(2010) 04 GUJ CK 0091

In the Gujarat High Court

Case No : Tax Appeal No. 542 of 2009 with Tax Appeal No''s. 810-823 of 2010

Commissioner of C. EX., Ahmedabad-II APPELLANT

Vs

Chhajusingh S. Kanwal RESPONDENT

Date of Decision : 21-04-2010

Acts Referred:
Central Excise Rules, 2002 — Rule 25, 26
Central Excises and Salt Act, 1944 — Section 11AC, 14, 35G

Citation : (2011) 272 ELT 202

Hon'ble Judges : Harsha Devani, J;D.A. Mehta, J

Bench : Division Bench

Advocate : Darshan M. Parikh, for the Appellant;

Judgement

H.N. Devani, J.—In these appeals u/s 35G of the Central Excise Act, 1944 (the Act), the appellant-Revenue has challenged consolidated order dated 11th December, 2008, made by the Customs, Excise and Service Tax Appellate Tribunal (the Tribunal) proposing the following two questions: -

(i) Whether the Hon''ble CESTAT is justified in observing that the evidence brought on record fn the form of depositions/statements of suppliers, buyers and transporters u/s 14 of the Central Excise Act, corroborated/supported by evidences in the form of Bank''s statements as well as trip''s registers in respect of clandestine removal of the goods by the assessee, are not sufficient or not reliable to prove?

(ii) Whether the Hon''ble CESTAT is justified in observing that the assessee, partners of M/s. A.S. Corporation, Ahmedabad, supplier of bogus bills/invoices who in fact are either involved in the act of evasion of duty or in any ether manner abetted in evasion of duty and who are guilty and liable to penalty, are innocent in view of facts and modus operandi adopted by the assessee in connivance with M/s. A.S. Corporation?

2. The facts of the case stated briefly are that M/s. Sulekhram Steels Private

Limited (hereinafter referred to as ''Sulekhram'') is engaged in the manufacture of TMT Bars and holds central excise registration. On the basis of intelligence to the effect that the unit was indulging in evasion of duty by way of clearing finished goods i.e. TMT Bars to its dealer M/s. A.S. Corporation, Ahmedabad, and the said dealer was simultaneously procuring bogus bills from other dealers in respect of such illicit goods so as to settle their books of account for such illicit transactions, the officers of the Central Excise (Prevention), Ahmedabad conducted simultaneous searches on 21st September, 2004 at the premises of Sulekhram, residence of Ms. Satyabhama, Sales Executive of Sulekhram, M/s. H.V. Lokhandvala, a supplier of raw material, M/s. A.S. Corporation as well as residence of Shri Shakeel A.R Vohra, partner of M/s. A.S. Corporation. However, no incriminating documents were recovered but records maintained in the ordinary course of business were seized.

3. During the course of further investigation carried out by the Revenue, the statement of Shri Shakeel A.R. Vohra came to be recorded. Statements of various other persons were also recorded.

4. Statements of transporters also came to be recorded indicating that they used to load the materials from the factory of Sulekhram and deliver the same to the customers as per the instructions. Trip registers maintained by these transporters were also scrutinized to take support of the fact that goods were loaded at the premises of Sulekhram. On the basis of the aforesaid, proceedings were initiated against Sulekhram alleging that the supply made by M/s. A.S. Corporation to its customers was of the goods which were manufactured by Sulekhram and cleared without payment of duty. Notice proposing confirmation of demand of duty against M/s. Sulekhram Steels Private Limited and imposition of penalties and interest on Sulekhram as well as other parties came to be issued. The show-cause notice came to be confirmed by the Commissioner vide common order dated 31st March, 2008.

5. Being aggrieved, the respondents preferred appeals before the Tribunal, which came to be allowed vide the impugned order dated 11th December, 2008.

6. Heard Mr. D.M. Parikh, learned Standing Counsel for the appellant-Revenue in all these appeals. The learned counsel has assailed the impugned order of the Tribunal and has placed reliance upon the findings recorded by the Commissioner. It is submitted that in the light of the statements of the respondents except Sulekhram and its Chairman, recorded u/s 14 of the Act, wherein it has been stated that the goods were manufactured by Sulekhram and that they had purchased the same through Shri Shakeel Abdul Latif Vohra, partner of M/s. A.S. Corporation, the Tribunal was not justified in holding that there was no sufficient evidence against the respondents. It is accordingly submitted that the impugned order of the Tribunal does give rise to substantial questions of law as proposed or as may be formulated by this Court.

7. As can be seen from the impugned order of the Tribunal, the Tribunal has

examined the various issues considered by the Commissioner individually. As regards the issue or clandestine removal, the Tribunal found that the case of the Revenue was based upon evidence collected during the course of investigation, which indicated that M/s. A.S. Corporation had procured fictitious bills from various traders and sold goods to various buyers. Thus, as such, the case of the Revenue revolved around the activities of M/s. A.S. Corporation. The Tribunal noted that M/s. A.S. Corporation had rebutted the statement made by various traders/brokers that the goods were never supplied to them and had always maintained that the goods in question had been purchased by them from traders to whom payments were made by cheques. Investigation revealed that some of the traders were also registered with the Sales Tax Department. The Tribunal was, accordingly, of the view that merely because the registrations of some of the traders were cancelled subsequently, was no ground to assume that they were bogus. The Tribunal further noted that M/s. A.S. Corporation and Sulekhram had requested to cross-examine the traders as well as the brokers whose statements were being relied upon against them. However, the authority had rejected the said request on the ground that there was no justification for such cross-examination and that none of the buyers had retracted their statements. The Tribunal was, therefore, of the view that without giving the respondents the opportunity of cross-examining the said persons, their statements were not admissible in evidence. However, the Tribunal was not inclined to remand the matter as all the traders appearing before them had reiterated the stand taken by them earlier.

8. The Tribunal recorded that the Commissioner had framed an issue to the effect that if the traders/dealers had not supplied the goods to M/s. A.S. Corporation, from where could it have procured the TMT Bars that it supplied to its customers under its own bills and invoices, and thereafter, on the basis of the submissions of the buyers that TMT/CTD bars purchased from M/s. A.S. Corporation were embossed with the mark "SULEKHRAM" which identified the name of the manufacturer, held that the goods supplied by M/s. A.S. Corporation had been manufactured in the factory of Sulekhram, which thereby established that the goods supplied to 20 buyers were invoiced by M/s. A.S. Corporation which had been cleared clandestinely by Sulekhram. The Tribunal was of the view that the reasoning adopted by the Commissioner was not justified inasmuch as merely because the mark "SULEKHRAM" appeared on the TMT Bars purchased by various persons from M/s. A.S. Corporation, it cannot be concluded that the goods in question had been cleared clandestinely from its factory. The Tribunal was further of the view that more appearance of marking cannot be the sole factor to arrive at a finding against Sulekhram. The Tribunal noted that it was the case of M/s. A.S. Corporation that the goods had been purchased from other manufacturers like M/s. Sirhind Mills, M/s. Yogi Mills as well as from traders. The Tribunal accepted the contention raised on behalf of the respondents that the goods supplied by M/s. A.S. Corporation to their customers could be out of the stock-in-trade available in the market or could have been manufactured by other

small manufacturers in the name of Sulekhram, in view of the fact that Sulekhram enjoyed a good reputation in the market. The Tribunal was of the view that whatever be the source of procurement of goods by M/s. A.S. Corporation, demand of duty could not be confirmed against Sulekhram on the basis that the goods supplied by M/s. A.S. corporation bear the trade name of SULEKHRAM. The Tribunal also noted that all the buyers had stated that they had purchased the goods from M/s. A.S. Corporation to whom payment was made by cheques or demand draft and not a single buyer had stated that he had purchased the goods from Sulekhram.

9. The Tribunal further noted that the Commissioner had, for the purpose of deciding the issue as to from where M/s. A.S. Corporation had procured TMT Bars bearing mark of "SULEKHRAM" embossed on them, placed reliance upon trip registers maintained by transporters as well as statements of transporters indicating that the goods were being lifted from the factory of Sulekhram. The Tribunal upon examination of the trip registers found as a matter of fact that except entries in three places, the trip registers did not indicate that the goods were actually loaded from the premises of Sulekhram. That in fact, no trip registers were available in most cases, and those that were available did not indicate that the goods were loaded at the factory of Sulekhram. That out of three entries, one was shown as "Suleghram" instead of "Sulekhram". The Tribunal was accordingly of the view that the record maintained by the transporters could not be held to be corroborative evidence so as to support the statements of the transporters. The Tribunal held that the allegation of clandestine removal could not be sustained on the basis of the transporters'' record which is third party''s record without there being any corroborative evidence. That in any case, the transporters'' record did not support the case of the Revenue.

10. The Tribunal referred to the statements of Shri Vikram Singh, Factory Manager of Sulekhram wherein he had admitted that the word "SULEKHRAM" was embossed on all the material manufactured in their factory and held that because the mark "SULEKHRAM" was appearing on the goods which the said respondent was admittedly using on its own manufactured goods, it cannot be made the basis for arriving at the conclusion that the goods in question had been manufactured and supplied by Sulekhram. The Tribunal also referred to the statement of Shri Pankaj Trivedi, Assistant Accountant of Sulekhram and found that the said statement cannot be held to be an admission as sought to be contended by the Revenue. The Tribunal was at a loss to understand as to what the Commissioner meant by stating that what is admitted need not be proved as it was not clear as to what was admitted and by whom. The Tribunal found as a matter of fact that there was no clear admission on the part of any representative of Sulekhram admitting clandestine manufacture and clearance of goods. The Tribunal was also of the view that allegations of clandestine removal are required to be established by production of positive and tangible evidence and should not be arrived at on the basis of surmises and conjectures. The

Tribunal found that the case of the Revenue was based upon the statements of co-accused which statements were not supported by any independent corroborative evidence. The Tribunal found that in the facts Of the present case, the Department had not detected any discrepancy in the other stock of raw material or final product at the time of visit of the officers to the factory of Sulekhram; that no incriminating documents were recovered from either the business premises or residential premises of Sulekhram. That there was no evidence as regards procurement of such a huge quantity of raw material by Sulekhram so as to manufacture the goods clandestinely and remove the same without payment of duty-No record showing any extra payment to labourers had been placed on record. Revenue had not made any investigation as regards the consumption of electricity. According to the Tribunal, if goods worth about Rs. 8 crores had been manufactured and cleared by Sulekhram without payment of duty, the same would require procurement of raw material, extra working hours of the factory, electricity consumption, payment of labour charges, payment of transportation bills etc. That the Revenue had not investigated any of the said factors and the entire case was based upon the statement of the traders and buyers of M/s. A.S. Corporation. The Tribunal noted that M/s. A.S. Corporation had nowhere admitted that it had purchased the goods from Sulekhram without payment of duty nor was there any statement of any representative of Sulekhram admitting having cleared the huge quantum of goods without payment of duty. The Tribunal was accordingly of the view that there was no sufficient material on record to establish clandestine removal and clearance by Sulekhram and accordingly set aside the confirmation of demand and imposition of penalty u/s 11AC and Rule 25 of the Central Excise Act. Penalty of Rs. 10 lakhs imposed upon the Chairman-cum-Managing Director of Sulekhram was also set aside.

11. Insofar as penalty of Rs. 5 lakhs imposed upon Shri S.A. Vohra, partner of M/s. A.S. Corporation, the Tribunal found that the same had been imposed upon him under Rule 26 of the Central Excise Rules, 2002 on the ground that he was involved in transporting, removal, concealing and selling of excisable goods, cleared illicitly by Sulekhram. The Tribunal held that it having found that there was no clandestine removal and clearance from the factory of Sulekhram, penalty upon Shri S.A. Vohra could not be upheld. For the same reason, penalty upon Shri Kiritbhai C. Patel, proprietor of M/s. Avantika Steel Suppliers imposed on the ground that he had arranged alleged bogus bills was also set aside. As regards other traders, the Tribunal held that even if the allegations made by the Revenue are accepted, the imposition of penalty upon them in terms of Rule 26 of the Central Excise Rules, 2002 cannot be upheld in the light of the decision of the Larger Bench of the Tribunal in the case of M/s. Steel Tubes of India Ltd. v. CCE, Indore, 2007 (217) E.L.T. 506, wherein it has been held that penalty cannot be imposed where the assessee issues invoices only without movement of goods. The Tribunal accordingly set aside the penalty imposed upon the other respondents who are only traders and are alleged to have issued invoices without

supply of goods.

12. From the facts and contentions noted hereinabove, it is apparent that the Tribunal has based its conclusion upon the findings of fact recorded by it after appreciation of the evidence on record which have remained unchallenged inasmuch as the appellant has not raised any question assailing the impugned order on the ground of perversity. The Tribunal has found as a matter of fact that the case of the Revenue is based upon the statements of the traders and brokers who had stated that they only used to give bills to Shri Shakeelbhai Vohra of M/s. A.S. Corporation without actual supply of any material, despite which, the authorities had turned down the request made by M/s. A.S. Corporation as well as Sulekhram for cross-examining the traders and brokers. The Tribunal was, therefore, justified in holding that the statements of such traders and brokers were not admissible in evidence, as they had not been tested on the touchstone of cross-examination. It is apparent that the entire case of the Revenue is based upon the statements of traders and brokers who have stated that M/s. A.S. Corporation had procured fictitious bills from them and sold goods to their buyers as well as statements of transporters who have stated that they had lifted the goods from the factory of Sulekhram. M/s. A.S. Corporation had rebutted the statements of traders and brokers and no Director or employee of Sulekhram has admitted clandestine manufacture and removal of goods. Morever, the respondents have not been permitted to cross-examine the traders and brokers despite specific request having been made in this regard, thereby rendering the statements of such witnesses inadmissible in evidence. Insofar as the statements of transporters are concerned, the Tribunal upon scrutiny of the trip registers has found that the same do not support the case of the appellant that the goods were actually loaded from the premises of Sulekhram. The Tribunal has also found that despite the allegation of clandestine manufacture and clearance of goods, Revenue has not carried out any investigation to ascertain various factors which would indicate that Sulekhram had actually manufactured such large quantity of goods in its factory like discrepancies in the stock of raw material or final product, procurement of raw material, extra working hours of the factory, electricity consumption, payment of charges, payment of transportation bills etc. From the findings recorded by the Tribunal, it is apparent that the entire case of the Revenue as regards clandestine manufacture by Sulekhram is based upon dealings of M/s. A.S. Corporation. However, there is nothing to indicate that M/s. A.S. Corporation had actually purchased the goods from Sulekhram so as to indicate any connection between Sulekhram and M/s. A.S. Corporation. In the circumstances, in absence of any evidence to indicate that M/s. A.S. Corporation had purchased the goods from Sulekhram, there was no material on record on the basis of which Revenue could have arrived at the conclusion that the goods purchased by M/s. A.S. Corporation had been supplied by Sulekhram, and as such Revenue has not been in a position to establish its case regarding clandestine manufacture and clearance of goods on the part of Sulekhram. In absence of any evidence to indicate clandestine manufacture on the part of

Sulekhram, the Tribunal was justified in holding that the Revenue has failed to establish its case against Sulekhram and set aside the demand and imposition of penalty against Sulekhram.

13. In the light of the fact that the Tribunal has held that Revenue has not been able to establish clandestine manufacture and clearance by Sulekhram, as a necessary corollary, it had to be held that penalty could not be imposed upon Shri S.A. Vohra of M/s. A.S. Corporation or the other dealers and suppliers on the allegation of having supplied bogus bills.

14. In the light of the aforesaid discussion, it cannot be stated that the impugned order of the Tribunal suffers from any legal infirmity so as to warrant interference. No question of law, much less any substantial question of law can be stated to arise out of the impugned order of the Tribunal. The appeals are accordingly dismissed.