

(2013) 04 DEL CK 0285

In the Delhi High Court

Case No : CEAC 46 of 2012 and CM 18227 of 2012

Dharampal and Satyapal Sons Pvt. Ltd.

APPELLANT

Vs

CIT Delhi II

RESPONDENT

Date of Decision : 01-04-2013

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11A, 11A(1)

Citation : (2013) 4 AD 261 : (2013) 198 ECR 158 : (2014) 25 GSTR 22

Hon'ble Judges : R.V. Easwar, J; Badar Durrez Ahmed, J

Bench : Division Bench

Advocate : S.K. Bagaria with Dr. Prabhat Kumar, for the Appellant; Kamal Nijhawan, Senior Standing Counsel with Mr. Sumit Gaur, for the Respondent

Judgement

Badar Durrez Ahmed, J.—We have heard the learned counsel for the parties. The counsel are agreed that this appeal be disposed of at this stage itself. Two substantial questions of law arise for our consideration in this appeal. They are:-

(1) Whether, in the facts and circumstances of the case, the Customs, Excise and Service Tax Appellate Tribunal was correct in law in upholding the penalty of Rs. 2 crores under Rule 173Q(1)(d) of the Central Excise Rules, 1944?

(2) Whether the finding of the Tribunal in confirming the penalty under Rule 173Q(1)(d) of the Central Excise Rules, 1944 was not perverse inasmuch as the evidence produced by the appellant before the Commissioner in remand proceedings was not considered either by the Commissioner or by the Tribunal?

As can be noticed from the above questions, this appeal is only concerned with the question of penalty under Rule 173Q(1)(d) of the Central Excise Rules, 1944 (hereinafter referred to as "the said Rules"). The issue with regard to the payment of central excise duty on the production of raw kimam and other ingredients such as saffron, musk, perfumes and other spices stands settled by the Supreme Court by virtue of its judgment dated 21.04.2005 in civil appeal Nos. 1506-1508/2000 in the case of the present appellant itself. The issues

raised before the Supreme Court in that round of litigation were relating to (a) the excisability of kimam and classification thereof under sub-heading 2404.40 (w.e.f. 23.07.1996) and 2404.49 (prior to 23.07.1996); (b) the rationale for invoking the extended period of limitation u/s 11A(1); and (c) eligibility for the benefit of proforma and modvat credit classification of chewing tobacco kimam. All these issues were decided against the appellant and in favour of the revenue. This would be clear from the following extracts of the Supreme Court decision:-

It was urged that the assessee was under a bonafide impression that no duty was leviable on the goods; the full quantity of disputed goods was used captively and, therefore, proforma credit/modvat credit was available in respect thereof and, therefore, there was no intent to evade payment of duty. In support of the aforestated submissions, it was urged that suppression or breach of rules by itself would not amount to intention to evade; that some positive act of deliberate suppression or breach of rules was required to be shown by the department; that, if the assessee showed that credit available to it was equal to the demand then there may not be the case of intention to evade payment of duty. In this connection, reliance was also placed on the judgments of this Court in *Amco Batteries Limited, Bangalore Vs. Collector of Central Excise, Bangalore*, ; *Padmini Products Vs. Collector of Central Excise, Bangalore*, and *Formica India Division Vs. Collector of Central Excise and Others*,

We do not find merit in the above contentions. In this matter, we are concerned with the application of the above judgments to the facts of this case. The words "wilfulness" and "intent" in section 11A are expressions of mental state at the time of manufacture and clearance of the goods. The situs of the levy of central excise is on manufacture. Pricing and value of clearances are matters specially within the knowledge of the assessee. As stated above, the assessee herein was in the business of manufacture of chewing tobacco and its preparations for last couple of years. In the course of business, the assessee had dealt with similarly situated traders. It was fully aware that those traders who produced similar compounds had their units licensed or registered and yet the assessee herein did not take steps to get the above two units, in which the impugned compound (kimam) was manufactured, registered or licensed. As stated above, it has been buying a similar kimam from various traders. These circumstances constituted evidence of suppression brought on record by the department in answer to which it was contended on behalf of the assessee that they were under a bonafide impression that the compound was not excisable and that the benefit of proforma and modvat credit together with the benefit of exemption under notification no. 121/94 dated 11.8.1994 was substantially equal to the demand for duty herein and, therefore, there was no intention to evade payment of duty.

We do not find any merit in these submissions. As stated above, the adjudication in this case was confined to the question of excisability and concealment of the existence of two units in which the compound (kimam) was manufactured. No explanation has been given by the assessee for not disclosing the affairs of these

units, particularly when the assessee was in business for couple of years and when the assessee had been dealing with other traders who operated from licensed factories. It was for the assessee to explain the reasons for not getting the units registered or licensed. It was for the assessee to explain its failure to maintain the records under the 1944 Act and rules thereunder. In each of the above decisions, we find that there was substantial compliance of the rules under the said Act. In each of the decisions the findings indicate technical noncompliance and not total non-compliance of the rules. It was for the assessee to explain the basis of its alleged bonafide impression. In this connection, no evidence was put before the commissioner about receipt and utilization of the compound in the manufacture of Tulsi Zafrani Zarda. No evidence was led to show that the amount of proforma/modvat credits was equal to the duty demanded, although it was urged that after 3/94, the liability to duty on inputs stood shifted to the final product.

Modvat is basically a duty collecting procedure which provides relief to the manufacturer on the duty element borne by him in respect of the inputs used by him. The relief is given under the modvat scheme on the actual payment of duty on the input. On such payment, the assessee gets a right to claim adjustment/set-off against the duty on the final product. The question of duty adjustment/set-off against duty on the final product was not in issue. In any event, no record on credit entitlement was produced. A right to claim proforma/modvat credit against duty on final product was different from the defence of bonafides in a case where circumstances mentioned in the proviso to section 11A(1) stands proved by the department for invoking larger period of limitation. The burden to prove the defence of bonafides was on the assessee and the assessee in this case has failed to prove its bonafides. Under modvat, excisable finished products made out of duty-paid inputs are given relief of excise duty to the extent of duty paid on inputs. In the circumstances, we are satisfied that the department was justified in invoking the extended period of limitation under the proviso to section 11A(1).

On the applicability of the notification no. 121/94 dated 11.8.1994, the tribunal remanded the case back to the commissioner for re-examination of the limited question of its applicability. The tribunal also directed the commissioner to reconsider the quantum of penalty, fine etc. in the light of its findings on the applicability of the said notification. We do not wish to express any opinion on the applicability of the notification dated 11.8.1994. Suffice it to state, that, on the issue of excisability and clandestine manufacture and removal of the compound (kimam) from the two unlicensed/unregistered units at 96, Okhla Industrial Estate, Phase-III, New Delhi/E-1, Maharani Bagh, New Delhi, we do not find any infirmity in the impugned judgment.

Accordingly, these civil appeals filed by the assessees are dismissed with no order as to costs.

2. From the above it will be seen that on merits, the issue had been settled

except with regard to the applicability of notification No. 121/94-CE dated 11.08.1994. The Supreme Court had observed that the Tribunal had remanded the case to the Commissioner for re-examination of the limited question of its applicability. The Supreme Court further noted that the Tribunal had also directed the Commissioner to consider the quantum of penalty, fine etc. in the light of its findings on the applicability of the said notification. The Supreme Court made it clear that it did not wish to express any opinion on the applicability of notification dated 11.08.1994. However, it confirmed the issue of excisability and clandestine manufacture and removal of kimam from the two unlicensed/unregistered units at 96, Okhla Industrial Estate, New Delhi and E-1, Maharani Bagh, New Delhi. To that extent, the Supreme Court did not interfere with the decision of the Tribunal dated 1.10.1999.

3. The learned counsel for the appellant fairly stated that insofar as the question of applicability of notification No. 121/94-CE was concerned, that issue had subsequently been settled by the Supreme Court by virtue of its decision in Commissioner of Central Excise, New Delhi Vs. Hari Chand Shri Gopal and Others, etc. etc., He submitted that in view of the said decision, the said notification No. 121/94-CE dated 1.10.1999 would not be applicable in the present case of the appellant. It is for this reason that the issue with regard to the applicability of the said notification was not raised as a subject matter of challenge even before the Tribunal in the second round.

4. The learned counsel for the appellant submitted that the only issue that he seeks to raise in the present appeal, as would be evident from the questions which have been formulated, is that of the penalty under Rule 173Q(1)(d) of the said Rules. He submitted that once the Tribunal in the first round by virtue of its order dated 1.10.1999 had remitted the matter for examination of the applicability of notification No. 121/94-CE and for consequent reworking of the quantum of penalty, fines, etc., the penalty order initially imposed by the Commissioner no longer survived and the penalty had to be reworked. It is another matter that the notification No. 121/94-CE does not now apply to the case of the appellant due to the subsequent decision of in Hari Chand Shri Gopal (supra). However, the learned counsel for the appellant says that this does not mean that it is not open to the appellant to place its point of view with regard to the question of penalty. According to the learned counsel, the entire issue of the levy of penalty as also the quantum of penalty was remitted to the Commissioner of Central Excise for re-examination. While it is true that the Supreme Court in the first round, had examined the question of contravention of the provisions of the Act and Rules alongwith the issue of intent to evade duty, that was in the context of the proviso to Section 11A(1) of the Central Excise Act, 1944 (hereinafter referred to as "the said Act"). The learned counsel for the appellant submitted that at that point of time the Supreme Court had concluded that it was for the appellant to have demonstrated its bona fides by producing the relevant evidence to, inter alia, show a one-to-one relationship between the clearances of perfumed kimam from the two units in question and the receipt of the same by

its other units which produced chewing tobacco from the perfumed kimam processed in the two units which are in question. He further submitted that at that point of time the appellant had not produced any evidence and it is for this reason that the Supreme Court concluded that the appellant was not able to demonstrate its bona fides and, therefore, the Supreme Court did not interfere with the Tribunal's findings that extended period of limitation prescribed in the proviso to Section 11A of the said Act had been correctly invoked. The learned counsel for the appellant however submitted that because the appellant had been given a second opportunity on account of the remand made by the Tribunal on the issue of penalty, the appellant was able to produce evidence to show that the perfumed kimam produced at its two units in question had been captively consumed by the appellant itself in the manufacture of chewing tobacco, on which full duty was paid.

5. The learned counsel submitted that this evidence would go to show that the appellant did not have an intention to evade duty inasmuch as, had the appellant complied with the statutory provisions and got the two units in question registered and paid central excise duty on the clearances of perfumed kimam, the appellant would have got credit for the same in its other units which were producing chewing tobacco and, therefore, the revenue effect would be neutral. That being the position, the learned counsel for the appellant submitted that the appellant could not be said to have an intent to evade duty which was a necessary ingredient for Rule 173Q(1)(d) of the said Rules. It is another matter that the Supreme Court, on virtually the same considerations, held against the appellant when it considered the question of invocation of the extended period of limitation under the proviso to section 11A of the said Act. But, at that point of time the Supreme Court held against appellant because the appellant did not produce any material or evidence to demonstrate its bona fides.

6. In this backdrop, the limited question raised by the appellant is that when the issue of penalty was open before the Commissioner because of the remand order passed by the Tribunal on 1.10.1999 and the appellant had produced certain evidence in the remand proceedings, the same ought to have been considered by the Commissioner before levying the penalty of Rs. 2 crores. He submitted that the Commissioner imposed the penalty of Rs. 2 crores in the following manner:-

III. Penalty under Rule 173Q

28. Rule 173Q of the Central Excise Rules, 1994 provided for a penalty upto three times the value of the goods or Rs. 5000/- whichever higher, inter alia for manufacture of excisable goods without registration or removal of excisable goods in contravention of any of the provisions of the Central Excise Rules with the intention to evade payment of duty.

29. It has already been upheld by the Hon'ble Tribunal in their Final Order dated 1-10-1999 that the goods in dispute were excisable/dutiable, that these goods had been manufactured without obtaining registration from the Central Excise

department and that the conduct of the party amounted to suppression of facts with intent to evade payment of duty, justifying demand of duty beyond the normal period of six months. Clearly, the elements of offence envisaged under Rule 173Q are present in the case of the party. I, therefore, have no hesitation in holding that the conduct of the party warranted imposition of penalty under Rule 173Q.

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38. XXX

ii. I impose a penalty of Rupees two crores on the party under Rule 173Q(1) of the Central Excise Rules, 1994 read with Section 38A of the Central Excise Act, 1994...

7. Being aggrieved by this order the appellant filed an appeal being Excise Appeal No. 1463/2005 before the said Tribunal. The appeal was in respect of other grounds as also on the point of penalty. By virtue of an order dated 07.04.2011 the Tribunal dismissed the appellant's appeal. However, since the said order only dealt with the other issues and the question of penalty had not been considered by the Tribunal in the said order dated 07.04.2011, the appellant filed an application (rectification of mistake application) before the Tribunal which was disposed of by the impugned order dated 17.07.2012 whereby the Tribunal specifically addressed the issue of penalty under Rule 173Q(1)(d) of the said Rules. By virtue of the said order, the Tribunal quoted the portions of the Supreme Court decision dated 21.04.2005, which we have already extracted above. After setting out the said extract, the Tribunal held that the Supreme Court had held that the appellant was fully aware that other persons who had produced similar compounds (perfumed kimam) had applied for registration and yet the appellant had not taken any steps to get its units registered. The Tribunal further observed that the Supreme Court had held that these units of the appellant were manufacturing kimam without registration or licence and therefore, there was violation of the Rules as also there was evidence of suppression. The Tribunal further observed as under:-

8. When the Apex Court itself has given a finding that the non-payment of duty was deliberate and not a bonafide mistake, penalty under Rule 173Q(1)(d) would be attracted and looking to the quantum of duty demand upheld against the appellant, the penalty of Rs. 2,00,00,000/- cannot be called excessive.

9. In view of the above discussion, we do not find any merit in the appellant's plea with regard to imposition of penalty. The appeal is, therefore, dismissed.

8. We have also heard the learned counsel for the respondent who has reiterated the findings returned by the Tribunal. He also submitted that once the Supreme Court had returned a clear finding with regard to the lack of bona fides of the appellant in the context of the proviso to Section 11A of the said Act there was no option left with either the Commissioner or the Appellate Tribunal to return a

contrary finding. Therefore, according to the learned counsel for the respondent the impugned order ought not to be interfered with.

9. Having considered the rival contentions of the learned counsel for the parties and also the history of the litigation it appears to us that when the matter travelled to the Supreme Court, the question of penalty was not in issue. It was only the quantum proceedings which were before the Supreme Court and the Supreme Court had settled the issue with regard to the excisability of the perfumed kimam produced by the appellant. The issues with regard to the applicability of notification No. 121/94-CE and the reworking of the penalty u/s 173Q(1)(d) of the said Rules were not touched upon by the Supreme Court as the Tribunal had remanded the matter to the Commissioner for a consideration of those very issues. Now, we have already observed above that the issue of applicability of notification No. 121/94-CE was subsequently concluded by the Supreme Court by virtue of its decision in Hari Chand Shri Gopal (*supra*). As a result, the learned counsel for the appellant conceded that the said notification would not apply even in the appellant's case. That left only the issue with regard to penalty to be decided. We feel that since the question of penalty had been reopened in view of the remand made by the Tribunal by virtue of its order dated 1.10.1999 and penalty proceedings being generally separate and independent of the quantum proceedings, it was incumbent upon the Commissioner to have examined the evidence that was produced at the stage of remand by the appellant which would in any way alter the case for levy of penalty on the appellant. In the first round the Supreme Court had observed that the bona fides of the appellant were not established inasmuch as the appellant had failed to prove the same. The Supreme Court had come to the conclusion inasmuch as it felt that the burden to prove the defence of bona fides was on the appellant, which it had failed to discharge. In the second round when the penalty issue was being considered by the Commissioner some material/evidence was produced by the appellant in an attempt to discharge its burden and to establish its bona fides. That material/evidence has not been considered by the authorities below. Neither by the Commissioner of Central Excise nor by the Tribunal. Therefore, we are of the view that the impugned order ought to be set aside and the matter ought be remitted to the Tribunal for considering the said material while taking a view on the levy of penalty under Rule 173Q(1)(d) of the said Rules. Accordingly, we set aside the impugned order dated 17.07.2012 and remit the matter to the Tribunal to consider the question of imposition of penalty under Rule 173Q(1)(d) of the said Rules in the light of the material available on record including the material which had been furnished by the appellant before the Commissioner at the stage of remand. We make it clear that we have not expressed any opinion as to what effect such material would have on the question of imposition of penalty. That is entirely for the Tribunal to consider. All that we have stated is that the Tribunal ought to have considered the said material before it arrived at the conclusion that the penalty imposed by the Commissioner was in accordance with law. With these observations the two questions are decided in favour of the

appellant and the matter is remitted to the Tribunal as indicated above.
The appeal stands disposed of.