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

Date of Hearing:27.12.2016
/Decision:11.01.2017

Excise Appeal No.56939 & 56940/2013-EX(DB)

[Arising out of common Order-in-Original No.87/2012(CE) dated 31.12.2012 passed by the Commissioner, Central Excise Commissionerate-I, Jaipur]

Goyal Tobacco Co.Pvt. Ltd. — Appellants
Shri Rajesh Goyal, Director

Vs.

CCE & ST,Jaipur-I — Respondent

Appearance:

Rep. by Shri Manish Agarwal, CA & Shri Zared Khan, Advocate for the appellant.
Rep. by Shri R.K. Manjhi, DR for the respondent.

Coram: Hon'ble Mr. Justice (Dr.) Satish Chandra, President
Hon'ble Mr. B. Ravichandran, Member (Technical)

Final Order No.50354-50355/2017

Per B. Ravichandran:

These two appeals were filed against common impugned order dated 16.01.2013 passed by the Commissioner of Central Excise, Jaipur-I and as such, are taken up together for disposal.

2. The main appellant (M/s.Goyal Tobacco Co.Pvt. Ltd.) are engaged in packing of pouches of unmanufactured chewing tobacco with brand name of "Laxmi Chhap". There is another proprietary unit in the name of "M/s/ Rajesh Tobacco Company" engaged in trading of tobacco products having their own godown in other premises. In Jan. 2011, Central Excise Officers conducted verification in different premises of the appellant and M/s. Rajesh Tobacco

Company. In the godown of M/s.Rajesh Tobacco Co, officers found three pouch making machines and, Laxmi brand tobacco pouches and other materials. Further investigations were conducted and proceedings were initiated against the appellant. The case of the Revenue is that the main appellant produced and cleared tobacco pouches without accounting and payment of duty using the packing machines found in the premises of M/s.Rajesh Tobacco Co. The Original Authority upon adjudication of the case, concluded that in terms of the Chewing Tobacco and Unmanufactured Tobacco, Packing Machine (Capacity Determination and Collection of Duty) Rules, 2010, the appellant are liable to pay central excise duty of Rs.3,17,14,935/- for the period March, 2010 to Jan. 2011. The duty calculation has been made on prorata basis for the month of March, 2010 and Jan. 2011 and on the basis of number of machines and capacity for the remaining period. He also imposed penalty of equivalent amount on the main appellant and Rs.50 Lakhs on Shri Rajesh Goyal, Director of the main appellant (second appellant). Confiscation of the unmanufactured tobacco and seized machines were also ordered with an option to redeem the same on payment of fines.

3. Ld. Counsel for the appellant contested the findings of the Original Authority on various grounds. He emphasized that these three machines, found in the rented godown, were not in working condition at the time of verification by the officers. The whole demand is confirmed on the presumption that the mere availability of some machines is sufficient and it is not required for the Department to prove the working condition or usage of such machines. The 2010 Rules were invoked for such summary conclusion of duty demand. The Original Authority concluded that the Compounded Levy Scheme is applicable and duty

demand will be made based on the goods deemed to have been manufactured and is for the appellant to prove non-functioning of the machines.

4. Ld. Consultant emphasized that they have repeatedly requested the Department to conduct a technical inspection of the detained machines to establish their exact condition. Such request was not honored and the Original Authority went by perusal of certain still photographs and also referred to the fact that the machines were plugged in. Though the fact that crucial parts like motors, etc. was missing was taken note by the Original Authority, still the duty was confirmed without appreciating the facts. Ld. Consultant also submitted that there is no corroborative evidence of clandestine manufacture or clearance of dutiable items. There is no examination of electricity consumption either by power connection or by generator arrangement. He submitted that whole demand is based on the presumption without any element of supporting evidence. Presence of non-functional scrapped machines cannot be the basis of confirming excise duty demand.

5. Ld. AR submitted that these machines were found by the officers in the premises during the inspection. These machines can be made functional without much difficulty. It is for the appellant to establish the non-operation of these machines. The duty demand has been correctly made in terms of the 2010 Rules, which provided for Compounded Levy Scheme for the impugned goods. As such, it is not open to the appellant to dispute the duty liability. He also referred to the statements given by Rajesh Goyal and others admitting the unaccounted manufacture and clearance of goods.

6. We have heard both the sides and perused the appeal records.

7. The whole case of the demand against the appellant is on the basis of the availability of three machines in the premises verified by the Central Excise Officers. The demand was confirmed by considering these machines as having been used for illicit packing of excisable goods which were later cleared resulting in non-payment of duty. Admittedly, no other corroborative evidence has either been collected or presented by the officers in confirmation of such demand. In such situation, the actual condition of the machine at the time of detention of the said machines has become crucial. We note that the appellant on various occasion (25/02/2011, 18/03/2011, 19/05/2011, 4/7/2011, 8/7/2011, 14/7/2011) repeatedly requested for examination of the machines by the experts. The same was not accepted by the Department. We are not able to understand as to why such a vital aspect of investigation, that too on repeated requests of the appellant, was not accepted by the Revenue. Apparently, such examination by experts would have clearly brought out the exact status of the machines, the possibility of such machines having been put to use for clandestine manufacture etc. The inference by the Commissioner that the machines were plugged in, the motor can be fitted at any time to run the machine, is fallacious. The Original Authority himself records that some of the essential parts in the machines were missing and in absence of recovery of these missing parts from the premises it can be actually argued that the said machines were not in working conditions on the date of visit by the officers. The Original Authority records that though the machines may not be in working condition on the date of visit by the officers (18.01.2011), there is no evidence to show that they were not in working condition since 8.3.2010. We find that such inference apart from being fallacious is legally untenable. The demand was made based on presumption that these machines were working from 8.3.2010 without

interruption. The Original Authority emphasized that in terms of Compounded Levy Scheme, the goods shall be determined to have been manufactured with the help of installed packing machines irrespective of whether it is in use or not, or is in working condition or not. He held that non-working of any machine is not relevant to determine the duty liability. However, we note that in the present case that the submission of the appellant is that these machines were scrapped and were lying un-utilised and cannot be considered as packing machines “installed” for operation in terms of the Explanation II to Rule 19. If the inference of the Original Authority is considered as a legal ratio, then wherever the packing machines were lying, in any premises, including the premises of the manufacturer or seller of such machines, then the duty can be demanded from them in terms of the Compounded Levy Scheme. Apparently no such situation is covered by the Scheme. Presumptive duty liability as envisaged in the Compounded Levy Scheme of 2010 Rules cannot be extended to a level that automatic duty liability will arise in all cases, where some packing machines are found in a premises.

8. Rule-4 of the said Rules states that the factor relevant to the production of notified goods shall be the number of packing machines in the factory of the manufacturer. Rule -5 stipulates that the quantity of goods shall be determined to be as per the table appended therein. Rule 18(2) stipulates that if it is found that the goods have been manufactured or cleared from a unit, which is not registered with the jurisdictional central excise officers, then the duty liability of such unit shall be determined on the basis of number of packing machines found available in the premises of the unit, unless evidence to the contrary is provided to the satisfaction of the central excise officers, such machine shall be determined to have been in operation. Keeping in view the above provisions of the Rules, we

find that the non-functional scrap condition of the machines have been repeatedly asserted by the appellants on many occasions during the course of investigations. No verification or technical examination of the machines have been carried out by the department to establish the functional capability of the machines. Since the machines were detained and were under custody of the department, the repeated prayer of the appellant for technical examination is the only rebuttal the appellant could make in terms of Rule 18(2). Admittedly, the machines were not in operation at the time of the visit by the officers and were not having many essential parts including motors. This has been recorded in the impugned order. However, the Original Authority inferred that the machines can be made operational easily and the appellant failed to establish that they were not in operation during the impugned period. We find that such inference is not supported either by fact or by law. We note that the status of each machine with details of essential parts that were not found were submitted by the appellant before the Original Authority. However, the Original Authority chose to give a finding that the mere presence of machines along with the statements of admission regarding manufacture of dutiable items is sufficient to invoke the provisions of 2010 Rules to confirm the demand.

9. Further, we note that the Original Authority categorically concluded that when the machines were found in an unregistered premises and the manufacturer and clearance is established, the duty demand is correctly made. While the presence of machines is an admitted fact, the manufacture and clearance has not been evidenced with any corroborative evidence established during investigation. For this the only reliance was on the statements given by the Accountant of the appellant’s unit, labourer and the driver of the tempo. There is no verification of

procurement of raw materials, packing material, bank statements, etc. to corroborate the illicit manufacture and clearance of dutiable items. We also note that the Commissioner did not permit the cross examination of the witnesses with reference to prayer of the appellant regarding serious irregularities in panchnama and search proceedings. We find that the Commissioner recorded since the machines were found in an unauthorized premises, the cross examination of the witnesses would not make any change. Similarly, cross examination of the officers conducting search operation was also denied. We further note that the Hon'ble High Court of Rajasthan in **Jupitor Industries and Another** in **Tax Reference Case No.28 of 2004** decided on 7.4.2006, while examining the duty liability with reference to another Compounded Levy Scheme, held that the manufacture of goods is a condition precedent for charging excise duty without which no levy can be made. The Rule cannot be made to go beyond the scope of the charging provisions.

10. Apart from the physical availability of three packing machines, the Revenue relied on the statements of Shri Rajesh Goyal (second appellant), Shri Rakesh Kumar, Shri Pramod Kumar Sharma, Shri Deepak Sharma, Shri Dinesh Jogi and Shri Babu Lal Meema. Shri Rajesh Goyal retracted his statement immediately at the earliest possible occasion. Though the other persons did not retract their statements, their cross examination was sought by the appellant, which was not allowed by the Adjudicating Authority. However, reliance was placed on these statements as a corroborative evidence to conclude that these machines were infact used for packing dutiable items. As such, in terms of 2010 Rules, duty liability was determined. In this connection, we note that denial of cross examination and relying on the statements, put the impugned order in legal

jeopardy. The provisions of Section 9 D of the Central Excise Act, 1944 is very clear. By now, it is well settled legal position that the Adjudicating Authority, if he intends to rely on the contents of any statement recorded under the Central Excise Act, 1944, then the procedure, as prescribed under Section 9 D, has to be followed scrupulously. In fact, in a recent decision, the Hon'ble Punjab & Haryana High Court in the case of **Jindal Drugs Pvt. Ltd. - 2016 (340) ELT 67 (P&H)** held that a Adjudicating Authority cannot straightaway rely upon the statement recorded during the investigation before the central excise officer, unless and until, he can legitimately invoke clause (a) of Section 9D (1). The statements given under Section 14 are to be examined in chief before the Adjudicating Authority and if the same is not done, it cannot be taken as reliable evidence. If the maker of the statement is examined in chief by the Department, cross examination of the said person must be allowed, if sought for by the assessee. We find legal ratio regarding cross examination of the person, whose statement has been relied upon by the Department, has been laid down by the Hon'ble Delhi High Court in **Basudev Garg – 2013 (294) ELT 353 (Delhi)** and Hon'ble Allahabad High Court in **Parmarth Iron Pvt. Ltd. – 2010 (260) ELT 514 (Delhi).** Further, reference can be made to the decision of Hon'ble Delhi High Court in **J.K. Cigrettes Ltd. – 2009 (242) ELT 189 (Delhi)** and Hon'ble Allahabad High Court in **Govind Mills Ltd. – 2013 (294) ELT 361 (All.).** In the present case, we find that the statements were relied upon as corroborative evidences and the cross examination of witnesses who made such statements was denied without valid ground. We find that there is no other corroboration evidencing operation of these machines even for a single day during the impugned period. The presence of machines and certain statements of labourers and accountants were the only evidences, which resulted in confirmation of demand. We find that these evidences, the admissibility of which itself is legally not sustainable, cannot be the basis for confirmation of duty on the goods allegedly manufactured and cleared by the appellant. The investigation in the present case has been very sketchy and will not support the findings in the impugned order.

11. After careful consideration of the impugned order and the grounds of appeal, we find that the impugned order has fallen short in appreciating the factual position, evidence gathered and applicable legal provisions in arriving at the findings of non-payment of duty. The order is not sustainable for more than one reason as recorded above.

12. Accordingly, we set aside the impugned order. The appeals are allowed.

[order pronounced on 11.01.2017.]

(Justice Dr. Satish Chandra)
President

(B. Ravichandran)
Member (Technical)

Ckp.