CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI
REGIONAL BENCH

Excise Appeal No. 1053 of 2012

(Arising out of Order-in-Original No. 57/M-I/2011-12 dated 29.03.2012 passed by the Commissioner of Central Excise, Mumbai-I)

Dattatray Madhusudan Bichu **Appellant**
Director, Pyro Electric & Allied Instruments Pvt. Ltd.,
Flat No. 1A, Hill Crown Apartments,
College Road, Mapuca, Goa 403 507.

Vs.

Commissioner of Central Excise, Mumbai-I **Respondent**
115, New Central Excise Building,
Maharshi Karve Road, Churchgate, Mumbai 400 020.

WITH

Excise Appeal No. 1054 of 2012

(Arising out of Order-in-Original No. 57/M-I/2011-12 dated 29.03.2012 passed by the Commissioner of Central Excise, Mumbai-I)

Ramnath Madhusudan Bichu **Appellant**
Director, Pyro Electric & Allied Instruments Pvt. Ltd.,
Flat No. 1A, Hill Crown Apartments,
College Road, Mapuca, Goa 403 507.

Vs.

Commissioner of Central Excise, Mumbai-I **Respondent**
115, New Central Excise Building,
Maharshi Karve Road, Churchgate, Mumbai 400 020.

WITH

Excise Appeal No. 1055 of 2012

(Arising out of Order-in-Original No. 57/M-I/2011-12 dated 29.03.2012 passed by the Commissioner of Central Excise, Mumbai-I)

Madhusudan Dattatray Bichu **Appellant**
Managing Director, Pyro Electric & Allied Instruments Pvt. Ltd.,
Flat No. 1A, Hill Crown Apartments,
College Road, Mapuca, Goa 403 507.

Vs.

Commissioner of Central Excise, Mumbai-I **Respondent**
115, New Central Excise Building,
Maharshi Karve Road, Churchgate, Mumbai 400 020.

AND

Excise Appeal No. 1056 of 2012

(Arising out of Order-in-Original No. 57/M-I/2011-12 dated 29.03.2012 passed by the Commissioner of Central Excise, Mumbai-I)

Shyam Sadanand Bichu **Appellant**
General Manager, Pyro Electric & Allied Instruments Pvt. Ltd.,
B-103, Dhawalgiri, Sher-E Punjab Society,
Off Mahakali Caves Road, Andheri (E), Mumbai 400 098.

Vs.

Commissioner of Central Excise, Mumbai-I **Respondent**
115, New Central Excise Building,
Maharshi Karve Road, Churchgate, Mumbai 400 020.

Appearance:

Shri Ganesh K.S. Iyer, Advocate, for the Appellant
Shri Sanjay Hasija, Superintendent, Authorised Representative for the Respondent

CORAM:

HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)
HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

FINAL ORDER NO. A/85133-85136/2022

Date of Hearing: 16.02.2022
Date of Decision: 16.02.2022

PER: SANJIV SRIVASTAVA

These four appeals are directed against the order in original No 57/M-I/2011-12 dated 29.03.2012 of the Commissioner of Central Excise, Mumbai-I. By the impugned order, the Commissioner has held as follows:

"ORDER

31. In view of above discussion and findings, I pass the order as under:

(a) I Confirm the duty demand of Rs 51,35,195/- under the provisions of Section 11A of the Central Excise Act, 1944.

(b) I order for recovery of interest at the appropriate rate on the amount of duty confirm as above, in terms of the provisions of Section 11AB of the Central Excise Act, 1944 from M/s. M/s. Pyro Electric And Allied Instruments Pvt. Ltd., Mahim (West), Mumbai-400 016.

(c) I impose a penalty of 51,35,195/- on M/s. Pyro Electric And Allied Instruments Pvt. Ltd., Mahim (West), Mumbai-400 016 under Section 11AC of the Central

Excise Act, 1944, read with Rule 25 of the Central Excise Rules, 2002.

(d) *I impose penalty of 10,00,000/- each on Shri Madhusudan Dattatray Bichu, Managing Director, Shri Ramnath Madhusudan Bichu, Director and Shri Dattatray Madhusudan Bichu, Director all of M/s. Pyro Electric and Allied Instruments Pvt. Ltd., Mumbai and Shri Shyam Sadanand Bichu, General Manager of M/s. Pyro Electric Instruments Goa Pvt. Ltd. under Rule 26 of the Central Excise Rules, 2002.*

2.1 An investigation was undertaken against the Company, and after completion of investigations, following allegations were made against the Company and its Directors:-

"6.1 From the above the investigating officer came to the conclusion that M/s. Pyro Mumbai are not vided for benefit of SSI exemption in view of the Notification No.08/2003 dated 01.03.2003 or as mended, as it envisages fulfillment of specific criterion so as to enable a unit to avail of the same. The same are spelt out in Para 3(b) and 3A(b) which are reproduced as under:

"........clearances bearing the brand name or trade name of another person, which are ineligible for the grant of this exemption in terms of paragraph 4........."

The paragraph 4 spelt out: -

"......... The exemption contained in this notification shall not apply to specified goods bearing a brand name or trade name, whether registered or not, of another person......."

Similarly paragraph 5(A) of the notification defines brand name or trade name as per below:

"......... brand name" or "trade name" means a brand name or trade name, whether registered or not, that is to say, a name or a mark, such as symbol, monogram, label, signature or invented word or writing which is used in relation to such specified goods for the purpose of indicating, or so as to indicate a connection in the course of trade between such specified goods and some person using such name or mark with or without any indication of the identity of that person........."

From the above it was concluded that M/s.Pyro Mumbai are not entitled for SSI exemption and they were supposed to discharge *duty liability since start of their manufacturing activity. There is clear suppression and demand of duty stands for extended period of five years.*

6.2 As per the records, M/s. Pyro Mumbai and M/s. Pyro Goa, both are private limited company, thus legally implying that both are separate legal identity. Both the companies are having same set of directors viz. Shri M.D. Bichu as Managing Director and S/Shri D.M. Bichu and R.M. Bichu as Directors. The products manufactured by both the units are same except the technicality involved in the manufacture. M/s. Pyro Mumbai were catering to meet the requirement of lower end of market, where as M/s. Pyro Goa were catering to the higher end of market. M/s. Pyro Mumbai prior to starting manufacturing in April 2004 was a marketing office. From the forgoing, in order to increase sales and supply of the product at lower cost i.e. without central excise duty, they purposely started manufacturing at M/s. Pyro Mumbai. That is the reason they never filed any declaration with Central Excise department.

6.3 As stated in the foregoing paras it was concluded that, M/s.Pyro Mumbai were not eligible to avail the benefit of Notification No.08/2003 dated 01.03.2003 as amended and accordingly the demand for central excise duty evaded has been worked out for M/s. Pyro Mumbai from November 2005 onwards.

7. In view of the foregoing, the investigating agency found that M/s. Pyro Mumbai through their above acts of omission and commission have deliberately willfully and with an intent to evade payment of central excise duty contravened the provisions of section 4 & 6 of the Central Excise Act, read with rules 4,6,8,9,10,11,12 of the Central Excise Rules, 2002, in as much as it has manufactured and cleared the excisable goods clandestinely to their customers without :

> *7.1 Obtaining the Central Excise Registration for manufacture and clearing of excisable goods, as was required under the Section 6 of the Central Excise Act, 1944, read with rule 9 of the Central Excise Rules, 2002.*
>
> *7.2 Determining the correct value of goods manufactured and cleared, as was required under section 4(b) of the Central Excise Act, 1944.*

7.3 Determining the correct central excise duty liability on the goods, as was required under rule 6 of Central Excise Rules, 2002.

7.4 Payment of appropriate central excise duty by debit entry in the statutory account on the goods prior to its removal under rule 8 and rule 4 of the Central Excise Rules, 2002.

7.5 Preparing an invoice at the time of clearance of excisable goods as prescribed under rule 11 of Central Excise Rules 2002.

7.6 Maintaining the daily stock account in the prescribed format in terms of rule 10 of Central Excise Rules, 2002.

7.7 Filling the information in the periodical returns, as required under rule 12 of the Central Excise Rules, 2002.

7.8 Furnishing of the list of all accounts maintained and returns prepared.

8. M/s. Pyro Mumbai thus appears to have failed to account for the excisable goods manufactured by them and have cleared the same without payment of central excise duty and without filing any declaration with the Central Excise department or without declaring the same to the Central Excise authorities, thereby suppressing this information from Central Excise authorities. Incrementally from the foregoing facts enumerated above it is evident and appears that it has contravened the provisions of the Central Excise Act, 1944 and suppressed the facts about the illicit removal of finished goods from its premises with an intent to evade the applicable central excise duty and thus in the instant case the proviso to section 11A of the Central Excise Act, 1944 for the extended period of limitation is clearly invokable.

8.1 It appears that Ms. Pyro Goa has aided and abetted M/s. Pyro Mumbai by deploying Shri Shyam S. Bichu, General Manager to look after it's day to day production work under overall supervision of Shri M.D. Bichu, Managing Director. Purchase orders were also procured on behalf of M/s. Pyro Mumbai.

9. It appears that Ms. Pyro Mumbai and M/s .Pyro Goa have thus, rendered themselves liable for penal action under section 11AC of the Central Excise Act, 1944 read with rule 25 of the Central Excise Rules, 2002.

10. It further appears that Noticee No 3 Shri M D Bichu, Managing Director of M/s. Pyro Mumbai, is the person who was in charge of the overall functioning of the said companies, including responsibility for discharging the central excise duty liabilities by M/s. Pyro Mumbai. In view of the facts that all the goods manufactured at M/s Pyro Mumbai were liable to Central Excise duty, Shri M.D. Bichu was bound to declare all goods manufactured by them and clear the same on valid invoices by discharging the applicable duties. Since Shri M.D. Bichu has failed to comply with such statutory obligations, he has, thus, rendered himself liable for penal action under rule 26 of the Central Excise 2002 as amended.

11. It further appears that the notices no.4, 5 and 6 being General Manager and Directors actively of M/s. Pyro Mumbai have acted in aiding and abetting the alleged manufacturing and removal of excisable goods without payment of central excise duty by noticee no.1. Thus, it appears that notice no.4, 5 and 6 have concerned themselves with the removal, storage, concealment, transportation of the said goods and/or otherwise have dealt with the same, which they knew or had reason to believe that the same are liable for confiscation, under the provisions of the Central Excise Act, 1944 and the Rules made thereunder and hence, they appear to be liable to penal action under the provisions of rule 26 of the Central Excise Rules, 2002."

2.2 On the basis of above allegations a show cause notice dated 07.12.2010 was issued to the Company and the Appellants asking them to show cause as to why:

"i. Central Excise duty to the tune of Rs.49,96,146/-, Education Cess amounting to Rs.99,923/-, higher education cess amounting to Rs.39,126/- and totally amounting to Rs.51,35,195/- in respect of excisable goods falling under the Chapter No. CHSH 90251990 of CETA, 1985, and as detailed in Annexure-I of this show cause notice, should not be demanded, from them under the provisions of section 11A invoking the first proviso of sub-section (1) of section 11A of the Central Excise Act, 1944;

ii. Interest under section 11AB of the Central Excise Act, 1944, should not be recovered from them on the above *mentioned amount of central excise duty at the appropriate rates applicable during the relevant period;*

iii. Penalty should not be imposed on them under section 11AC of the Central Excise Act, 1944, read with rule 25 of the Central Excise Rules, 2002 as amended.

iv. Further, noticee Nos. 3 to 6 are also individually called upon to show-cause to the said Commissioner, within 30 days of the date of receipt of this notice, as to why penalty should not be imposed, under rule 26 of the Central Excise Rules, 2002, for the active malafide and premeditated roles in causing the aforesaid loss of central excise duty by M/s. Pyro Mumbai."

2.2 The show cause notice was adjudicated as per the impugned order referred in para 1, above. Aggrieved by the impugned order appellants have filed these appeals.

3.1 Heard Shri Ganesh K S Iyer, Advocate for the Appellants and Shri Sanjay Hasija, Superintendent, Authorized Representative for the revenue.

4.1 We have considered the impugned order along with the submissions made in appeal and during the course of arguments.

4.2 The appeal filed by the appellant M/s. Pyro Electric and Allied Instruments Pvt Ltd., Mahim (West), Mumbai 4001016 (Company), has been dismissed by us as deemed withdrawn as the matter in respect of that appellant has been settled under the SVLDRS-2019 and Form IV has been issued to them.

4.3 The appellants in the four appeals before us are the Director's of the Company whose case as observed at 1.2 been settled under SVLDRS-2019 and on whom penalties have been imposed in terms of Rule 26 of the Central Excise Rules, 2002. Ideally these Directors could have made the declaration under the SVLDRS-2019 and could have got the matter settled in their individual cases, in terms of reply to Question No 40 of FAQ's issued by CBIC on the scheme, which is reproduced below:

Q40. If the main noticee avails benefit of the Scheme whether Directors whose appeals are pending in respect of penalty only get a waiver of the penalty?

Ans. Once the main noticee discharges the duty/tax demand, the co-noticees can avail the benefits under the Scheme.

1.4 At Question No 42 of FAQ's following has also been stated:

Q42. If I file a declaration under the Scheme, will it be assumed that I have admitted to the position and agree with the allegations made in the show cause notice?

Ans. No. A declaration under the Scheme will not be a basis for assuming that the declarant has admitted the position and no fresh show cause notice will be issued merely on that basis.

4.4 Thus the declaration made by the Company for settlement of its case under the SVLDRS-2019 cannot be termed as admission of the case of revenue by the appellants.

4.5 Commissioner has while imposing the penalties on the appellants has observed as follows:

"17 to 29 concern the case of demand of duty and penalties against the Company, so omitted.

30. Shri Madhusudan Dattatray Bichu, Managing Director of M/s. PYRO (Mumbai) was in charge of the Bichu, is liable to penal action under rule 26 of the Central Excise Rules, 2002. As regards, Shri Shyam Sadanand Bichu, General Manager, Shri Ramnath Madhusudan Bichu, Director and Shri Dattatray Madhusudan Bichu, General Manager of M/s. PYRO (Mumbai) have acted in aiding and abetting to M/s. PYRO (Mumbai) in the alleged manufacture and removal of excisable goods without payment of Central Excise duty and thereby concern themselves in transporting, removing, selling excisable goods which they knew were liable to confiscation as the same were removed in contravention of the provisions of Central Excise Act, 1944 and the rules made there under. Therefore, I hold that Shri Shyam Sadanand Bichu, Shri Ramnath Madhusudan Bichu, and Shri Dattatray Madhusudan Bichu, are also liable to penal action under rule 26 of the Central Excise Rules, 2002."

4.6 We have reproduced the findings of the Commissioner in the impugned order. In the said order, only Para 30 can be said to be the findings recorded by the Commissioner, against the appellants who are present before us. The findings recorded are very general in nature without assigning any role to the appellants herein specifically. Also the issue was in relation to the ownership of the brand name which in any case belonged to the sister concern of Company at Goa, and is purely an interpretational issue without any mens rea. Even impugned order does not records any finding to that effect. As the issue of Company has been settled in terms of SVLDRS-2019, we refrain for making any observations in respect of the case of the Company.

4.7 In the case of Ramesh Deshpande [Final Order No A/86667-86668/2021 dated 27.07.2021] where we were concerned with similar facts we have observed as follows:

"3.2 The reasons for imposing penalty under rule 26 of Central Excise Rules, 2002, have been recorded by the Commissioner in para 61 of his order, as follows:

"61. As regards, the proposed imposition of penalty on Noticee No. 3 (Shri D. Chatterjee) & 4 (Shri Ramesh Deshpande) under Rule 26 of Central Excise Rules, 2002, I observe that both the Noticees are engaged in day-to-day activity / affairs of the company and were well aware of prescribed procedure and Rules in relation to Registration. Thus the act of applying for Central Excise Registration for DTY Section by Misstating the facts indicate disregard to the legal provisions. The act of omission & commission committed by the Noticee No 3 & 4 revealed that they have not ensured adherence to the Law & procedure of Central excise but intentionally concerned themselves with the mis-declaration & were also instrumental in removal of impugned excisable goods without payment of appropriate duty & therefore cannot escape from penal action & thereby rendered themselves liable for penal liability under the provisions of Rule 26 of Central Excise Rules, 2002."

3.3 Rule 26 of the Central Excise Rules, 2002 reads as follows:

" *(1) Any person who acquires possession of, or is in any way concerned in transporting, removing, depositing, keeping, concealing, selling or purchasing, or in any other manner deals with, any excisable goods which he knows or has reason to believe are liable to confiscation under the Act or these rules, shall be liable to a penalty not exceeding the duty on such goods or two thousand rupees, whichever is higher."*

3.4 From the perusal of the para 61 of impugned order, it is evident that penalty has been imposed upon the appellant for the reason that they were the employees of the Company and *were responsible for handling the day to day activities/ affairs. Commissioner has not established the element of "mensrea", which is an essential ingredient for imposition of penalty under Rule 26 of the Central Excise Rules, 2002.*

3.5 Hon'ble Karnataka High Court has in case of Vijaya Steels Pvt Ltd [2012 (282) ELT 215 (Kar)] has after taking note of Rule 26, held as follows:

***"9.** For application of the Rule, the condition precedent is any excisable goods which he knows or reason to believe are liable to confiscation under the Act or the Rules, then penalty is leviable under the aforesaid provision.*

***10.** In the instant case, admittedly no excisable goods are confiscated. The offence alleged against these respondents is, they were not diligent in seeing that the cheques issued towards payment of the excise duty were whether encashed or not. Therefore, the said offence does not fall under Rule 26 of the Excise Rules."*

3.6 Hon'ble Punjab and Haryana High Court has in case of Vee Gee Faucet Pvt Ltd [2015 (329) ELT 76 (P&H)] held as follows:

***"27.** In respect of penalties imposable under Rule 26, again the penalty is payable if a person acquires possession of, or in any manner deals with any excisable goods 'which he knows or has reason to believe' are liable to confiscation under the Act. Such provision again makes the mens rea a necessary ingredient for imposition of penalty, as held by the Supreme Court in Pepsi Foods Ltd. case (supra).*

***28.** In view of the above, we find that the Revenue has not been able to prove the intention to evade the payment of duty or the fact that the assessee knew or has reason to belief that the goods used are liable to be confiscated under the Act. The Tribunal is right in setting aside the order of imposition of penalty."*

3.7 Since the impugned order fails to establish the ingredient of "mensrea" on the part of the Appellants who were otherwise performing their duties as employee of the company, in view of the above orders of Hon'ble High Court, we are not in position to *uphold the penalties imposed on the appellants in these two appeals.*

3.8 Hon'ble Punjab and Haryana High Court has in case of Vikas Garg [2014 (306) ELT 94 (P & H)] held as follows:

***"5.** Learned counsel for the appellant vehemently argued that the conclusion of proceedings under Section 11A(2) of the Act does not absolve the partners from the penalty proceedings initiated separately under Rule 26 of the Rules.*

***6.** We do not find any merit in the said argument. Once the proceedings against the firm stand concluded, penalty proceedings against partners of the firm cannot continue as Rule 26 of the Rules is not an independent provision but has to be read with Section 11A of the Act. The firm has satisfied the due of the Revenue, therefore, the imposition of penalty under Rule 26 of the Rules are not justified."*

3.9 In view of the above referred decision, once the issue of the main company against whom the demand for duty was made under Section 11A of Central Excise Act, 1944, has been settled under SVLDRS, case for imposition of penalty under Rule 26 on the employees will fail. This exactly is prescribed by the scheme also only requirement is that person on whom penalty is imposed makes application under the scheme."

4.8 Thus we do not find any merits in the impugned order imposing penalties on the appellants who were performing their duties within the company.

5.1 Appeals are allowed.

(Order pronounced in the open court)

(Sanjiv Srivastava)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

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