IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI
PRINCIPAL BENCH, COURT NO. IV

Excise Appeal No. 238-239 of 2010 SM

[Arising out of Order-In-Appeal No. 9-10 /2009 dated 22. 05.2009 passed by Commissioner of Central Excise (Appeals), Delhi 1]

Moongipa Roadways Pvt. Ltd. **Appellant**
Krishna Freight Movers

Vs.

Commissioner of Central Excise **Respondent**
Delhi I

Appearance:
Shri Ravinder Jain, Consultant for the Appellants
Shri M Sharma, AR for the Respondent

<u>CORAM</u>:

Hon'ble Ms. Archana Wadhwa, Member (Judicial)

Date of Hearing : 2.02.2017
Date of Decision : 27.2.2017

ORDER NO . FO/ 52016-52017/2017-(SM)

<u>Per Ms. Archana Wadhwa :</u>

The challenge in the present appeals is to penalty of Rs. 25 lakh imposed on each of the appellant, who is a transporter, in terms of Rule 26 of Central Excise Rules, 2002.

2. The main impugned order is against one M/s. Sunrise Food Corporation, who are engaged in the manufacture of Goa brand of gutkha. Their factory was visited by the Central Excise officer on

14.06.2006 who conducted various checks and verifications. Simultaneously, the office premises of the present appellant was also visited by the Excise officers who found 130 plastic bags in the said premises, the same were opened and found to be containing pouches of Goa brand gutkha total valued at Rs. 24.57 lakhs. Statement of Shri Rakesh Aggarwal, Manager of the present appellant was recorded wherein he submitted that the said bags have been received only on previous date i.e. 13.6.2006 without the cover of invoice / challan.

2. The present impugned order confirmed the demand against the main noticee Sunrise Food Products which was also challenged before the Tribunal and on account of non compliance with the stay order, their appeal stand dismissed. As such, the present appeal is being taken up independently.

3. During the course of adjudication, the appellant took a categorical stand that the goods in question were received by their company only the previous day and inasmuch as the same were without cover of invoice, no documents were prepared for transportation of the same. Otherwise also they are not liable to penalty in terms of Rule 26 as they have neither transported the goods nor dealt with the same nor had any knowledge or reasons to believe that the goods which were in sealed packages were contraband goods.

4. While dealing with the said belief of the appellant, Commissioner has observed that:

> *"68. Now I take up the defence of the Noticees in respect of Show cause notice dated 18.3.2008. Firstly, Noticee No. 5 to the show cause notice dt. 18.3.08 i.e. transporter M/s. Moongipa Roadways (P) Ltd. have contended that since the noticee demanded invoice / challan/ bill from the person who came for booking and the said person left the goods their and promised to bring invoice and in the meantime the goods were seized by the Central Excise Officers. And further contended that the statement of Shri Rakesh Aggarwal was dictated to him by the Central Excise Officere and was not a voluntary statement. I find that only denial by the noticee at this stage contrary to the evidences as mentioned above cannot in any way outweigh them. This plea is only for the sake of argument and hence needs no discussion. The only inference that can be drawn on the basis of documentary evidence that M/s. Moongipa Roadways were transporting 'Goa' Gutkha manufactured by M/s. SFP only which were on different facts. In cases of clandestine removal one has to go by the facts of a given case and judicially no generalization can be made. I therefore, hold that cited case law do not in any way diminish the evidentiary value of material on records. I find that in respect of M/s. Moongipa Roadways the statement of Shri Rakesh Aggarwal dated 13.2.2007 had confessed that there was a recovery of 130 bags of Goa Gutkha from their premises and these goods were booked by Shri Sanjay Aggarwal, Prop of M/s. Sanjay Aggarwal and Company and Shri Vinod Sharma, Director of M/s. Sunrise Food Product, and they used*

to book the items stating it as mawa Mouth Freshner, Zarda and Supari, etc. but actually it used to be Gutkha and Pan Masala. Further Shri Vinod Kumar in his statement dated 12.09.07 has stated that they used to book Gutkha through Moongipa Roadways Pvt. Ld. In the name of fictitious company in the name and style of M/s. Capital Trading Co. and M/s. Vishal Trading Co. Shri Sanjay Aggarwal in his statement dated 14.6.06 had stated that they used to book the goods by the name of fictitious company in the name and style of M/s. Rakesh sale.

69. Thus, M/s. Moongipa Roadways were well versed with the activities done by M/s. Sunrise Food Product and M/s. Sanjay Aggarwal and company and have helped them in the transportations of clandestinely cleared goods from their factory to other place, as all these Gutkha and Pan Masala were booked in the other names of Mawa, Mouth Freshner etc."

5. Similarly in the case of Ms. Krishna Freight Movers, the Commissioner observed as under:

"70. I, also find that M/s. Krishna Freight Movers were found to be receiving excisable goods without the cover of any invoice or challan for onward transportation. I also find that M/s. Krishna Freight Movers had the knowledge that the goods received from M/s. Sunrise Food Products were actually in the name of fictitious firms. Thus M/s. Krishna Freight Movers have colluded with M/s. Sunrise Food Products in transportation of clandestine removed goods."

6. The appellants contention that they are neither involved in the allegations of clandestine removal by Sunrise Food Corporation nor is there any evidence to that effect. Admittedly, 130 bundles of goods delivered to their office by the said manufacturers were sealed and were opened by the officers to find out that goods therein were gutkha and removed clandestinely. The appellant had not booked the said consignment for transportation, in the absence of invoices/ suppliers documents. As such, the appellants were totally unaware of the fact of non-payment of duty on the said goods and as such, no penalty can be imposed upon them under Rule 26. The Commissioner has gone on the assumption and presumption that the appellant had in the past transported the goods knowing well that the same was gutkha and were not duty paid. My attention also stand brought to various decisions.

7. After having gone through the above reproduced paragraphs from the impugned order and after hearing Shri M R Sharma, learned DR, I find that admittedly, the appellant had not booked the consignment by the time the officers reached the premises and seized the consignment. Various packages were unopened packages and there is nothing on record to show that the appellant was aware of the contents of the said packages and their non-duty paid character. No documents were prepared by the transporter for the transportation of the said goods.

8. The Tribunal in the case of ***Perfect Transport Co. vs. CCE, Vapi [2013 (297) ELT 248 (Tri)]*** has held that penalty cannot be imposed based on assumption and presumptions. Similarly, in the case of ***Vijay Transport Co. Ltd. vs. CCE Daman [2008 (230) ELT 154 (Tri)]***, Tribunal has observed that transporter can not be expected to be the expert of Central Excise laws to find out before transporting the goods as to whether the manufacturer has correctly discharged the duty burden or not.

Larger Bench of the Tribunal in the case of ***Steel Tubes of India vs. CCE Indore [2007 (217) ELT 506 (Tri-LB)]*** has held that separate penalties in the absence of any evidence cannot be imposed under Rule 209A of the Erstwhile Central Excise Rules. .

9. Further in the case of Chawla Highway Carriers vs. CCE Mumbai III [2003 (161) ELT 165 (Tri)], the Tribunal observed that even awareness of bad documentation /defective documentation, does not establish the involvement of transporter in the evasion of duty. The Department has to prove not only the non-duty paid nature of the goods but also the fact that person dealing with these goods has conscious knowledge that the goods were not duty paid.

10. By applying the ratio of the above cases to the facts of the present cases, I am of the view that the Revenue failed to produce evidence on record to show that the appellant was aware of the

contents of the bags recovered from their premises or non-duty paid character of the same. As such, I find no justifiable reasons to impose penalties upon the appellants. Accordingly, same are set aside and appeals allowed with consequential relief to the appellants.

(pronounced in the open court on 27.2.2017)

(Archana Wadhwa)
Member(Judicial)

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