CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI
WEST ZONAL BENCH

Excise Appeal No. 86447 of 2013

(Arising out of Order-in-Appeal No. 156 to 158 dated 11.11.2012 passed by the Commissioner (Appeals-IV), Central Excise & Service Tax, Mumbai I

Shri Rakesh Jagdish Mehta .....**Appellant**
Vinit Bunglow 7,
Dewan & Shah Housing Enclave, Dewaman,
Ambadi Road, Vasai (W), Dist. Thane

VERSUS

Commissioner of Central Excise, Thane II .....**Respondent**
3rd Floor, Navprabhat Chambers,
Ranade Road, Dadar (W), Mumbai

APPEARANCE:

Shri Neerav Mainkar, Advocate for the appellant
Shri P.K. Acharya, Superintendent (AR) for the respondent

CORAM:
HON'BLE MR. AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER No: 85497/2024

DATE OF HEARING : 14.12.2023
DATE OF DECISION : 17.05.2024

PER: AJAY SHARMA

Order-in-Appeal dated 11.11.2012 passed by the Commissioner, Central Excise & Service Tax (Appeals-IV), Mumbai has been impugned in the instant appeal, by which the learned Commissioner rejected the appeal filed by the appellant and upheld the order of attachment of immoveable property owned by the appellant and his brothers jointly.

2. The issue involved herein is whether the Department can attach a jointly owned immovable property, under Customs (Attachment of Property of Defaulters of Recovery of Government Dues) Rules, 1995 for recovery of its dues, of which 80% share stands in the name of persons who have nothing to do with the government recovery? The facts leading to the filing of the instant appeal are stated in brief as follows. M/s. Turbo Micro Systems was a partnership firm having four partners and the appellant herein is also one of them. The said partnership firm was dealing in resale of computer and its parts. The shares of the partners were as under:-

(i) Shri Prashant M. Golwala -	-33%
(ii) Shri Anand Sorte	-33%
(iii) Rakesh Jagdish Mehta	-25% [*Appellant herein]*
(iv) Jagdish M. Mehta	-9% *[Appellant's father]*

3. Jagdish M. Mehta and Rakesh Jagdish Mehta (appellant herein) are father & son. Since the department found certain discrepancies/illegality in the invoices/bills etc. of M/s. Turbo Micro Systems, therefore a show cause notice dated 4.3.1994 was issued to the firm as well as its partners for recovery of Central Excise duty amount of Rs.5,67,673/- and the same was culminated in the adjudicating order dated 24.2.1998 confirming the duty demand of Rs.5,67,673/- alongwith interest and equal penalty on the partnership firm and also imposing personal penalty of Rs.1,50,000/- on each of the partners of the firm

including the appellant and his father. Although the appellant and his father had filed the appeal against the adjudication order but since that was filed beyond the prescribed period of limitation therefore dismissed being not maintainable. Further Appeal before this Tribunal as well as before the Hon'ble High Court also received the same fate of dismissal. As a result the duty demand alongwith interest and penalty on firm as well as on individual partners attained finality.

4. On 9.11.2009 order for attachment of the property viz. *M/s. Mehta Automobiles, 5,6&7, Royal Shopping Centre, Ambadi Road, Vasai (West), Distt. Thane* [Emphasis supplied], for recovery of confirmed demand of total amount of Rs.14,35,346/- was issued to the appellant under Rules 9 & 10 of the Customs (Attachment of Property of defaulters of Recovery of Government Dues) Rules, 1995 (hereinafter referred to as '*Rules of 1995*') and it has been mentioned in *Appendix-VIIC* of the said order that the appellant herein being partner of M/s. Turbo Micro System has not paid the arrears amounting to Rs.14,35,346/- (Rupees fourteen lakhs thirty five thousand three hundred and forty six only) in respect of certificate No.01/2005 dated 25.2.2005 and the interest payable u/s. 11AA of Central Excise Act, 1944 for the period commencing immediately after the said date. The said appendix to the notice acknowledged that the appellant is only one of the joint owners of the attached property.

5. Feeling aggrieved, the appellant filed appeal against the aforesaid order of attachment, before the learned Commissioner (Appeals-IV) stating therein that the appellant is not the sole owner of the attached property; that the same has been bought jointly by the appellant alongwith his two brothers and that the appellant's share in the said property is only 20%. Two brothers of the appellant's, having share of 40% each, have also filed the appeal before the learned commissioner stating inter alia that the attached property is neither the property of M/s. Turbo Micro System nor the personal property of the appellant herein, therefore, the same has wrongly been attached by the department for recovery. But the learned Commissioner rejected both the appeals by upholding the order of attachment.

6. Learned counsel for the appellant submits that in order to buy peace the appellant had paid the total amount of Rs.6,86,018/- voluntarily towards liabilities of the appellant and also of his father Shri Jagdish M. Mehta during the pendency of Appeal before this Tribunal, the break-up of which is as follows:-

i) ₹2,83,837/- through challan dated 26.12.2012

ii) ₹1,58,082/- through challan dated 21.01.2015

iii) ₹2,44,099/- through challan dated 23.04.2015

According to learned counsel the duty amount confirmed on M/s. Turbo Micro System is Rs.5,67,673/- and the appellant being the partner of 25% , his share comes out to be Rs.1,41,198/- and similarly out of the equal penalty imposed on the firm, the share of the appellant could be Rs.1,41,198/- and adding 1,50,000/- personal penalty in the said amount, the *total liability of the appellant comes to Rs.4,33,836/-*[emphasis supplied]. So far as the father of the Appellant is concerned who was partner of 9%, his duty liability comes to Rs.51,091/- and equal penalty share Rs.51,091/- and adding personal penalty of Rs.1,50,000/- *the total liability of appellant's father Mr. Jagdish M. Mehta comes to Rs.2,52,181/-*[emphasis supplied]. Adding both the aforesaid amounts together, the total liability of the father & son duo comes out to Rs. 6,86,018/- which has already been paid. According to learned counsel, the other two partners of M/s. Turbo Micro System who are 66% shareholders have not paid any amount although their share of duty and penalty on the firm comes to Rs.7,49,328/- nor any personal penalty was paid by them and despite having shared their detailed addresses with the department, no action or recovery has been initiated against them. He further submits that in the attached property the appellant has only 20% share and the remaining 80% belong to his brothers, who have nothing to do with M/s. Turbo Micro System or with the recovery. Per contra learned Authorised Representative appearing on behalf of Revenue supported the findings recorded in the impugned order and prayed for dismissal of appeal.

7. I have heard learned counsel for the appellant and learned Authorised Representative on behalf of Revenue and perused the case record including the written submissions/case

laws placed on record. Another fact that needs to be brought on record at this juncture is that not only their share of duty, penalty and personal penalty, even remaining amount of duty and penalty of the firm of Rs.7,49,328/- was also paid by them vide challan dated 05.02.2024 after conclusion of hearing herein, for which liberty was granted to them at the time of reserving the order on 14.12.2023. This fact was brought to my notice through the 'Final submissions' filed by the learned Counsel on 13.02.2024. The relevant extract of the written submission filed by the appellant after reserving of order is as under:-

> "*xxx xxx xxx*
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> *5. The appellant wishes to state and submit that the said litigation is now over 3 decades old and does not wish to pursue the same anymore as the erstwhile Partners are unlikely to be pursued by the Department despite his request and his joint property is being arbitrarily held under attachment. As such, the Appellant has paid off the balance 66% amount of duty and penalty Rs.7,49,328/- as above and hence the entire liability of duty and penalty on the Firm M/s TMS as well as his own personal penalty as well as that of his late Father is now paid off and settled. Copy of Challan CTIN No. 2402615234 dated 05-02-2024 for Rs. 7,49,340/- (Balance duty + Penalty) is hereto annexed and marked as (**Exhibit B**)."*

It is not disputed anywhere that the brothers of the appellants, who are the majority shareholders of the immoveable property in issue, have nothing to do with the government recovery as they were not concerned with M/s. Turbo Micro System or its affairs nor there was any charge against either of brothers of the appellant but the Learned Commissioner rejected the submissions of the appellant by holding that government recoveries of the statutory dues are first charge on defaulter's properties.

8. The order of attachment of immovable property has been done under the Rules of 1995, which were made in exercise of the powers conferred by Section 156 r/w. Section 142 of the Customs Act, 1962. Rule 2(vi) of the said Rules of 1995 defined *'defaulter'* as any person from whom Government dues are recoverable under the Act. Chapter II of the said Rules deals with the procedure for the attachment of property. The issuance of certificate under rule 3 of chapter II is for the dues not paid by the *defaulter* to the government and the amounts specified as the amounts due from '*such person'. Such person* can only be the 'defaulter' as defined u/r. 2(vi) and no one else. Rule 10 is very relevant for the situation herein as it stipulates that "*where the property to be attached consists of the share or interest of the defaulter in property belonging to him and another as co-owners, the attachment shall be made by a notice to the defaulter prohibiting him from transferring the share or interest or charging it in any way"*. The language of Rule 10 is very crisp & clear but despite that learned commissioner while rejecting the submission of the appellant and also of two other partners in the joint property recorded the finding as under:-

> "*8. The submission that the attachment order ought to have specifically mentioned attachment only to the extent of defaulter's interest in the attached properties also need not detain me any further because such non-mention do not give the attaching officer any discretion to seize such interests which do not belong to the defaulting partners. Such a specific mention, however, would deprive the attaching officer to put such properties to auction to recover the dues from the defaulter. Upon such auction the recovery would limit only to the defaulter's interest and the balance amounts would go to the uninterested owners in the attached property…...*"

Aforesaid finding by the learned Commissioner is not in tune with rule 10 *ibid* which specifically stipulates that the attachment should be confined to the share of the defaulter. The question about the auction of attached property would not arise when in a way, it amounts to attaching the entire immovable property, which itself is violative of Rules of 1995.

9. Now I have to see, whether the duty amount with interest and penalty which has become due and payable pursuant to the Order-in-Original dated 24.2.1998 by the defaulting firm, could be recovered by attaching the entire property in which the appellants' personal share is on 20%. The answer to this question should be in the negative. I am conscious that a partnership firm under the Indian Partnership Act, 1932 is not a separate legal entity and the liability of the partners is joint and several u/s 25 *ibid.* It has already been discussed earlier that "defaulter" as defined u/r. 2(vi) of the Rules of 1995 means any

person from whom Government dues are recoverable under the Act, therefore, recovery under the Rules can be made only against the defaulter that too by following the procedure under the Rules. Here the share of the appellant in the attached personal property is merely 20% whereas 80% of the share therein is that of his brothers who have nothing to do with the defaulting firm or their activities. In the absence of any specific provision under the Rules for recovery of the dues by attaching the personal property of some other partnership in which the majority of the shareholders have nothing to do with the recovery of the government dues, the notice of attachment of said property is bad in law.

10. As discussed earlier the entire duty amount alongwith equal penalty has been paid by the appellant herein alongwith personal penalty on him as well as on his father. Now the issue is about the interest imposed on the duty amount, by the adjudicating authority in Order-in-Original dated 24.02.1998 which has attained finality. The interest has been imposed under section 11AB of Central Excise Act, 1944. Here it is interesting to note that duty demand has been made and confirmed for the goods cleared during the year 1993 and the show-cause notice was issued on 04.03.1994. Admittedly during the period Section 11AB ibid was not brought into force by the legislature as the same has been introduced w.e.f. 28.09.1996. That’s why there is no whisper about charging of interest u/s 11AB ibid in the show-cause notice. Not only that, sub-section

(2) of interest under Section 11AB stipulates that the provisions of sub-section (1), which provides for charging of interest on excise duty, shall not apply to cases where the duty became payable before the date on which the Finance (no.2) Bill, 1996 receives the assent of the President.

11. Although the Order-in-original dated 24.02.1998 has attained finality as mentioned in earlier paragraphs but in view of the peculiar facts of this case, being such an old case and the appellant is the only partner of the defaulting firm who has cleared all the government dues payable as per the adjudication order and more particularly Section 11AB was neither in the statute nor referred to in the show-cause notice, it is a fit case to invoke inherent power available with the Tribunal to do justice in view of Rule 41 of Customs, Excise & Service Tax Appellate Tribunal (Procedure) Rules, 1982 which provides as under:-

> *"**Rule 41. Orders and directions in certain cases** – The Tribunal may make such orders or give such directions as may be necessary or expedient to give effect or in relation to its orders or to prevent abuse of its process or to secure the ends of justice.'*

Therefore while exercising power u/r 41 ibid, the demand of interest confirmed against M/s. Turbo Micro System u/s 11AB is set aside.

12. As the duty and penalty on M/s Turbo Micro System has been satisfied by the appellant along with personal penalty, the attachment of the immovable property in issue herein is set

aside. Accordingly, the impugned order is also set aside and the Appeal filed by the Appellant is allowed with consequential relief, in accordance with law. Needless to mention that Revenue authorities are at liberty to initiate recovery proceedings against the defaulting partners, who have not yet paid the personal penalty.

(Pronounced in open Court on 17.05.2024)

(Ajay Sharma)
Member (Judicial)

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