

(2011) 03 DEL CK 0094

In the Delhi High Court

Case No : CEAC No's. 05 and 14 of 2010

Golden Tobacco Limited

APPELLANT

Vs

Commissioner of Central Excise

RESPONDENT

Date of Decision : 30-03-2011

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35E, 35G

Customs Act, 1962 — Section 129E

Sick Industrial Companies (Special Provisions) Act, 1985 — Section 22

Citation : (2012) 275 ELT 375 : (2011) 5 ILR Delhi 570 : (2012) 28 STR 312

Hon'ble Judges : Dipak Misra, C.J.;Sanjiv Khanna, J

Bench : Division Bench

Advocate : Nisha Bagchi, S.K. Mongia, Anupam Srivasastava, Sujata Shirolar, Shuchi Kakkar and Sameer Nandwani, for the Appellant; Mukesh Anand, R.C.S. Bhadoria, Shailesh Tiwari and J. Singh, for the Respondent

Judgement

Sanjiv Khanna, J.—Golden Tobacco Company, formerly known as GTC Industries Limited, have filed the present appeals CEAC Nos. 5/2010 and 14/2010 u/s 35G of the Central Excise and Salt Act, 1944 (Act, for short). CEAC No. 5/2010 is directed against the order dated 15th February, 2010 passed by the Customs Excise and Service Tax Appellate Tribunal (Tribunal, for short), disposing of their application for waiver of pre-deposit, with the direction to deposit two amounts of Rs. 8,71,70,993/- and Rs. 3,07,55,877/-. The impugned order grants waiver of deposit of the cumulative penalty of Rs. 20 Crores. CEAC No. 14/2010 is directed against the order dated 19th July, 2010 passed by the Tribunal dismissing the original appeals filed by the Appellant for failure to deposit the tax amount in terms of the earlier order dated 15th February, 2010. In this manner, the two appeals are inter-connected.

2. Questions of law as formulated by the Appellant in the two appeals read as under:

CEAC 5/2010

A. Whether, in view of the specific direction of the Hon''ble Supreme Court directing that each Show Cause Notice must be limited to the case made out therein by the Revenue, it was open to the Learned Tribunal to refer to and rely upon the allegations contained in the third Show cause notice for the purpose of holding that there was no prima facie case in favour of the Appellants?

B. Whether, the requirement to pre-deposit the said amount will cause undue hardship to the Appellant as the impugned demand has been confirmed in violation of the directions of the Hon''ble Supreme Court as well as in violation of the principles of natural justice?

C. Whether, the requirement for pre-deposit ought to have been waived as the Respondent was bound by the provision of the Rehabilitation Scheme formulated by BIFR where under they had agreed not to insist on pre-deposit in respect of any appeal?

CEAC 14/2010

a) Whether the Learned Tribunal not err in dismissing the Appellant's Appeal even though the issue of pre-deposit was pending before the Hon''ble Court?

b) Whether, in view of the specific direction of the Hon''ble Supreme Court directing that each Show Cause Notice must be limited to the case made out therein by the Revenue, it was open to the Learned Tribunal to refer to and rely upon the allegations contained in the third Show cause notice for the purpose of holding that there was no prima facie case in favour of the Appellants?

c) Whether, the requirement to predeposit the said amount will cause undue hardship to the Appellant as the impugned demand has been confirmed in violation of the directions of the Hon''ble Supreme Court as well as in violation of the principles of natural justice?

d) Whether, the requirement for predeposit ought to have been waived as the Respondent was bound by the provision of the Rehabilitation Scheme formulated by BIFR where under they had agreed not to insist on pre-deposit in respect of any appeal?

3. As the order dated 19th July, 2010 challenged in Appeal No. 14/2010 is consequential and sequester to the earlier order dated 15th February 2010, we have discussed and treated CEAC No. 5/2010 as the main appeal.

4. The law on the question of pre-deposit, when the statute requires the Appellant to deposit the impugned tax or demand which is challenged in an appeal, has been lucidly and clearly expounded by the Supreme Court in their decisions in Benara Valves Ltd. and Others Vs. Commissioner of Central Excise and Another, and Indu Nissan Oxo Chemicals Ind. Ltd. Vs. Union of India (UOI) and Others, . "Undue hardship" which entitles an Appellant to seek waiver, means something, which is not warranted by the conduct of the Appellant or very much disproportionate to the said conduct. Undue hardship is caused when the

hardship is not warranted by the circumstances. Undue hardship is normally associated with economic hardship but the use of word "undue" before the word "hardship" would show that it should be excessive hardship or hardship greater than what the circumstances warrant. The other aspect which has to be kept in mind is the need and requirement to safeguard the interest of Revenue. Tribunals while disposing of applications for waiver of pre deposits have to keep in mind the said two factors.

5. In the case of Union of India (UOI) and Another Vs. Adani Exports Ltd. and Another, , the Supreme Court examined a similar provision of pre-deposit in Section 129E of the Customs Act, 1962. It was held that prima facie case is one of the aspects which has to be taken into consideration to decide whether or not to grant full or partial stay but the interest of the Revenue is important and cannot be ignored. Right to appeal is neither an absolute right nor an ingredient of natural justice, principles of which must be followed in all judicial or quasi-judicial adjudications. The right to appeal is a statutory right which can be circumscribed by the condition for the grant. (See Government of Andhra Pradesh and Others Vs. Smt. P. Laxmi Devi, .)

6. In the case of Indu Nissan (supra), reference was made to the earlier decision of the Supreme Court in Metal Box India Ltd. Vs. Commissioner of Central Excise, Mumbai, and it was held that Section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985 (SICA, for short) does not by itself or ex facie entitle a "sick company" to claim waiver of pre-deposit in the appellate proceedings on the ground of undue hardship. Payment of pre-deposit does not fall under any of the categories mentioned in Section 22 of the SICA. Learned Tribunal in the order dated 15th February, 2010 has recorded the Appellant's contention with reference to the Section 22 of the SICA and rejected the same relying upon the aforesaid decisions. It may be noted that rehabilitation scheme or the package was finalized by the BIFR by the order dated 17th December, 2002 and we are in the year 2010-11. BIFR order pertains to the past demands and cannot relate to demands, which were to arise in future. As per the written arguments filed by the Appellant, what was restructured under SICA was repayment of the confirmed duty amounts totaling Rs. 5516.82 Lakhs in installments from the financial year 2005-06 onwards. It is the case of the Appellant that Rs. 4120 Lakhs has been prayed to the Excise Department but the installment due on 30th September, 2010 was delayed in view of financial difficulty. It is pleaded by the Appellant that disputed liability of excise was outside the purview of the scheme; yet it is submitted that the Excise Department had agreed not to impose condition of pre-deposit in future for hearing of an appeal on disputed liabilities during the rehabilitation period. The Respondent has disputed the said contention and has stated that no such concession was agreed. The response of the Respondent has been placed on records as Exhibit-DD to the counter affidavit. The Respondent has placed on record a newspaper report that the Appellant has sold immovable properties in Mumbai for Rs. 591 Crore. Along with the counter affidavit the Respondent has

enclosed, the response of the Appellant, admitting that they had entered into a development transaction to develop property measuring 8 acres in Vile Parle (West), Mumbai. This contention of the Appellant relying upon SICA is accordingly rejected.

7. Examination of the grounds of appeal show that three other contentions have been raised by the Appellant. Firstly, the adjudication order dated 12th March, 2009 passed by the Commissioner of Central Excise (Adjudication), New Delhi is ex-facie contrary to law and is liable to be set aside for the reason, it is based upon the third show cause notice dated 2nd September, 1985, which was struck down by the Supreme Court in its decision dated 22nd July, 1997, reported in 1997 (94) ELT 9. Secondly, the Tribunal has failed to take into consideration the earlier order dated 9th December, 2005 in GTC Industries Ltd. v. Collector of Central Excise 2006 (198) E.L.T. 121 (Tri.- Del.), which dealt with same/ similar contentions of the Revenue and lastly, security deposit was a norm in the industry which was followed by other cigarette/tobacco manufacturers. The Supreme Court in the case of I.T.C. Ltd. Vs. Commissioner of Central Excise, New Delhi and Another, , has held that the excise duty can be charged on the basis of retail sale price.

8. The first contention is based upon the order of the Supreme Court dated 22nd July, 1997 in the first round of litigation. The operative portion of which reads as under:

15. The Tribunal found no legal difficulty in holding that the allegations contained in the third show cause notice should be looked into for the purpose of adjudication of the first and second show cause notices. We find great difficulty in upholding the Tribunal's view. As we see it, each show cause notice must be limited to the case that is made out therein by the Revenue. It is not within the jurisdiction of the Tribunal to direct otherwise; to do so is to go beyond its purely adjudicatory function.

16. The appeals are allowed to the extent a fore stated. The appeal filed by the Revenue before the Tribunal is held to be beyond time and it shall not be entertained. The hearing on remand of the first and second show cause notices shall proceed, but limited to the case made out in each on its own merits.

9. The aforesaid order was passed by the Supreme Court on a challenge made by the Appellant herein to the order of the Tribunal, reported as 1996 (86) ELT 431 , on appeals filed by the Appellant herein in respect of 3 show cause notices dated 26th August, 1983, 19th April, 1984 and 2nd September, 1985. The first and the second show cause notices were in respect of the factory at Bombay (now Mumbai) and the factory at Baroda (now Vadodra), respectively, relating to period 1978 to 1983. The third show cause notice, which related to the period 1st July, 1978 to 30th June, 1980, was in respect of factories of the Appellant at Bombay, Baroda, Universal Tobacco Hyderabad and J.K. Cigarettes, Jammu. The contention raised with regard to the third show cause notice was regarding

limitation. In paragraph 11 of the order, the Tribunal held that the proceedings arising from the third show cause notice were required to be remanded for fresh consideration on the question of limitation. The Supreme Court held that the order passed by the Central Board of Excise u/s 35E was beyond the period prescribed. Thus, the third show cause notice was struck down. The effect of the said order has been elaborately considered by the order passed by the Commissioner (Adjn.) dated 12th March, 2009. He has held that there was a search and during the course of search several documents and material were seized. This additional evidence could be relied upon while deciding and going into the merits of the first two show cause notices. This as per the Commissioner (Adjn.) is permitted and as per law. He in this connection has referred to Indore Wire Company Limited v. UOI 2006 (203) ELT 179 and decision of the Tribunal in the Appellant's own case reported as 2002 (83) ECC 442 .

10. The second and third contention of the Appellant has also been noted by the Commissioner (Adjn.) and dealt with. It may be noted that the order of the Tribunal dated 9th December, 2005 related to different show cause notices which were issued in 1986 and related to a different period. The question and issue raised was decided vide order dated 9th December, 2005 on the evidence and material on record. The contention of the Revenue is that a finding of fact based upon the evidence and material available and on record, does not constitute a binding ratio decendi. Against the said order, the Revenue has filed appeals which are pending before the Supreme Court. This order dated 9th December, 2005 of the tribunal is reported in 2006 (198) E.L.T. 121 (Tri.- Del.). In paragraph 13 of this order, the Tribunal has referred to lapses on the part of the Revenue in making enquiries and held that there was no material that there was direct or indirect flow back from the principal buyers to the Appellant. In the case of ITC Ltd. (supra) the Supreme Court was concerned with interpretation of two exemption notifications dated 1st March, 1983 and 2nd September, 1985 and the period involved was from 1983 to 1987. A question arose whether the said manufacturer had wrongly availed concessional rate of duty under the said notifications by consciously and deliberately ensuring that the actual retail sale prices of the cigarettes were higher than the declared and printed sale prices. The Supreme Court interpreted the said notifications and applied them to the facts of said case. Accordingly, it was observed that the Supreme Court need not go into other questions which were debated. The other aspects were left open.

11. With regard to the second and third contention of the Appellant, it may be appropriate to refer to the findings recorded in the order dated 12th March, 2009. For the sake of convenience, the relevant paragraphs of the said order on the question of allegations and the findings are reproduced below (paragraphs have not been reproduced in seriatim as per the order but have been appropriately placed to show the allegations and part evidence which is being relied upon by the Revenue):

I. 22.2 It is an undisputed position that after the budget of 1979, M/S GTC

reduced in the ex-factory, selling price of their most popular brand "Panama Plain" (PPL) from Rs. 89.50 to Rs. 85.60 per "M". This drastic reduction by Rs. 3.90 per "M" resulted in bringing down the assessable value from Rs. 26.58 to Rs. 18.18, resulting in reduction in the payment of excise duty. The said reduction in the price of PPL was done, not because of any genuine commercial considerations but because M/s GTC wanted to keep the price to Wholesale buyers, practically unchanged, while on, the other hand increasing a fund called EPM by Rs. 3.90 per "M". The New Deposit Scheme was devised and implemented from 6.3.79 to recover huge amounts from the W Bs at the rate of Rs. 3.90 per "M" of PPL brands supplied to them. This recovery was to take away the extra EPM generated at the hands of the W Bs by reducing the price charged to WB.

II. 23.1 ...This scheme was further extended to other brands like Blue Bird Regular (BBR), Golden Gold Flake Filter King (GGFTK), Golden Gold Flake Regular (GGFTR), and Prince Filer Regular (PFTR). The W Bs did not oppose the NDS because they did not loose any money of their own but were returning M/s GTC's money out of EPM created by lowering the invoice price of cigarettes.

III. 22. It is observed that during 1979, GTC had devised a scheme called "New Security Scheme". They contended that the scheme was devised to safeguard their interest against risks involved in selling cigarettes on credit, against unfounded claims and dictates of such customer and transporters. M/s GTC contended that this was a normal feature of their business with the customers who purchased their cigarettes on credits and this practice prevailed almost in the entire cigarette industry.

IV. 22.1 I observed that the two SC Ns alleges that the real purpose of the NDS was to ensure a continuous flow of interest on sales outstanding at the rate of 15% to 20% depending on the prevailing rate while they were required to pay only 3% towards the accumulated deposits realized by the adjustment of sale proceeds towards outstanding on deposits. It is charged that M/s GTC had not accepted the full amount of the deposit from any of the buyers. Acceptance of a minor part of the deposits, in fact, had achieved in creating an outstanding in deposits by the buyers to Assessee in subsequent period. It was further revealed that the sale proceeds were then adjusted, against such outstanding in deposits. By the adjustment of the above nature, it is observed that the Assessee had created sales outstanding for which interest at the rate of 13% to 20% has been charged from time to time. This arrangement resulted in a situation where Assessee gets a continuous flow of interest on sales outstanding at the rate of 15% to 20% depending on the prevailing rate while they were required to pay on 3% towards the accumulated deposits realized by the adjustment of sale proceeds towards outstanding on deposits. Thus, the declared purpose as disclosed to the department was not the real purpose. In fact, the security deposits were not taken from the wholesale buyers rather, only accounting jugglery was used to receive additional funds from the wholesale buyers. The

documentary evidences on record clearly establish that the NDS was operated in a fashion to receive a part of the sale proceeds in the guise of differential interest.

V. 24.1 Under the NSD Scheme, M/s GTC had devised some terms and conditions which were circulated. M/s GTC would ask the Whole sale buyers to deposit very huge amount as Security Deposit, knowing fully well that the WB would never be able to deposit the said security. It is not disputed that a format in cyclostyled form was also circulated by M/s GTC, according to which the WB would be asked to inform M/s GTC that he could not deposit the said amount and he would be willing to built up the said deposit in a phased manner by agreeing to apportion, the amounts in thousands, out of the payment made by him to M/s GTC against supply bills, towards the security deposit and to apportion the faction of the payment towards the supply account. In other words, if the WB paid an amount of Rs. 1,20,175/- against the supply bill of FTC, then M/s GTC was liberty to divert Rs. 1,20,000/- towards security deposit and to credit the balance of Rs. 175/- only, in the supply A/c against the bill amount. Thereby Rs. 1,20,000/- was shown as outstanding due to the company against the sales and it was considered as credit given to the WB. Under the NSD scheme M/s GTC would pay an interest at only 6% on the said deposit amount, artificially, built up as mentioned above and simultaneously M/s GTC would demand and recover an interest @ 18% on the amount due on the M/s GTC i.e. identical to the amount of deposit. As a result, on an artificially created deposit and a credit there would be surplus of interest, in favour of M/s GTC at the differential rate of 12%. Detailed instructions regarding the conditions and the procedure to be followed in this regard were circulated by M/s GTC and were binding on the WB. It is interesting to note that the rate of interest was unilaterally fixed and changed from time to time by M/s GTC without asking consulting the WB. The interest due to M/s GTC from WB at 18% was called "over due interest" (ODI) and it was calculated on daily basis or product method and demanded by way of a debit note every month. In this manner interest calculation report were prepared by M/s GTC and the seized records contain voluminous computerized and other interest calculation reports. A credit note for the interest to be paid by M/s GTC on the artificial deposit amount was issued quarterly to the WB.

VI. 25.1 The quantum of new security deposit prescribed in March 1979 was revised in November 1979. A comparison of the old security deposit and the New Security deposit as initially fixed in March, 1979 and as revised in November, 1979 in respect of some of the wholesale buyer, is given below:

SI No. Name of Amounts of Amounts of Amounts of the party deposit in deposit in deposit in Old Security new security new security Deposit as on Deposit as Deposits w.e.f. 30th Nov. 1979 fixed initially 17th Nov, 1979 (Rs) in March 1979

1) Coimbatore Tobacco Co. Coimbatore 24,000 2,60,000 10,24,000 2) M/s Raja V.S. Subramania Chettiar Sons Dindigul 37,500 72,000 36,38,000 3) M/s P. Nala Chakraborti Chettiar, Madras 50,000 22,75,000 50,50,000 4) M/s Mani Company, Madurai 35,000 65,000 50,35,000 5) M/s Southern 6,000 82,000

30,06,000

The above charts shows that the so called security deposits were raised manifolds without any apparent reason in the form of proportionate increase in sale volume or actual credit."

12. Some other evidence/material relied upon in the Assessment order are:

I. 23.6 Further, the letter dated 25th September 1979 (Annexure-31) written by the Regional Office of M/s GTC to their Head Office in Bombay regarding issue of debit notes revealed the true nature of the transactions. Relevant extracts of the said letter are as under:

The total quantity of Panama Plain supplied to our area for the period March 79 to Aug. 79 comes to 5.83 crores and Rs. 3.90 per M, the total debit note amount should have been for Rs. 22.76 lakhs whereas we have received debit notes for Rs. 27.79 lakhs as on 31.8.79. This reveals that you have raised excess debit notes to the tune of Rs. 5.00 lakhs."

The above evidences clearly establish that the amounts collected by M/s GTC at rates prescribed per "M" for each brand were collected as interest on sales balance created artificially by crediting the payment to security deposits instead of sales account. The interest on so called outstanding balance was not actually interest but was the part of the sale consideration and was based on quantity sold.

II. 24. The fact that M/s GTC collected money from its wholesale buyers per M specified for each brand is further corroborated by "Notes on NSD" prepared by Shri Prasad, Regional Manager of M/s GTC found in the files of M/s GTC. The relevant portion is extracted as under:

Just after 1979 Budget we started an NSD system to recover EPM surplus amounts from WB's. The system started keeping in view that we will recover at rate of Rs. 3.80 per "M" on PPL Vol. From each buyer. Later, we included BBRI and other 5 brands @ Rs. 4/- per "M" GGFTD Rs. 5/- GGFTD and Price FIR @ Rs. 5.60 per "M".

The aforesaid extracts brings out the real nature of the "New Security Deposit Scheme" (NSD). The cover for the recovery of flow back from the Whole sale buyers was sought to be provided by NSD. As already observed, the collections were made at fixed rates per "M" of some popular brands, based on the supplies made under each invoice. These collection were made in advance and they were treated as "on account" payment. This clearly establish the true nature as part of sale consideration of the so called interest on credit balance.

III. 25.3 Notes on NSD, prepared by Shri G. Prasad, Regional Manager, of M/s GTC Bombay (Annexure-36) also reveal the fraudulent nature of the scheme. It is observed that the NSD System was started, just after 1979 Budget, to recover the EPM surplus amount from Whole sale buyers which started with Rs. 3.80

(upto June'79) and Rs. 3.90 per "M" thereafter, on PPL volume, from each buyer. Later on it was extended to BBR and other 5-P brands at Rs. 4/- per "M" GGFTK at Rs. 5/- GGFTTR and Price FTR at Rs. 5.60 per "M". The New Security Deposit Amount was worked out for each buyer, keeping in view the PPL Volume initially and on the basis of total generation minus Distribution, and Advertising, Sales Promotion Expenses for each buyer. Shri G. Prasad has confirmed the above position in his statement dated. 22.08.83 (Annexure-11).

IV. 25.6 ...GTC Bombay to the Bangalore Regional Office (Annexure-45), in reply to their letter of November 10. The letter mentions "we do not see why you have written giving all the details whereas we have warned you on several occasions to be careful. Please note that henceforth such lapses will be taken seriously.

V. 30. The above evidences make it clear that the New Security Deposits were raised retrospectively to adjust to the "on account" collections made by M/s GTC based on rates per "M" fixed for certain brands. Accordingly, wherever the actual inflow at fixed rates was more than the amount of interest as per the debit note, the security amount was adjusted to revise the differential interest. M/s GTC had never returned the excess collections to the wholesale buyers but the amounts of security Deposits had been raised retrospectively so that the outstanding amounts would also go up and correspondingly, the amount of interest would increase retrospectively to enable M/s GTC to mop up the entire "generations minus allowable expenses". Similarly, where the amount of interest for a particular period was more than the actual "on account" payments received during the period, no efforts were made to recover more amounts from the wholesale buyers but the security deposit amounts were reduced so that the outstanding amounts were also reduced to that extent resulting in lower interest debit note to match the "generations minus allowable expenses". These generations were out of the sale considerations which were over and above the invoice price.

VI. 37. It is seen from the various evidences discussed above that the purpose of this NSD Scheme was nothing but to give a cover to the flow back of the amounts recovered from the Whole sale buyers at fixed rates as mentioned earlier. No credit, in fact, was given to the WB because the WB had paid the full purchase price against the bill or before receipt of the consignments. Similarly, no deposit was in fact ever built up or paid by the WB. However, to give some cover to these fictitious transactions, income tax was deducted at source by both the parties, under instructions of M/S GTC. The tax deducted at source, (TDS) by the WB, initially from his own sources was allowed to be adjusted towards expenses out of EPM, by M/S GTC. This also shows that the WB was given an understanding that WB was to lose nothing in agreeing for the NSD Scheme. It was also noticed that later on the security deposit amounts were suddenly raised very high or reduced very low from time to time, at the sole discretion of M/s GTC and the amounts of ODI flowing from WB to M/S GTC and the amount of interest flow from M/s GTC to WB, were varying from time to time. However, the

WB was not bothered about such fluctuation because he was assured that the real margin was fully protected and he had nothing to loose in the NSD Scheme. At the time of terminating the WB the amounts from the security deposit account would be set off or adjusted against the outstanding amounts in the supply accounts, which were artificially created and there would be no security deposit worth the name, to be returned to the WB.

13. In view of the aforesaid findings, it is apparent that the Commissioner (Adjn) has elaborately dealt with and has given due weight age and consideration to the entire material on record. Prima facie or ex-facie it is not possible to hold that the said findings and the reasoning are laconic, perverse or based upon mere surmises and conjectures. Of course, the said reasoning has to be examined in detail by the Tribunal, but keeping in view the parameters laid down by the Supreme Court, we do not think there is any justification and reason to interfere with the impugned order passed by the Tribunal directing the Appellant to deposit the principal amount of the tax. Tribunal has granted exemption/waiver from payment of penalty and interest. The impugned order dated 15th February, 2010, takes into consideration the relevant facts as well as the law as applicable. We do not think any question of law arises for consideration of this Court and accordingly Appeal No. 5/2010 does not have any merit and is liable to be dismissed.

14. As far as appeal No. 14/2010 is concerned, we are inclined to partially allow the said appeal. It may be noted that appeal No. 5/2010 was filed in May, 2010 and vide order dated 26th May, 2010, notice was directed to be issued. The Tribunal vide order dated 19th July 2010 dismissed the appeal of the Appellant on the ground of non-compliance of the order dated 15th February, 2010. Keeping in view the facts of the present case Question No. (a) in Appeal No. 14/2010 is answered in affirmative and it is held that Tribunal erred in dismissing the appeal of the Appellant vide order dated 19th July, 2010. Time up to 16th May, 2011 is granted to the Appellant to make deposit of the entire tax amount and in case the said deposit is made, the appeals filed by the Appellant will be heard by the Tribunal. It is made clear that no further extension of time shall be granted for deposit of tax. Observations and findings recorded above are for the disposal of the present appeals, and will have no influence and will not be binding on the tribunal when the appeals before them are heard on merits. No order as to costs.