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(2016) 04 GUJ CK 0006

In the Gujarat High Court

Case No : Tax Appeal No. 548 of 2015 with T.A. Nos. 516 and 549 of 2015

Commr. of C. Ex., Cus. & S.T. APPELLANT

Vs

Shree Krishna Industries RESPONDENT

Date of Decision : 01-04-2016

Acts Referred:

Citation : (2017) 345 ELT 629

Hon'ble Judges : Harsha Devani and G.R. Udhwani, JJ.

Bench : Division Bench

Advocate : Shri R.J. Oza, Sr. Standing Counsel and Gaurang H. Bhatt, Standing Counsel, for the Appellant; Shri Devan Parikh, Sr. Advocate with Harshal M. Shah, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

Harsha Devani, J. (Oral)—These appeals at the instance of the revenue have been preferred against the common order dated 9th January, 2015 passed by the Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench at Ahmedabad (hereinafter referred to as "the Tribunal") by proposing the following questions stated to be substantial questions of law :

Tax Appeals No. 548/2015 and 549/2015

Whether in the facts and circumstances of the case, the Tribunal has committed substantial error of law to set aside demand of duty, interest and imposition of penalty imposed on the respondent assessee on the ground that charges levelled against him are not proved, in ignorance of relevant material and evidence placed on record in the adjudication while confirming demand and proposal made in the show cause notice by the adjudicating authority?

Tax Appeal No. 516/2015

Whether in the facts and the circumstances of the case, the ld. Tribunal is justified in the eye of law, in holding that the revenue has failed to establish the clandestine clearance of the goods by the assessee-respondent, in spite of adducing by the Revenue, the relevant and important significant records/ documents pertaining to the respondent along with their positive corroboration by the specific admission of the said respondent and the witnesses, which were never retracted?

Since the facts and contentions in all the three appeals are more or less common, the same were taken up for hearing together and are disposed of by this common judgment. For the sake of convenience, reference is made to the facts as stated in Tax Appeal No. 548/2015.

2. The respondent - Shree Krishna Industries is engaged in the manufacture of Ceramic Glaze Fritz falling under Chapter sub-heading 3207.10/90 of the Central Excise Tariff Act, 1985. However, according to the respondent, since the clearances made by it are not in excess of Rs. 1,00,00,000/- (rupees one crore), it is not required to be registered under the Central Excise Rules as applicable.

2.1 Intelligence was received by DGCEI, Ahmedabad, that M/s. Shree Krishna Industries, Jambusar was engaged in illicit manufacture and clandestine removal of Ceramic Glaze Fritz on which central excise duties were not paid by it. Further, the intelligence indicated that the unit was not registered under the Central Excise Rules and the law as applicable. In terms of the information, M/s. Shree Krishna Industries had another factory at Survey No. 326-328 at village: Vadu, taluka : Kadi, district : Mehsana. The intelligence further pointed out that M/s. Shree Krishna Industries had appointed a person for distribution of such clandestinely cleared goods to be sold inter alia in the areas in and around Morbi where large number of Ceramic Tiles manufacturing units are situated and that such person was paid a hefty commission as incentive for facilitating such illicit transactions by M/s. Shree Krishna Industries. On the basis of such intelligence, simultaneous search operations were carried out on 16th October, 2003 at M/s. Shree Krishna Industries at Jambusar, Bharuch and at another factory of Shree Krishna Industries and other units owned by their relatives having factories at Survey No. 326-328, village Vadu, taluka : Kadi. Searches were also conducted at the residential premises of the proprietor of Shree Krishna Industries and transporters and the premises of Shri Hitesh Parekh, its agent at Morbi, premises of units supplying raw materials to Shree Krishna Industries and premises of its buyers. During the course of search, large volumes of incriminating documents were recovered and placed under seizure under various panchnamas. Detailed investigation culminated into issuance of a show cause notice dated 17th November, 2004 demanding central excise duty amounting to Rs. 35,86,397/- pertaining to the periods 2002-03 and 2003-04 (up to 16th October, 2003) under Section 11A of the Central Excise Act, 1944 (hereinafter referred to as the "Act") along with interest under Section 11AB of the Act and proposing to impose mandatory penalty under Section 11AC of the Central Excise Act, 1944 read with Rule 25 of the Central Excise (No. 2) Rules, 2001 read with Central Excise Rules, 2002. Notices were also issued to various other parties proposing appropriate

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personal penalty under the provisions of Rule 26 of the Central Excise Rules, 2001 read with Central Excise Rules, 2002 for the acts of omission and commission.

2.2 By an order-in-original dated 31st March, 2008, the show cause notice came to be adjudicated by the Additional Commissioner of Central Excise, Vadodara-II, whereby he confirmed the demand of duty along with interest and imposed mandatory penalty equivalent to the duty amount on the respondent assessee. The adjudicating authority also imposed personal penalty on the other noticees. Being aggrieved, the respondent-assessee preferred appeals before the Commissioner (Appeals), Central Excise and Customs, Vadodara, who, after considering the submissions advanced on behalf of the assessee, dismissed the appeals by an order dated 29th September, 2009. The respondent carried the matter in appeals before the Tribunal and succeeded. Being aggrieved, the appellant revenue has preferred the present appeals.

3. Mr. R.J. Oza, learned senior advocate and senior standing counsel for the appellant, assailed the impugned order by submitting that the respondent enjoys exemption under Notification No. 8/2002-C.E. and is, therefore, not required to be registered under the provisions of the Central Excise Act. It was pointed out that in terms of clauses (v) and (vi) of the above notification, where the manufacturer clears the specified goods from one or more factories, the exemption in his case shall apply to the aggregate value of clearances mentioned against each of the serial numbers in the table and not separately for each factory. It was submitted that, therefore, the clearances of both the factories situated at Vadu and Jambusar are required to be clubbed together, in which case, the clearances exceed the limit specified for availing of exemption under the notification and hence, the respondent was required to be registered under the provisions of the Central Excise Act. Inviting the attention of the court to the contents of the show cause notice as well as to the impugned order passed by the Tribunal, it was pointed out that the Tribunal has not considered the evidence of the proprietor in the form of statements recorded on 17th October, 2003, 3rd August, 2004 and 5th August, 2004 and the findings on these statements have not been recorded. It was submitted that the Tribunal has considered the statements of three employees of the respondent namely, Ramesh Patel, Supervisor, Vadu, Mukesh Patel, Supervisor, Jambusar and Anil C. Shah, Ex-Supervisor at Vadu and has recorded its findings on the basis of these statements. Referring to the statements of the said employees, it was submitted that the Tribunal has not correctly read such statements. It was further submitted that the Tribunal has considered the evidence of buyers, transporters and suppliers of raw material and statements of agents and has recorded a finding that the invoices have been issued by the respondent for clearance of goods in favour of the buyers and that since invoices have in fact been issued, there is no clandestine removal. It was submitted that the question of clandestine removal has to be considered in the light of clearance of goods, the value whereof is more than Rs. 1,00,00,000/- in a year. Moreover, the Tribunal

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has not considered the statement of the supplier who has supplied goods and purchased goods namely, Shivam Chemicals and has also not considered the statement of Shital at Chhota Udepur recorded on 25th December, 2003. It was submitted that insofar as the statement of transporters are concerned, two of the transporters namely, M/s. Shah Roadlines, Ankleshwar and M/s. Hitesh Roadlines, Kadi, have supported the case of the revenue. Referring to the findings recorded by the Tribunal in Paragraph 9 of the impugned order, it was submitted that from the findings, nowhere it appears that there has been clandestine clearances by M/s. Shri Krishna based on invoices. Referring to the show cause notice, it was submitted that the same does not say that goods are not cleared under invoice but it says that the clearances exceed the SSI limit. Referring to the findings recorded by the Tribunal with regard to the suppliers of raw material, it was pointed out that the Tribunal has not made any reference to the statement of M/s. Shivam Chemicals. It was submitted that this is a case of clearance of goods beyond the permissible limit prescribed in the exemption notification and hence, what has to be established is the clearance of goods. It was submitted that there is no dispute as regards supply and the vital aspect is the clearance of goods and prima facie the supply of goods has been established by the Department. Reference was also made to the findings in the context of the statement of the transporters as recorded by the Tribunal and as contained in the show cause notice. It was pointed out that the employee who is the author of the notings found during the course of search has admitted to the notings and the production of goods. That the employee has explained the details in the documents and has thereby demonstrated production and despatch of goods by the respondent Shree Krishna Industries. It was pointed out that in the facts of the present case, the statements made by the concerned parties during the course of search, have not been retracted. It was, accordingly, urged that the Tribunal has failed to appreciate the evidence on record in proper perspective and that the findings recorded by the Tribunal being contrary to the evidence on record are perverse and hence, the appeals do give rise to substantial questions of law as proposed or as may be formulated by this court.

4. Mr. G.D. Bhatt, learned standing counsel appearing for the appellant in Tax Appeal No. 516/2015 submitted that the finding recorded by the Tribunal that there is no evidence as regards clandestine removal is required to be considered in the light of the fact that this is a case of clandestine removal in which case, the effort which would be made by the parties would be to see that there is no evidence of such production or removal. Referring to the findings recorded by the Tribunal in the impugned order, it was submitted that the Tribunal has failed to consider the fact that the revenue has also in its possession notebooks, registers, invoices, bills, challans and also panchnama which is sufficient positive evidence in support of its case of clandestine removal. It was submitted that Boric Acid is one of the essential ingredients in the manufacture of Ceramic Glaze and the extent of various raw materials is certainly not the criteria to infer that supply of Boric Acid is no evidence to lead to the illicit activity of the respondent. It was

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submitted that what is adduced as evidence has to be considered positively rather than what could not be adduced as evidence, so as to draw adverse inference against the revenue. Reiterating the submissions advanced by Mr. Oza, Mr. Bhatt submitted that the appeal deserves consideration on the questions of law as proposed.

5. Vehemently opposing the appeals, Mr. Devan Parikh, Senior Advocate, learned counsel for the respondent supported the impugned order by submitting that the findings recorded by the Tribunal are in consonance with the evidence on record. It was submitted that this is a clear case of appreciation of evidence and that in the absence of any perversity in the findings recorded by the Tribunal, no question of law arises. It was submitted that the findings with regard to clandestine removal is a question of balancing evidences. The Tribunal having relied upon all the evidence that was on record, there is no perversity therein. It was submitted that according to the revenue this is a clandestine removal, however, no money trail has been established by the Revenue. It has not been found that any amount is paid to the assessee and no document showing that the assessee has received any amount has been produced. It was submitted that out of sixty to seventy customers named in the notebook, the Department has examined only four such customers, despite the fact that the names of all the other customers are also there in the notebook. It was submitted that out of the four customers examined by the Department, two had made statements in favour of the assessee and the other two in their cross-examination have testified in favour of the assessee. It was submitted that as regards the factor of production of the final goods is concerned, to produce something, the manufacturers must also have raw material. It was submitted that in the facts of the present case, except for the purchase of Boric Acid, there is no evidence as regards purchase of any major raw material and that in any case of clandestine removal, there must be at least some positive evidence about goods being transported or the goods being located at the place of customers whereas in the facts of the present case, there is no evidence in this regard. Referring to the findings recorded by the Tribunal, it was submitted that all the evidence produced by the Department has been considered by the Tribunal. Insofar as the evidence produced by the Department is concerned, all that is produced are statements of suppliers without any proof of transportation or payment of cash. It was submitted that all the witnesses namely, suppliers and transporters have reneged from their original statements in their cross-examination and there is no proof of any purchase of any major raw material. Referring to Paragraph 11 of the impugned order, it was submitted that the statements of third parties cannot be relied upon in the absence of any supporting documents and that the Tribunal has considered all the evidence on record in proper perspective while arriving at the conclusion that the Department has failed to establish any clandestine removal on the part of the respondent.

5.1 In support of his submissions, the learned counsel placed reliance upon the decision of this court in the case of Suman Plywood Pvt. Ltd. v. Commissioner of

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Central Excise, Ahmedabad-II, 2015 (322) E.L.T. 290 (Guj.), for the proposition that unless a question of law arises for determination, the High Court is not to replace its reasoning with that of the Tribunal. Further, the High Court would not interfere unless material evidence on record were disregarded, or if considered, resulted in the Tribunal reaching findings which were ex facie illegal, perverse and such as would give rise to questions of law. It was submitted that the Tribunal has extensively dealt with the evidence on record and, in the absence of any perversity in the findings recorded by the Tribunal, the impugned order does not give rise to any question of law, warranting interference.

5.2 Reliance was also placed upon the decision of this court in the case of Commissioner v. Motabhai Iron and Steel Industries, 2015 (316) E.L.T. 374 (Guj.), wherein the court has held that even if on the same material, it was possible to take a different view, the same would not give rise to a substantial question of law. Reliance was also placed upon the decision of this court in the case of Commissioner of C.Ex., Cus. & Service Tax v. Vishwa Traders P. Ltd., 2013 (287) E.L.T. 243 (Guj.), wherein the court held that it is well-settled that the findings of the Tribunal can be interfered only if it is perverse or some material evidence is ignored. In such circumstances, only the court may exercise jurisdiction on issue which may give rise to any substantial question of law. The court in the facts of the said case found that no substantial question of law arose for consideration. It was submitted that the facts of that case and the facts of the present case are more or less similar and that the above decisions of this court have been confirmed by the Supreme Court. It was, accordingly, urged that the appeals being devoid of merit, deserve to be dismissed.

6. This court has considered the submissions advanced by the learned counsel for the respective parties and has perused the orders passed by the authorities below and the record of the case as produced before it. As can be seen from the impugned order, the Tribunal, after considering the submissions advanced by the learned counsel for the respective parties has found that the case was booked on the basis of notebooks mainly seized from the residence of an employee of M/s. Shree Krishna and statements of its buyers and suppliers of raw material as well as employee and Director of the firm. The Tribunal found that out of the four buyers whose statements were recorded, two buyers in their statement had clearly stated that purchases were made by them from the respondent under the cover of invoices. Insofar as the other two buyers are concerned, in their cross-examination, they had denied buying raw material from any other related concern of the respondent and had also stated that all purchases had been made under cover of invoice. The Tribunal found that except for statements which stood nullified in cross-examination, no other corroborative evidence in respect of clearance of goods by M/s. Shree Krishna was appearing on record. Insofar as the investigation conducted at the end of the suppliers of raw material on the basis of notebooks seized from the residence of Shri Mukesh Patel and factory premises is concerned, the Tribunal, after considering the evidence on record found that the allegation of receipt of raw material by the respondent was not

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sustainable. The Tribunal while recording such findings of fact has considered the statements of various parties and the evidence as collected by the Revenue authorities. The Tribunal has also noted that the show cause notice has relied upon investigation and statements of two transporters, but on an appreciation of the evidence on record, it has found that neither of the transporters owns any truck nor has any records and that only on the basis of some chithis seized from the Vadu factory, it has been stated that transportation has taken place, whereas no investigation has been carried out from the persons to whom the goods were reported to have been transported. The Tribunal was of the view that on the basis of such statement of the transporter, the demand cannot be confirmed against the respondent since there was no consignee of goods who has received any goods through the said transporter. The Tribunal further found that the other witnesses on whose statement the Department sought to place reliance have also not supported the case of the Department so as to hold the charge of clandestine removal. The Tribunal noted as a matter of fact that except for the alleged receipt of Boric Acid which is one of the materials required for manufacture of Fritz, there is no evidence appearing in the seized record or otherwise that the respondent has received any other raw material clandestinely. The Tribunal also noted that even no transportation of any other raw material required for manufacture of Fritz was appearing or alleged in the show cause notice and was accordingly of the view that the allegation of clandestine removal needs to be established by showing receipt of major raw materials, at least of some quantity, use of excess raw material, input-output ratio, transportation of raw materials, use of such goods in manufacture of finished goods, excess utilisation of power fuel, transportation of finished goods, investigation at the buyer''s end, receipt of money, etc. However, none of these factors have been taken into consideration during the course of investigation. The Tribunal, accordingly, came to the conclusion that the charges of clandestine removal are not established.

7. On a perusal of the impugned order, it is evident that the Tribunal has discussed the evidence on record in detail and has based its conclusions upon findings of fact recorded by it upon appreciation of the evidence on record. Having regard to the evidence which has come on record as discussed herein above, in the opinion of this court, it is not possible to state that the findings recorded by the Tribunal are in any manner contrary to the record of the case. Though the learned counsel for the appellant have assailed the impugned order on various grounds, they have not been in a position to dislodge the findings of fact recorded by the Tribunal after appreciating the evidence on record. Under the circumstances, the view adopted by the Tribunal being a plausible view and the impugned order passed by the Tribunal being in consonance with the evidence on record, it cannot be said that the findings recorded by the Tribunal are in any manner perverse. It, therefore, follows that in the absence of any perversity in the findings of fact recorded by the Tribunal on an appreciation of the evidence on record, even if on the same set of facts, it was possible for this

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court to take another view, the same would not give rise to a question of law, much less, a substantial question of law, warranting interference.

8. In the aforesaid premises, in the absence of any substantial question of law, the appeals fail and are accordingly dismissed.

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