

(2010) 04 GUJ CK 0077
In the Gujarat High Court
Case No : Tax Appeal No. 204 of 2009

Dharmesh Silk Mills Pvt. Ltd.

APPELLANT

Vs

Union of India (UOI) and Another

RESPONDENT

Date of Decision : 15-04-2010

Acts Referred:

Central Excise Rules, 1944 — Rule 173Q(1)

Central Excises and Salt Act, 1944 — Section 11AC, 35G

Citation : (2010) 177 ECR 1 : (2010) 256 ELT 541

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

Bench : Division Bench

Advocate : S. Suriyanarayanan and Dhaval Shah, for the Appellant; R.J. Oza, for Opponent 2, for the Respondent

Final Decision : Dismissed

Judgement

H.N. Devani, J.—In this appeal u/s 35G of the Central Excise Act, 1944, the appellant has challenged the orders dated 4th April 2007 and

27th June 2008 made by the Customs, Excise & Service Tax Appellate Tribunal (the Tribunal), proposing the following questions:

[i] Whether the Tribunal was justified in law in passing the impugned order dated 4.4.2007 and rejecting the appeal when the entire proceedings

against the appellant was violative of the principles of natural justice since the appellant had not been given an opportunity to cross-examine the

panchas who had signed the panchnama?

[ii] Whether the Tribunal was right in law in rejecting the appellant's appeal only on the basis of the department's submissions and orders of the

lower authorities and without considering the appellant's pleadings and submissions?

[iii] Whether, in the facts and circumstances of the case, the finding of the Tribunal that there was clandestine removal of goods by the appellant is

perverse since it is based on no legal and admissible evidence and is arrived at by disregarding the fact that the entire case of the Revenue was

based on conjectures and surmises? Whether the impugned order of the Tribunal is violative of the principles of natural justice since it is passed

despite the fact that the advocate for the appellant could not remain present and had specifically requested for an adjournment?

[iv] Whether, in the facts and circumstances of the case, the Tribunal was justified in law in upholding imposition of composite penalty of identical

amount on the appellant?

[v] Whether, in the facts and circumstances of the case and in the light of the binding order dated 9.8.2007 of the Honourable High Court in Tax

Appeal No. 902 of 2007, the Tribunal was justified in holding that review of order dated 2.4.2007 cannot be sought in the garb of an ROM

application and even without considering whether there is any mistake apparent on record or not?

[vi] Whether, in the facts and circumstances of the case and the settled law on the subject, can the Tribunal could have concluded that imposition

of composite penalty under two different penal provisions, viz. Rule 173Q(1) of the Central Excise Rules, 1944 and Section 11AC of Central

Excise Act, 1944 is not a mistake apparent on the record?

2. The appellant is, inter alia, engaged in the manufacture of processed man made fabrics. A search came to be conducted by the Central Excise

Officers on the factory premises of the appellant on 3rd January 2000, which resulted in recovery of fifteen double set/parallel central excise

invoices from the drawer of the table of the excise clerk. The statement of Shri Bhogilal Krishnaram Lavangwala, Director of the appellant came to

be recorded on the same day whereby he admitted recovery of fifteen parallel invoices and further stated that 801 pieces of processed man-made

fabrics totally valued at Rs. 15.34 lacs approximately had been removed by them without accounting for the same in the statutory record and

without payment of central excise duty. It was also stated that the grey fabrics were received from various traders without entering the same in the

record and as such, after processing the same, they had been cleared against

cash. Statements of various traders as reflected in the invoices were also recorded. The said traders admitted having sent the grey fabrics without challan and having received the same from the appellant, after processing, without payment of duty under the cover of parallel central excise invoices. During the course of subsequent investigation, statement of Shri Lavangwala was recorded on 2nd March 2000 whereupon he again accepted the fact of clearance of goods without payment of duty. On the basis of the aforesaid, proceedings were initiated for confirmation of demand and imposition of penalty, which resulted into order dated 30th January 2004. The appellant carried the matter in appeal before Commissioner (Appeals) who vide order dated 4th February 2005, dismissed the appeal. The appellant carried the matter in further appeal before the Tribunal. The Tribunal vide the impugned order dated 2nd April 2007 reduced personal penalty on the Director from Rs. 1,00,000/- to Rs. 10,000/-, but dismissed the appeals subject to the aforesaid modification.

3. The appellant carried the matter before this Court in Tax Appeal No. 902 of 2007. Vide order dated 9th August 2007, the appeal was disposed of with liberty to the appellant to approach the Tribunal for necessary correction in the order of the Tribunal. Liberty was reserved for the appellant to file fresh appeal against the impugned order as well as the order that may be passed by the Tribunal on the application filed by the appellant in case the same came to be rejected. The appellant thereafter moved an application for rectification of mistake which came to be rejected by the impugned order dated 27th June 2008.

4. The learned advocate for the appellant has vehemently assailed both the impugned orders of the Tribunal. The order dated 27th June 2008 is assailed on the ground that the application had been treated as an application for rectification of mistake. It is contended that in view of the order passed by the High Court, the Tribunal should have re-considered the appeal on merits. On merits of the first order, it is submitted that the annexures supplied to the appellant along with the panchnama were totally different from the annexures supplied with the show cause notice.

Hence, the appellant had requested the adjudicating authority to permit the appellant to cross-examine the panchas. It is submitted that despite such specific request having been made, the appellant was not permitted to

cross-examine the panchas which has resulted into violation of the principles of natural justice.

5. Next it is submitted that the authorities have arrived at a conclusion that there was a clandestine removal solely on the basis of the statement of the director. It is urged that the other factors like use of excess electricity, procurement of raw materials, and excess wages to labourers had not been established by the revenue and as such, the Tribunal was not justified in upholding the orders passed by the lower authorities.

6. Referring to the order made by the adjudicating authority it is pointed out that composite penalty has been imposed under Rule 173Q(1) of the Central Excise Rules, 1944 read with Section 11AC of the Act to submit that it is not permissible in law to levy composite penalty in respect of two different provisions. It is, accordingly, submitted that the appeal requires admission and that the questions, as proposed or as may be deemed fit, are required to be formulated.

7. The contentions advanced by the learned advocate in relation to the subsequent order dated 27th June 2008 made on the rectification application do not merit acceptance inasmuch as there is no direction by the High Court to consider the appeal afresh. A perusal of the application made by the appellant also indicates that the same is in the nature of an application for rectification of mistake. In the circumstances, no fault can be found in the impugned order of the Tribunal in treating the same as an application for rectification of mistake and rejecting the same in view of the fact that the grounds raised in the application relate to the merits of the case.

8. Insofar as the challenge to the order dated 2nd April 2007 is concerned, a perusal of the said order indicates that the appellant had neither put in appearance on the date when the matter was fixed for hearing, nor had any request for adjournment been made. The learned advocate has invited attention to a consolidated application made in eight appeals, sent to the Tribunal on 2nd April 2007. However, there is nothing on record to indicate that the said application which appears to have been sent via facsimile on the date of hearing had in fact been brought to the notice of the Tribunal. It is in these circumstances, that the Tribunal had noted that the matter had been adjourned on several occasions and had thereafter proceeded to hear the matter.

9. On the merits of the case, the Tribunal has recorded that the Director of the appellant had in his statement recorded by the central excise authorities admitted recovery of fifteen double set/parallel central excise invoices and removal of processed man made fabrics without accounting for the same in the statutory records and without payment of central excise duty. It is further recorded that the traders whose names were reflected in the invoices, had admitted having sent the grey fabrics without challan and having received the same from the appellant, after processing, without payment of duty under the cover of parallel central excise invoices. It is also recorded that the recovery of fifteen double set/parallel central excise invoices from the drawer of the table of the excise clerk is not disputed and stands admitted by the Director in his two statements recorded during the course of investigation; that the fact of clandestine removal also stands fully corroborated by the statements of the traders; that no satisfactory explanation has been given by the appellant for existence of parallel invoice books and clearance of goods under the cover of the same without the such clearance being reflected in the statutory record. The Tribunal was of the view that the revenue's case based upon the recovery of parallel invoice book read with the two statements of the Director recorded over a period of time, read with the statements of the traders corroborate each other and prove the revenue's case beyond doubt.

10. As regards the contention regarding the annexures to the show cause notice and the panchnama being different, in the order-in-original, the adjudicating authority has recorded thus:

I observe that all these fictitious 15 invoices also bear the details of lot No. On verification of these lot No., with relevant entry in lot register, the details like No. of Psc, meters and name of the party were not tallying with the details of invoices. That is the precise reason that these 15 invoices are fictitious. To prove that the details of these 15 fictitious invoices do not tally with the details of lot register, an abstract of these 15 entries of lot register was drawn in presence of Panchas and same was given to the assessee as Annexure ""A"" of SCN along with the Xerox of these 15 invoices fictitious invoices. Therefore, it is but natural that the details of Annexure ""A"" would not tally with fictitious invoices. The party's very contention of non-tallying proves the offence.

Thus, the adjudicating authority has in the Order in Original explained the difference in the annexures to the panchnama and to the show cause notice.

11. As regards the cross-examination of the witnesses, Commissioner (Appeals) has considered the submissions and recorded that the appellant was required to give sufficient reasons before making a request to cross-examine of the witness and that it is the prerogative of the adjudicating authority whether or not to accede to such request. Moreover, a perusal of the impugned order of the Tribunal makes it amply clear that the said question does not arise there from, inasmuch as no such contention appears to have been raised before the Tribunal.

12. Thus, from the facts noted hereinabove, it is apparent that it has come on record that the Director of the appellant had admitted recovery of fifteen parallel invoices for removal of processed man-made fabrics without accounting for the same in the statutory record and without payment of central excise duty. Statements of traders whose names were reflected in the invoices, had been recorded, and they had admitted having sent the grey fabrics without challan and having received the same from the appellant, after processing, without payment of duty under the cover of parallel central excise invoices. Though the statements made by the Director have been subsequently retracted, it has been done so after two years and hence, the lower authorities have rightly not accepted the subsequent retraction. Furthermore, it is nobody's case that the various traders, whose statements were recorded, have also retracted their statements. In the face of the findings recorded by the Tribunal, after appreciation of the evidence on record, it is not possible to state that the impugned order of the Tribunal suffers from any legal infirmity so as to warrant interference. Besides, it is settled legal position that this Court would not interfere with the concurrent findings of facts based on pure appreciation of evidence, even if it were possible to take a different view unless such concurrent findings are patently perverse or based on manifest misreading of any legal provision so as to give rise to a substantial question of law. This is not the case here.

13. In the light of the aforesaid, no question of law, as proposed or otherwise, can be stated to arise out of the impugned orders of the Tribunal.

The appeal is, accordingly, dismissed with no order as to costs.