CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH AT HYDERABAD
Division Bench
Court - I

Appeal No. E/674/2009
(Arising out of Order-in-Appeal Nos. 8 to 10/2009 (H-III)CE, dated 30.03.2009 passed by CCE&ST (Appeals-III), Hyderabad)

CCE,CC, Hyderabad-III ….. Appellant(s)

Vs.

Dr. Raj Laboratories Limited …..Respondent(s)

Appearance
Shri Arun Kumar, Dy. Commissioner/AR for the Appellant.

None for the Respondent.

Coram:

Hon'ble Mr. M.V. RAVINDRAN, MEMBER (JUDICIAL)
Hon'ble Mr. P.V. SUBBA RAO, MEMBER (TECHNICAL)

Date of Hearing: 22.05.2018
Date of Decision: 06.06.2018

FINAL ORDER No. A/30628/2018

[Order per: P. VENKATA SUBBA RAO]

1. This is the departmental appeal against the Order-in-Appeal passed by Commissioner (Appeals) setting aside the Order-in-Original.

2. The respondents in this case are manufacturers of P or P medicaments falling under chapter 30 of Central Excise Tariff. Anti Evasion Wing of the Commissionerate received information that respondents herein were manufacturing of P or P medicaments and removing them

clandestinely without payment of duty even after crossing the exemption limit as laid down in notification No. 8/2001-CE. They have searched the factory premises, the residential premises of the proprietor and godowns of some chemists and seized medicines and cash. They have also seized several records, the most important of which is a private diary maintained by the manufacturing chemist showing the production of the medicines. They have also recorded the statements of the manufacturing chemist and others. As far as goods that were seized are concerned, a show cause notice was issued by Commissioner of Central Excise, Hyderabad-III within six months from the date of seizure, proposing confiscation of goods and cash and demanding duty thereon. This show cause notice was subsequently decided confiscating the goods and releasing the seized cash.

3. A separate show cause notice was issued by the Additional Commissioner of Central Excise demanding duty under proviso to Section 11A along with interest and proposing penalties with respect to the goods which were supposedly clandestinely manufactured and cleared. This show cause notice was based on the private register maintained by the manufacturing chemist, his statement as well as the statements of others recorded during investigation. The show cause notice was originally dropped by the Additional Commissioner on grounds of limitation of time which, when appealed by the Department, was set aside by the Commissioner (Appeals). The Commissioner (Appeals) observed that

demand was not hit by limitation and remanded the matter back to the adjudicating authority to examine the merits of the case. After *de novo* adjudication, the Joint Commissioner confirmed the demand along with interest and imposed penalties as indicated in the show cause notice.

4. Aggrieved, the respondents herein appealed to Commissioner (Appeals) who set aside the Order-in-Original (*de novo)* passed by Joint Commissioner with consequential relief to the assessee. The department appealed against this Order-in-Appeal on the following grounds:

(a) The earlier Commissioner (Appeals) had held that the case is not hit by limitation of time and extended limitation period is sustained. In the present order, the Commissioner (Appeals) has agreed with the decision given by his predecessor on limitation. Having agreed on this, prima-facie, the Commissioner (Appeals) agrees that the case is sustained. Thereafter, the Commissioner (Appeals) set aside the Order-in-Original with the findings that the impugned order is weak and the department has not been able to come up with conclusion to the alleged clandestine production/clearances by the appellants. The stand taken by the Commissioner (Appeals) in the second instance is contradictory to the view taken in the first instance (agreeing that the case is not hit by limitation of time).

(b) As held in the case of Commissioner of Central Excise, Surat-I vs. Umiya Chem Industries [2005(185) E.L.T. 10 (Tri.-Mumbai)], the incriminating documents found from appellant's premises must be presumed to be true as per Section 36A of Central Excise Act, 1944.

(c) In any type of clandestine activity, the person tries not to leave any evidence and they cannot be expected to faithfully put the details of all such clearances and in some register and append their signatures; hence clandestine activity can never be established by circumstantial evidence and it will be humanly impossible to establish every link in the chain of clandestine activity without any break, as held in Gulabchand Silk Mills Pvt. Ltd. vs. CCE, Hyderabad-II [2005(184)E.L.T. 263 (Tri.-Bang.)].

(d) Once goods are cleared and payment is received for such goods, revenue is not required to establish from receipt of raw material onwards to clandestine clearances as held in the case of CCE, Chandigarh vs. Sudesh Enterprises [2006(195) E.L.T. 319 (Tri.-Del.)].

(e) When the assessee himself had admitted that the goods were sold to unknown people in the market, Revenue cannot be expected to approach the customers and to record their statement for the purpose of corroboration as held in CCE Ahmedabad vs. Tirupati Processors [2007(212)ELT 330 (Tri.-Ahmd.)].

(f) Private diary maintained by production manager of factory showing actual production as against very low level production indicated in the statutory records – when it is established beyond doubt that authenticity and ownership of the private diary never challenged, demand based on the same is a corroborated demand, as held in CCE Pune Vs. U.D. Suryavanshi [2007(220) ELT 805 (Tri.-Mumbai)].

5. In the instant case, the investigating officers have proof of clandestine production and clearance of excisable goods without payment of duty over and above the exemption limit of Rs. 1 crore. They have arrived at the production details conclusively based on the records seized and statements of production prepared by the Production Chemist from the seized records and confirmed by the husband of the proprietrix in his statement. The details of clearances value and duty amount involved were arrived at elaborately narrated in paras 8 & 11 of the show cause notice.

In view of the above, they prayed that the Order-in-Appeal may be set aside.

6. During personal hearing, none appeared for the respondent. Ld. DR reiterated the aforesaid arguments forcefully and prayed that the appeal may be allowed. The respondent, however, had sent their Memorandum of cross objections as follows:

(i) In the instant case, they submit with sufficient proof that the chemist register does not reflect production particulars and therefore the onus is on the department to establish that there was clandestine removal.

(ii) The allegation of clandestine removal has to be proved by tangible, direct, affirmative and positive evidence and not on mere surmises, as held by the Tribunal in the case of RA Castings vs. CCE, Meerut UI [2009(237)ELT 674)].

(iii) The adjudicating authority has explained that there is no evidence of clandestine clearance by recording "*the mere fact of non-maintenance of this record points the needle of suspicion towards* *them"* and points out " an inconsistency which has arisen due to non-maintenance/improper maintenance of records by them" and the fact that investigation has taken pains to get the details authenticated is brought out in the number of times, Mr. Phanisekhar, Mr. Nagi Reddy and other were called to compare, correlate, explain and confirm the details as narrated in the show cause notice.

7. We have perused the records of the case and heard Ld. DR. We agree with Ld. DR that there is a contradiction in the order of Commissioner (Appeals) in first stating that there is a case to invoke extended period of limitation and then stating that ther is no case on merits. Section 11A deals with recovery of duties not levied or not paid or short levied or short paid or erroneously refunded. Once the liability to recovery is decided on merits, the question of time limit (normal or extended) within which to recover can be examined. By stating that the extended period is invokable before deciding the merits of the demand, the Ld. Commissioner (Appeals) has put the cart before the horse. We now proceed to decide the case on merits.

8. In a nutshell, Central Excise Department has received information about clandestine removal by the respondent and have conducted searches, seized goods and documents and recorded statements of the

concerned persons. As far as the goods that were seized are concerned, a show cause notice was issued and adjudicated the current appeal pertains to the second show cause notice issued with respect to clandestine removal of goods arrived at based on the documents seized and statements recorded. The most important of which is the register maintained by the manufacturing chemist substantiated by the statements recorded by the department. During personal hearing before the adjudicating authority (in denovo proceedings), the Counsel for the assessee has cross examined three witnesses including the manufacturing chemist. All three have retracted their statements. The adjudicating authority remarked regarding this cross examination "the cross examination of the chemist and few buyers made during the personal hearing is totally superfluous exercise as they all seem to parrot tutored lines regarding giving statements under duress, without mentioning any details which they had manipulated from the actual to what the department wanted to say, stating that the adjudicating authority dismissed the cross examination as an after thought". Ld. Commissioner (Appeals) did not agree with this position of the adjudicating authority and remarked as follows:

> "6. Coming to the merits of the case, it is seen that the investigation has not adduced any tangible evidence regarding the alleged clandestine production/clearance. There is a heavy reliance on the statements of the Production Chemist and the buyers of the alleged clandestinely cleared goods, who have subsequently retracted the

statements during cross examination at the time of personal hearing. The lower authority has surprisingly brushed aside this aspect by observing that *"the cross examination of the chemist and the few buyers made during the personal hearing is a totally superfluous exercise as they all seem to parrot tutored lines regarding giving statements under duress".* I do not agree with this contention of the lower authority. At the time of cross examination, the individuals concerned should have been confronted with all the evidence available on record to elicit the correct facts which would have called their bluff, if it was really so. While the Appellants have taken the plea that the inconsistencies between production vis a vis clearances is due to the improper maintenance of records by them, the lower authority has held that "Further, as manufacturer of P or P medicaments (affecting public health) it is the legal and moral responsibility of DRL to maintain a proper account of production. The mere fact of non-maintenance of this record points the needle of suspicion towards them." She has further observed that "DRL have not come out with details of full production record". Thus, the lower authority has conveniently shifted the onus onto the Appellants to come out with details of production record failing which it is presumed that they had resorted to clandestine manufacture/clearance. The burden is on the investigation to come up with irrefutable evidence about such clandestine activities and not on the Appellants. No doubt, the Appellants are responsible for proper maintenance of records, but this lapse in itself is not sufficient to establish the clandestine clearances. The investigation has failed to conclusively prove the quantum of alleged clandestine production/clearances. While questioning the persons concerned, the department should arrive at conclusive proof/get the information contained in the private records authenticated with irrefutable evidence. The department has obviously failed on this score by merely relying on the private records maintained by Sri V. Phani Sekhar, Production Chemist. The Appellants have contended that the Chemist had entered certain figures for his reference and entered the production figures for each stage of production process for keeping track and hence the same set of figures are repeated at each stage. It is their contention that while arriving at the production figures, the investigating authorities had summed up all these figures and arrived at a grand figure, which is wrong. I also find merit in their contention that the demand is merely based on the first stage production records, without any basis to prove such batch actually materialized into production."

9. We have examined the relevance of the statements given for by the Central Excise Officers during the course of enquiry or any proceedings. Section 9D of Central Excise Act, 1944 reads as follows:

"**9D. Relevancy of statements under certain circumstances**

(1) A statement made and signed by a person before any Central Excise Officer of a gazetted rank during the course of any inquiry or proceeding under this Act shall be relevant, for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which is contains,-

(a) When the person who made the statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the court cosiders unreasonable; or

(b) When the person who made the statement is examined as a witness in the case before the court and the court is of the opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interests of justice.

(2) The provisions of sub-section (1) shall, so far as may be, apply in relation to any proceeding under this Act, other than a proceeding before a court, as they apply in relation to a proceeding before a court."

10. As can be seen above, the statements given before the Central Excise Officers of Gazetted Rank is relevant for the purpose of proving in any prosecution for offence under the Act (a) when the person is dead or cannot be found or (b) when the person who made the statement is examined as a witness in the case before the court and the court is of the

opinion that having regard to the circumstances of the case, the statement should be admitted in evidence in the interest of justice. The same rule applies to any proceedings other than before a Court including that of adjudications under the Central Excise Act.

11. We, therefore, find that the statements made before the Central Excise Officers are admissible only when the persons making them are examined as witnesses and the adjudicating authority is convinced that the statements should be admitted as evidence. In this case three of the persons who made the statements were examined and all three have retracted their statements. It does not appear from the records that other persons who made statements were examined by the adjudicating authority or cross examined. The only thing that is left to prove the cases other than the statements of the three persons is the diary maintained by the production chemist which he explained during adjudication that it does not reflect the actual production.

12. We are fully conscious that the department cannot prove with mathematical accuracy in the case of clandestine removal, the entire process of manufacture and sale. However, in this case, the main pieces of evidence of clandestine removal are the private register maintained by manufacturing chemist and the statements of the concerned persons. All those persons who were examined before the adjudicating authority have

retracted their statements and the manufacturing chemist denied his own diary reflected the actual production.

13. In view of the above, we find that the Commissioner (Appeals) was correct in setting aside the Order-in-Original with consequential relief to the assessee.

14. Appeal filed by the department is rejected.

(Pronounced in the open Court on 06.06.2018)

(P.VENKATA SUBBA RAO)
MEMBER (TECHNICAL)

(M.V. RAVINDRAN)
MEMBER (JUDICIAL)

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