CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH AT HYDERABAD

Division Bench

Court – I

Excise Appeal No. 640/2011

(Arising out of Order-in-Appeal No. 55/2010 (T) CE dt.27.07.2010 passed by CCCE & ST (Appeals), Guntur)

M/s Parle Bisleri Pvt Ltd
Western Express Highway, Andheri (East),
Mumbai – 400 099 **......Appellant**

VERSUS

Commissioner of Customs, Central Excise
& Service Tax, Tirupati **......Respondent**
9/86-A, Behind West Church Compound,
Amaravati Nagar, M.R. Palli, AP – 517 502

and

Excise Appeal No. 53/2011

(Arising out of Order-in-Appeal No. 56/2010 (T) CE dt.27.07.2010 passed by CCCE & ST (Appeals), Guntur)

M/s Jain Irrigation Systems Ltd
D.No. 18-1044, Upstairs, High Road,
Chittoor – 517 001 **......Appellant**

VERSUS

Commissioner of Customs, Central Excise
& Service Tax, Tirupati **......Respondent**
9/86-A, Behind West Church Compound,
Amaravati Nagar, M.R. Palli, AP – 517 502

Appearance

None for the Appellants.
Shri N. Bhanu Kiran, Authorized Representative for the Respondent.

Coram:

HON'BLE MRS. SULEKHA BEEVI C.S., MEMBER (JUDICIAL)
HON'BLE MR. P. ANJANI KUMAR, MEMBER (TECHNICAL)

FINAL ORDER No. A/31004-31005/2019

Date of Hearing: 23.10.2019
Date of Decision: 25.10.2019

[Order per: P. ANJANI KUMAR]

1. These two appeals i.e., E/640/2011 & E/53/2011 have been filed by M/s Parle Bisleri Pvt Ltd (PBPL), Mumbai and M/s Jain Irrigation Systems Ltd (JISL), Chittoor. As both the appeals are emanated from the same Order-in-Original, the same are taken up for consideration together.

2. The brief facts of the case are that M/s PBPL are engaged in the manufacture and clearance of fruit pulp falling under Chapter sub-heading 2001.10 of Central Excise Tariff Act, 1985. The appellants procured "Open Top Sanitary Cans" (OTS cans) falling under Chapter 73.10 without payment of duty by availing exemption under Notification No. 43/2001-CE (NT) dt.26.06.2001 as amended from time to time read with provisions of Central Excise (Removal of goods at concessional rate of duty for manufacture of excisable goods) Rules, 2001. On the basis of certain intelligence received, the premises of the appellants were searched and the department came to a conclusion that the appellants have diverted/misused/non-accounted for a quantity of 4,36,097 OTS cans during the period August 2001 to September 2005. A show cause notice seeking recovery of applicable duty of Rs.11,56,920/- was issued to the appellant, imposed penalty of Rs.25,000/- on Shri V.S. Purushotam Reddy, Accounts Officer and also ordered that the demands arising out of the order are recoverable from M/s JISL, Chittoor, in terms of the proviso to section 11 of the Central Excise Act, 1944, confirmed by the Order-in-Original No. 38/2009 dt.19.11.2009. On an appeal filed by the appellant, learned Commissioner (Appeals) vide Order No. 55/2010 (T) CE dt.27.07.2010 upheld the demand, however, restricting the same to Rs.7,15,732/- finding that as per records, 2,69,861 OTS cans were totally available and therefore, duty can be recovered only on balance 1,94,916 OTS cans. Accordingly, he confirmed duty of Rs.7,15,732/- and imposed equal penalty. In respect of the appeal filed by M/s JISL, learned Commissioner vide Order No. 56/2010 (T) CE dt.27.07.2010 has held that M/s JISL have to bear the burden of liability of M/s PBPL.

3. None for the appellants. However, the counsel submitted a letter requesting that the case be decided on available records. Shri N. Bhanu Kiran represented the department and supported the Order-in-Original.

4. Regarding the confirmation of duty, we find that the facts of the case are in favour of the revenue. We find that the investigation has clearly established that there was a non-accounted shortage/diversion of OTS cans and we find that the same has been accepted by Shri V.S. Purushotam Reddy, Accounts Officer of M/s

PBPL and others. Therefore, we have no doubt regarding the duty liability on the OTS cans to be payable by M/s PBPL. We find that learned Commissioner (Appeals) has given allowance to a number of cans available in the factory while computing the duty liability. We find that the appellants have taken a plea that all the cans have been used in the export goods directly or after receiving from job workers and there was wastage and home consumption of 73,836 OTS cans and the actual shortage comes to 42,515 OTS cans. Therefore, a total duty of Rs.4,54,3018/- is payable on 1,16,315 OTS cans only and the same has been duly discharged. However, we find that the appellants other than making such averment in the submissions before the Commissioner and in the grounds of appeal have not produced any records evidencing the same. In the absence of the same, their submissions do not hold water and therefore, we are not inclined to accept the same. Therefore, we find that the order of the learned Commissioner (Appeals), as far as the confirmation of duty liability is concerned, requires no interference. In the result, appeal E/640/2011 is rejected.

5. Coming to appeal E/65/2011 filed by M/s JISL, we find from the records of the case that the appellants have not been issued any show cause notice for confirmation of duty. The confirmation of the duty was basically against M/s PBPL and the appellants were informed that JISL are also liable to settle past dues as per section 11 of Central Excise Act, 1944. The appellants, however, in the grounds of appeal have submitted that M/s PBPL was an existing firm and was solvent; that the appellants cannot be asked to bear the burden of payment of duties. We find that in the Order-in-Original, the appellants submitted that they have purchased the unit from M/s PBPL on 09.02.2016; the issue raised in the show cause notice is from May 2001 to June 2005 which was prior to February 2006 and therefore, M/s PBPL are only responsible for the allegations made in the show cause notice.

6. We find that for a better appreciation of the position of law a reading of section 11 of Central Excise Act, 1944 is necessary, which reads as follows:

> *"Section 11. Recovery of sums due to Government. –*
>
> *In respect of duty and any other sums of any kind payable to the Central Government under any of the provisions of this Act or of the rules made thereunder including the amount required to be paid to the credit of the Central Government under Section 11D, the officer empowered by the Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963 (54 of 1963) to levy such duty or require the payment of such sums [may deduct or require any other Central Excise officer or a proper officer referred to in section 142 of the customs act, 1962 (52 of 1962) to deduct the amount so payable from any money owing to the person from whom such sums may be recoverable or due which may be in his hands or under his disposal or control or may be in the hands or under disposal or control of such other officer, or may recover the amount] by attachment and sale of excisable goods belonging to such person; and if the amount payable is not so recovered, he may prepare a certificate signed by him specifying the amount due*

from the person liable to pay the same and send it to the Collector of the district in which such person resides or conducts his business and the said Collector, on receipt of such certificate, shall proceed to recover from the said person the amount specified therein as if it were an arrear of land revenue.

Provided *that where the person (hereinafter referred to as predecessor) from whom the duty or any other sums of any kind, as specified in this section, is recoverable or due, transfers or otherwise disposes of his business or trade in whole or in part, or effects any change in the ownership thereof, in consequence of which he is succeeded in such business or trade by any other person, all excisable goods, materials, preparations, plants, machineries, vessels, utensils, implements and articles in the custody or possession of the person so succeeding may also be attached and sold by such officer empowered by the Central Board of Excise and Customs, after obtaining written approval from the Principal Commissioner of Central Excise or Commissioner of Central Excise, for the purposes of recovering such duty or other sums recoverable or due from such predecessor at the time of such transfer or otherwise disposal or change.*

(2) (i) The Central Excise Officer may, by a notice in writing, require any other person from whom money is due to such person, or may become due to such person, or who holds or may subsequently hold money for or on account of such person, to pay to the credit of the Central Government either forthwith upon the money becoming due or being held, or at or within the time specified in the notice, not being before the money becomes due or is held, so much of the money as is sufficient to pay the amount due from such person or the whole of the money when it is equal to or less than that amount;

(ii) every person to whom a notice is issued under this sub-section shall be bound to comply with such notice, and in particular, where any such notice is issued to a post office, banking company or an insurer, it shall not be necessary to produce any pass book, deposit receipt, policy or any other document for the purpose of any entry, endorsement or the like being made before payment is made, notwithstanding any rule, practice or requirement to the contrary;

(iii) in a case where the person to whom a notice under this sub-section has been issued, fails to make the payment in pursuance thereof to the Central Government, he shall be deemed to be a person from whom duty and any other sums of any kind payable to the Central Government under any of the provisions of this Act or the rules made thereunder have become due, in respect of the amount specified in the notice and all the consequences under this Act shall follow."

7. On a plain reading of the provision it is clear that section 11 pertains to recovery of sums due to the Government. That is to say, there should be a confirmed demand against the notice, on the date of invocation of the section, as on the day of notice. As on the date of transfer of unit from M/s PBPL to the appellants M/s JISL even the show cause notice was not issued. The show cause notice was issued on 31.10.2008 and was confirmed by Order-in-Appeal dt.27.07.2010 against M/s PBPL. Therefore, we are of the opinion that the issue of show cause notice to M/s JISL as on 31.10.2008 was premature as there was no confirmed demands as on that date. Even the show cause notice was not in existence. Therefore, we find that the invocation of section 11 in show cause notice even before the demands are confirmed is not as per law. We find that learned Commissioner has found that the three conditions contemplated under section 11 of the Central Excise Act, 1944 are viz.,

a) the person from whom duty is recoverable/due, transfers or otherwise disposes or effects any change in ownership;
b) of business or trade, either in whole or in part;
c) in consequence of which he is succeeded in such business or trade

He relied upon the decision of the Hon'ble High Court of Bombay in the case of Krishna Lifestyle Technologies Limited Vs UOI [2008 (229) ELT 173 (BOM)].

8. However, as we noted above, the very operation of section 11 starts after the duties are confirmed by a competent authority or an appellate authority on the culmination of the proceedings. The case referred to by learned Commissioner (Appeals) also discusses a situation where confirmed arrears were existing before the purchase of the unit by the new incumbent. Therefore, invocation of section 11 at the stage of show cause notice is immature. A notice issued immaturely does not merit confirmation. Therefore, we find that there is force in the contention of the appellants and we find that the Order-in-Appeal is not sustainable, to the extent. Thought the department would be free to invoke all the legal provisions to recover Government dues, we hold that the Order, as per discussion above, is not sustainable.

9. In the result, appeal E/53/2011 is allowed for the limited purposes as discussed above and appeal E/640/2011 is rejected.

(Pronounced in open court on 25.10.2019)

(SULEKHA BEEVI C.S)
MEMBER (JUDICIAL)

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)

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