(2013) 11 AHC CK 0108

In the Allahabad High Court

Case No : Central Excise Appeal No. 332 of 2013

Krishna Gopal Lawania APPELLANT

Vs

Commissioner of Central Excise and Service Tax RESPONDENT

Date of Decision : 25-11-2013

Acts Referred:

Citation : (2013) 42 GST 471

Hon'ble Judges : Surya Prakash Kesarwani, J;Sunil Ambwani, J

Bench : Division Bench

Advocate : Ashish Agrawal, for the Appellant; Ashok Singh, for the Respondent

Judgement

1. We have heard Shri Ashish Agrawal, learned counsel for the appellant. Shri Ashok Singh appears for the Central Excise Department. This Central Excise appeal u/s 35G of the Central Excise Act, 1944 arises out of an order passed by the Customs, Excise and Service Tax Appellate Tribunal dated 11.9.2013 by which it has while disposing of the application u/s 35F of the Central Excise Act for waiver of the pre-deposit of the Central Excise duty and penalty, directed the appellant to deposit an amount of Rs. 55 lakhs towards penalty within 12 weeks and report compliance by 10.12.2013.

2. On the basis of the investigation in which the appellant was found running packing machines a ''Pan Masala'' unit without registration with the department, a show cause notice was issued on 3.4.2012. During the course of adjudication the appellant admitted and paid excise duty of Rs. 55.50 lakhs for the period January, 2011. The Commissioner, Central Excise and Service Tax, Kanpur by an order dated 30.11.2012 found that in view of Rule 17(2) of the Pan Masala Packing Machines (Capacity Determination and Collection of Duty) rules, 2008 the deeming clause of the period for operating the machines will be applicable to the applicant with effect from 1st April of the financial year i.e. 1st April 2010 and not 1st April, 2011 as claimed by the appellant. The Tribunal found that deeming clause under rule 17(2) will be applicable, unless evidence to the contrary proves to the satisfaction of the Central excise Officers that the

machines were used in the previous financial year as well. In the present case the brand owner Shri Sunil Kumar Agarwal, Director of M/s. Astha Fragrance Pvt. Ltd. has executed agreement with the petitioner to run the unit on 1.10.2010. It was admitted that unit was running in the month of January, 2011. In the circumstances the Commissioner, Central Excise found that the financial year under consideration will begin from 1st April, 2010 and not 1st April, 2011. The findings of the Commissioner, Central Excise in his order dated 30.11.2012 is quoted as below:--

It is observed that duty liability has been admitted by the notice No. 1 since January 2011. The basic issue for decision is whether duty can be demanded from April 2010 onwards. For the sake of convenience, I take on record the provisions of rule 17(2) of the Pan Masala Rules, as amended vide Notification No. 8/2010-CE (NT) Dated 27.02.2010 which is as under:--

(2) If it is found that goods have been manufactured in or cleared from a unit which is not registered with the jurisdictional Central Excise Office, then the duty liability of such unit shall be determined on the basis of number of packing machines found available in the premises of the unit and the retail sale price of the pouches manufactured with the aid of such packing machines and unless evidence to the contrary is provided to the satisfaction of the Central Excise Officer, such machines shall be deemed to have been in operation since the 1st day of April of the financial year in which unit was found to be not registered and shall be construed as operating packing machines for the purposes of rule 7 and dealt with accordingly.

On perusal of the above provision, it emerges that in case when manufacture of the goods without obtaining registration and filing the declaration and without payment of duty is detected, duty is to be demanded from the first month of the financial year in which the machines were found available, unless evidence to the contrary is provided to the satisfaction of proper officer, such machines are deemed to be in operation since the 1st day of April of the financial year in which the unit was found to be not registered. It is an undisputed fact as the same has been admitted by the notice No. 1 in his statement dated 19.04.2011 recorded u/s 14 of the Central Excise Act, 1944, that they were indulged in unauthorized operation of the manufacture of Pan Masala since the last three months i.e. January 2011. This makes it explicit that the Pan Masala packing machines were run by them in clandestine manufacture and they were engaged in clandestine removal of excisable goods during the financial year 2010-11, which in turn proves beyond doubt that the machines were found to be not registered during the financial year 2010-11. Under such circumstances, the FFS machines detected are deemed to be in operation since the 1st day of April 2010. Accordingly I am of the view that demand of duty has been quantified correctly under the provisions of the Pan Masala Rules, as amended.

Further in view of the clandestine manufacture and clearance made by the notice No. 1 without obtaining registration u/s 6 of Central Excise Act, 1944 read with

Rule 9 of the Central Excise Rules, 2002 and without observing the provisions of Rule 6 and Rule 9 of the Pan Masala Rules with regard to filing of necessary declaration and payment of central excise duty respectively, the proposed demand of duty is liable to be confirmed and the same is recoverable from the notice No. 1. Accordingly I hold the same.

3. The Commissioner Central Excise raised a demand of central excise duty to the tune of Rs. 2,40,50,000/- recoverable u/s 11A(1) of the Central Excise Act, 1944 read with Rule 7 of the Rules of 2008. An amount of Rs. 55,50,000/- already deposited was appropriated against the demand. The Commissioner imposed penalty equivalent to the amount of duty on Shri Krishna Gopal Lawania u/s 11AC of the Act read with Rule 17 of the Rules of 2008 with an option to pay an amount of 25% of the central excise duty as per the provisions contained in the first proviso to Section 11AC of the Act. He also directed recovery of interest under Sections 11AA and 11AB of the Act and further imposed penalty of Rs. 2,40,50,000/- on Shri Sural Agarwal under Rule 26 of the Central Excise Rules, 2002.

The Tribunal considered the application for waiver of pre-deposit and has given substantial relief to the appellant. After recording findings that the appellant has deposited Rs. 55.50 lakhs, it gave waiver of the entire remaining amount of central excise duty, as reduced by Rs. 55.50 lakhs and directed the appellant to deposit a further amount of Rs. 55 lakhs towards penalty within 12 weeks.

4. Shri Ashish Agrawal, learned counsel for the appellant submits that in view of sub-rule (2) of Rule 17 the deeming provision will be applicable from 1st April, 2011 as the inspection was made on 10th April, 2011 in which unit was found running. Sub-rule (2) of Rule 17 of the Rules of 2008, by which the machines shall be deemed to have been in operation is applicable to any unit, which is not registered, from 1st April of financial year in which unit was found to be not registered. Shri Agrawal submits that substantial amount has been deposited by the appellant and that the question whether deeming provision will be applicable from 1.10.2011 or from 1.10.2010 is to be decided on merits in appeal. He submits that in view of deposit of the amount and the substantial question of law, which is still required to be adjudicated by the Tribunal, the Court may consider to waive the deposit of entire amount of penalty to avoid injustice to the appellant.

5. Prima facie we are unable to agree with the submission of Shri Agrawal that the deeming provision will be applicable from 1st April of the financial year in which unit was found to be not registered. We also do not prima facie find any fault in the reasoning given by the Tribunal that the deeming provision will be applicable unless evidence to the contrary is provided to the satisfaction of the Central Excise Officer. In the present case the appellant admitted that the agreement was executed on 1.10.2010 and the manufacture started from January, 2011 for which he also deposited admitted excise duty of Rs. 55.50 lakhs. The deeming provision as held by the Tribunal prima facie applied with

effect from 1st April, 2010 in case of unit, which is not registered and not from 1st April, 2011. In any case this question is still to be considered by the Tribunal and thus we do not express any final opinion on the issue.

6. The petitioner has been given substantial relief both in depositing the excise duty as well as the penalty and thus we do not propose to interfere in the appeal. We also find that no substantial question of law arise for consideration by the High Court.

7. The central excise appeal is dismissed. On the request of Shri Ashish Agrawal the time of deposit is extended by four weeks. The deposit will be made on or before 9th January, 2014.