CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL NEW DELHI

PRINCIPAL BENCH - COURT NO. 1

Excise Appeal Nos. 52826, 53066 & 53075 of 2015

(Arising out of Order-in-Original No. 19-Commr-DDN-2015 dated 31.03.2015 passed by the Commissioner of Customs, Central Excise & Service Tax, Dehradun)

DATE OF HEARING : 03.11.2017
DATE OF DECISION : 21.11.2017

Shri Piyush Jain …. **Appellants**
The Rishabh Velveleen Ltd. (Rep by Shri P.R. Mullik & Rahul Tangri, Adv.)
Shri Umesh Chand Jain

VERSUS

CCE, Dehradun …. **Respondent**
(Rep. by Sh. R.K. Mishra, DR)

CORAM : HON'BLE MR. JUSTICE (DR.) SATISH CHANDRA, PRESIDENT
HON'BLE MR. V. PADMANABHAN, MEMBER (TECHNICAL)

FINAL ORDER NO. 57968-57970/2017

PER JUSTICE (Dr.) SATISH CHANDRA :

All the present appeals are filed by the assessee-Appellants against the Order-in-Original No. 19-Commr-DDN-2015 dated 31.03.2015 passed by the Commissioner of Customs, Central Excise & Service Tax, Dehradun. The period in dispute is 1993-1995.

2. The brief facts of the case are that, during the period under consideration, the assessee-Appellants were engaged in the manufacture of Flock Fabrics. A search was conducted at the business premises on 06.05.1994. On the basis of the statement recorded and other materials seized, the Department opined that the assessee-Appellants have made clandestine removal of the goods. So, duty demand was raised and penalty imposed. Being aggrieved, the assessee-Appellants have filed the appeal before the Tribunal. The Tribunal vide its Final Order No. 348/06-EX dated 28.03.2006 has observed that :

"(1) We confirm the demand of duty on the goods clandestinely removed as shown in Annexure C-1 to the show cause notice subject to the direction that the amount of duty on these goods should be reworked out by the Commissioner by taking value shown in the Annexure as cum duty price.

(2) On quantification of amount of duty as aforesaid, 25% of the quantified amount of duty is imposed as penalty on the respondents under Rule 173Q(1) of Central Excise Rules, 1944.

(3) The seized goods are held to be liable for confiscation. Since the goods have already been released provisionally, the respondents are directed to pay a fine of 25% of the value of the goods in lieu of confiscation.

(4) Land, building, plant and machinery of RVPL, valued at Rs. 83,20,695/- is hereby confiscated under Rule 173Q(2) of the

Central Excise Rules, 1944. The respondents are given option to redeem the same on payment of fine of 15% of the value of plant and machinery in lieu of confiscation.”

3. Being aggrieved, the assessee-Appellants have filed the appeal before the Hon’ble High Court of Uttrakhand (Central Excise Appeal No. 05 of 2007) where the matter was remanded to the Commissioner vide order dated 27.12.2012.

4. As per the direction of the Hon’ble High Court, the Commissioner has issued notices of hearing to the assessee-Appellants. However, in the meantime, Shri Vikash Kumar Singh and Shri H.V. Raghavn Iyer have died.

5. The assessee-Appellants have demanded the copies of the relied upon documents which were not provided by the Commissioner. Hence, assessee-Appellants have filed a Civil Writ Petition No. 389 of 2015 before the same High Court. The Single Judge of the Hon’ble High Court vide its order dated 07.05.2015 has dismissed the Interim Application as well as the Writ Petition without granting any relief to the assessee-Appellants. Not being satisfied, the assessee-Appellants have filed Special Appeal before the Division Bench of the Hon’ble High Court of Uttarakhand (Appeal No. 242 of 2015) which was also dismissed vide order dated 03.06.2015.

6. In this scenario, the Commissioner has passed the impugned order, which is the outcome of the second round of litigation. In the second round of litigation, the Commissioner has

confirmed the duty as well as the penalty. Being aggrieved, the assessee-Appellants have filed the present appeals.

7. With this background, Shri P.R. Mullik, learned counsel for assessee-Appellants (M/s Rishabh Velveleen Ltd. and Shri Umesh Chand Jain), submit that, during the search operation two private registers were seized, namely, register at Sl. No. 50 and 92 of the Relied Upon Documents (RUD). The first register contains sale of Velvet Fabrics as per the norms of the RG-1, but the second register is not matching with the entries. It is the submission of the learned counsel that Shri Vikash Kumar Singh, Accounts Officer, whose statement was recorded by the visiting team of the Department, has died during the pendency of the appeals and Shri H.V. Raghavn Iyer, earlier counsel, has also expired. It is the submission of the learned counsel that there is no suppression of production as not even a single unaccounted voucher was found by the visiting team. During the course of arguments, our attention was drawn to para 5.16 of the impugned order where it is mentioned that the entries made in the Register were matching with the railway receipts/despatch reports/transporter. The entries were in the handwriting of the noticee. The learned counsel replied that these registers were maintained for giving the rosy picture to the banks for obtaining the loan. It is the submission of the learned counsel that no enquiry was made from the buyers and no payment has been shown received from the buyers.

8. Shri Rahul Tangri, learned counsel, appeared for Shri Piyush Jain – Director, assessee-Appellant, upon whom a penalty of Rs. 10 lacs has been imposed. It is the submission of the learned counsel that in the remand proceedings, the penalty has been imposed which is the violation of law as per the ratio laid down by the Tribunal in the case of **Elemec Industries vs CCE, Pune,** 2003 (158) EWLT 595 (Tri.-Del.), where the issue was involved regarding the clubbing of value of clearances of four units regarding SSI exemption. For the purpose, he read out para 8.1 of the Tribunal's order. Relevant portion is reproduced below :

> **"8.1 We observe that in spite of the prayer (which did not mention the fourth unit namely M/s. Anand Auto Electricals) made in the Appeal filed against M/s. Elemec Industries, no appeals were preferred by the Revenue against the Remaining three units and Shri S.T. Batevara and V.T. Bhatevara. As no appeals were filed against these firms and individuals, the findings as contained in the Adjudication Order No. 40/93 have become final as far as all other parties to the notice, dated 2-6-92 are concerned. It is settled law that the Adjudication Order attains finality unless and until the same is challenged in appeal. As no appeal was filed in respect of Appellant Nos. 2 to 6 by Revenue, the findings as far as they are concerned have attained finality and cannot be reopened again on the basis that in the appeal filed against M/s. Elemec Industries, the Order has been set aside and matter has been remanded for readjudication……"**

Lastly, he made a request that penalty may please be dropped. Taking lead, Shri P.R. Mullik also submits that identical situation is in the case of Shri Umesh Chand Jain – assessee-Appellant, upon whom a penalty of Rs. 10 lac has also been imposed. Finally, both the learned counsels submit that the impugned order may kindly be set aside.

9. On the other hand, Shri R.K. Mishra, learned DR for the Revenue, has justified the impugned order. He submits that in para 2.18 of the impugned order, it is clearly mentioned that investigation was made from the buyers who have admitted that the goods were purchased without proper vouchers. In this context, he has also relied upon para 2.20 of the impugned order where identical situation exists.

10. We have heard both sides and perused the material available on record. From the record, it appears that search was conducted on 06.05.1994 and since then the case has travelled widely for more than 23 years. In this scenario, the learned DR for the Department submitted that no further evidence can be produced as no record is available. Shri Vikash Kumar Singh, whose statement was recorded, has died. Their advocate, Shri H.V. Raghavn Iyer, who was possessing the documents, has also died. In the statement of Shri Vikash Kumar Singh he stated that he has made the entries in the registers as per the direction of the Director, Shri Umesh Chand Jain. No cross-examination of Shri Umesh Chand Jain was conducted in the instant case.

11. In the peculiar facts and circumstances of the case, not even a single bill portraying fictitious sale was located by the investigating team. The cheque numbers mentioned in the so called private registers are for sales effected against gate passes as mentioned in the first original order. So, in the first round of

litigation, the adjudicating authority has dropped the demand vide his order dated 29.12.1995.

12. In the instant case, the authenticity of the private registers could not be considered to be reliable piece of evidence as there was no other corroborative evidence to support the entries made in the so called private registers, especially when not even a single bill was located to prove the clandestine removal. No other incriminating material was found from the factory premises. No verification was made from the transporters or railway authorities pertaining to unaccounted sale or transportation of the unaccounted goods. It may be mentioned that clandestine removal is very serious charge which required corroborated evidence. In the instant case, the department has failed to collect such evidence.

13. During the course of arguments, it was repeatedly submitted that entries were made in the private registers to build up a rosy picture for getting the financial advances from the financial institutions which has nothing to do with the real production or sale.

14. The Hon'ble High Court at Nainital has remanded the matter to the Commissioner to enable him to collect further evidence, if any, to substantiate his version. The learned Commissioner has failed to provide the copies of the "relied upon documents" from Sl. No. 19 to 41 of the paper book. Hence, the assessee-Appellants was forced to file the Writ Petition before the Hon'ble High Court.

15. At the cost of repetition, it may be mentioned that in the first round of litigation the Tribunal has observed that, "we also find that the Revenue has filed the appeal only in case of company, M/s Rishabh Velveleen Pvt. Ltd. and not in the case of other parties who were noticees in the show cause notice and against whom the Commissioner has dropped the charges." Finally, the matter was remanded back.

16. In the peculiar facts and circumstances of the case, we are of the view that nothing will come out even on remand when no additional material/evidence is available with the Department and that too after a lapse of considerable period. Hence, in the interest of justice and to put the controversy at rest, by giving benefit of doubt, and, more particularly, when the allegations are not corroborated by supporting documents, we set aside the impugned order and allow the appeals.

17. In the result, the appeals filed by the assessee-Appellants are allowed.

(Pronounced in the open court on 21 .11.2017)

(V. PADMANABHAN)
MEMBER (TECHNICAL)

(JUSTICE Dr. SATISH CHANDRA)
PRESIDENT

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