderance of probabilities. In view of this, I do not find any infirmity in the impugned order. The appeal is dismissed.

(Rakesh Kumar)
Member (Technical)

Ckp.