
(2023) 05 CESTAT CK 0023

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Excise Appeal No. 381 Of 2012

Nitin M Dhandhukia

APPELLANT

Vs

C.C.E.-Ahmedabad-II

RESPONDENT

Date of Decision : 12-05-2023

Acts Referred:

Central Excise Rules, 2017 — Rule 209A
Central Excise Rules, 1944 — Section 209A

Citation : (2023) 05 CESTAT CK 0023

Hon'ble Judges : C.L.Mahar, Member (T)

Bench : Single Bench

Advocate : Nirav Shah, P.Ganesan

Final Decision : Allowed

Judgement

C.L.Mahar, Member (T)

1. The brief facts of the matter are that the officer of Central Excise Department visited the factory premises of M/s. Raipur Manufacturing Co. Ltd, Saraspur Gate, Ahmedabad on 13.04.1998. After scrutiny of the Central Excise records for the previous financial year 1994-1995, 1995-1996 and 1996-1997. The department formed a view that assessee namely M/s. Raipur Manufacturing Co. Ltd has not valued the captively consumed yarn properly as they have failed to include the expenses such as bonus, gratuity , interest and marketing expenses and in the cost of yarn which has been used captively. A demand show cause notice was issued on 24.09.1999 demanding Central Excise duty of Rs. 1,02,68,913/- . The penal provision under 173 Q(1) has also been invoked. The penal provision under Rule 209 A of Central Excise Rules has also been invoked against the appellant Shri. Nitin M Dhandhukia and vide order-in-original dated 31.10.2000 the penalty of Rs. 5 Lacs has been imposed on the appellant under Rule 209 A of Central Excise Rules, 1944.

2. The Learned Advocate appearing on behalf of the Appellant contended that the

issue of inclusion of expenses such as Bonus, Gratuity, Interest and Marketing Expenses has already been settled in favour of the assessee by this Tribunal in the case of M/s. Asoka Spintex reported under 2004 (171) ELT 59 (Tri. Mumbai) and in the case of M/s. Asarwa Mill reported under 2015 (319) ELT 216 (SC). It is also argued that the provision of Rule 209 A of the Central Excise Rules, 1944 cannot be invoked against the Appellant as he was working as a employee and looking after the accounts work only. He was in no way concerned with the physical movement of raw-material or finished goods.

2.1 The Learned Advocate has stated that if there is no proposal to confiscate the goods in the show cause notice, the provision of Rule 209 A OF Central Excise Rules, 1944 cannot be invoked.

2.2 The Learned Advocate also submitted that entire proceeding in the matter were ex-parte as at the time of the adjudication the appellant has left the job of M/s. Raipur Manufacturing Co. Ltd and the factory was under the closure during the period of adjudication of the case took place and therefore no intimation of personal hearing was received by the appellant and matter was decided without hearing in violation of principle of natural justice.

3. I have also heard, Shri P. Ganesan, Learned Superintendent (AR) who reiterated the findings given in the Order-In-Original.

4. After hearing both the sides, I am of the view that the proceeding further in the matter we need to look at the provision of Rule 209 A of Central Excise Rules, 1944.

"RULE 209A. Penalty for certain offences:- Any person who acquires possession of, or is in any way concerned in transporting, removing, depositing, keeping, concealing, selling or purchasing, or in any other manner deals with, any excisable goods which he knows or has reason to believe are liable to confiscation under the Act or these rules, shall be liable to a penalty not exceeding the duty on such goods or ten thousand rupees, whichever is greater."

It can be seen from the plain reading of the Rule 209 A that the person who is to be penalized under this provision needs to have physically dealt with the dutiable goods and have done certain acts which have made the subject goods liable for confiscation. He is consciously in the know of this very fact that by acquiring possession of such goods by transporting such goods and dealing with in other manners, will be render the goods liable for confiscation.

4.1 In the facts of this matter, I find that the appellant was only an accountant who was doing normal accountancy work. The issue of valuation of captively consumed yarn is a matter of the interpretation and therefore the penal provision of Rule 209 A of Central Excise Rules, 1944 cannot be invoked against the person who is only involved in maintaining the accounts of the company.

4.2 I also find that the Order-In-Original has not followed the principle of natural justice, as no personal hearing was accorded to the appellant. It is also no where

mentioned in the Order-in-Original as to what efforts had been made by the department to serve notice of personal hearing to the appellant. Thus the matter was decided against the appellant in gross violation of principle of natural justice .

4.3 I also rely upon the judgment of Hon'ble Bombay High Court in the case of CCE Vs. M/s. Bansal Steel Corporation & Ors. The relevant extract is reproduced below:-

"9. Having heard the parties, we are of the view that the only question of law which would arise for determination is whether Rule 209A of the said Rules under which the penalty has been imposed is attracted only when the person has physically dealt with the excisable goods with the knowledge or belief that the goods were liable to confiscation. Rule 209A of the said Rules reads thus :-

"Rule 209A. Penalty for certain of fences. - Any person who acquires possession of, or is in any way concerned in transporting, removing, depositing, keeping, concealing, selling or purchasing, or in any other manner deals with, any excisable goods which he knows or has reason to believe are liable to confiscation under the Act or these rules, shall be liable to a penalty not exceeding three times the value of such goods or five thousand rupees, whichever is greater."

CEXA-108-07.doc

10. The Division Bench of this Court by a judgment dated 14 September 2010 passed in The Commissioner of Central Excise Vs. M/s. Ramesh Kumar Rajendra Kumar & Co. & Anr.3, in paragraph 7 after extracting Rule 209A has held that :-

"The sine qua non for a penalty on any person under the above rule is: either he has acquired possession of any excisable goods with the knowledge or belief that the goods are liable to confiscation under the Act or Rules or he has been in any way concerned in transporting, removing, depositing, keeping, concealing, selling or purchasing or has in any other manner dealt with any excisable goods with such knowledge or belief.

Acquisition of possession of goods is, indisputably, a physical act i.e. the act which could not have been done without handling or movement of excisable goods as mentioned in the rule. The words "who acquires possession" would indicate that the person sought to be penalized under this rule has to first acquire the possession and then do the activity of transportation etc. as contained in the rule. It is, thus, clear that the physical possession of the goods is a must for doing the activity of transporting referred in rule 209A. The ratio laid down by this Court in Jayantilal Thakkar & Co. (supra) covers the issue. In the said judgment, it is held that in the given situation, if the assessee is only issuing invoices wherein there is no movement of the goods, they cannot be visited with penalty under rule 209A."

11. From the above judgment, it is clear that Rule 209A can be invoked and the penalty imposed only when the person has physically dealt with the excisable

goods with the knowledge or belief that the goods are liable for confiscation. In the present case, the allegation was of unused gate passbooks CEXA-108-07.doc being misused by the Respondents for the purpose of issuing fake/forged gate passes to assist M/s. Singhal Swaroop Ispat Ltd. There was no case of the Respondents having physically dealt with the excisable goods with the knowledge or belief that such goods were liable to confiscation. We are thus, of the view that Rule 209A cannot be invoked in the present case. We follow the view taken by the Division Bench of this Court in Judgment dated 14 September 2010 (supra) whilst interpreting Rule 209A of the said Rules. The question of law framed, thus, stands answered in favour of the Respondents and against the Appellant.

12. The Appeal is accordingly, dismissed, with no order as to costs."

4.4 I also follow the decision of this Tribunal in the case of Shri Kamdeep Marketing Pvt Ltd VS. Commissioner of C. Ex., Indore reported under 2004 (165) ELT 206 (Tribunal – Delhi).

" 3.2 What remains to be considered in all these appeals is whether the penalties imposed on the appellants are sustainable or not. The penalties are under Rule 209A which reads :

"Penalty for certain offences. - Any person who acquires possession of, or is in any way concerned in transporting, removing, depositing, keeping, concealing, selling or purchasing, or in any other manner deals with, any excisable goods which he knows or has reason to believe are liable to confiscation under the Act or these rules, shall be liable to a penalty not exceeding three times the value of such goods or five thousand rupees, whichever is greater."

The sine qua non for a penalty on any person under the above rule is that either he has acquired possession of any excisable goods with the knowledge or belief that the goods are liable to confiscation under the Central Excise Act or Rules or he has been in any way concerned in transporting, removing, depositing, keeping, concealing, selling or purchasing or has in any other manner dealt with any excisable goods with such knowledge or belief. Acquisition of possession of goods is, indisputably, a physical act, and so is each of the various ways of dealing with goods, specifically mentioned in the rule. The expression "any other manner" should be understood in accordance with the principle of ejusdem generis and would, then, mean "any other mode of physically dealing with the goods". This position has been recognized in Godrej Boyce & Mfg. Co. (supra) which has been followed in A.M. Kulkarni (supra). The decision in Ram Nath Singh (supra) is also to the same effect. Any person to be penalized under the above rule should also be shown to have been concerned in physically dealing with excisable goods with the knowledge or belief that the goods are liable to confiscation under the Act/Rules. He should have done the act with mens rea. We have held so in S.R. Foils (supra) and J. Mitra & Co. (supra). The decision in Standard Pencils (supra) is also to the same effect. In the instant case, neither of

the essential ingredients of offence under Rule 209A has been shown to exist. We have already noted [vide Para (1) of this order] the Commissioner's findings against these appellants. The findings are contained in Para 82 of the impugned order, which is reproduced below :-

"From above it is also evident that the Noticee No. 2. Shri B.K. Bhattar, Managing Director of the unit had knowingly and wilfully engaged himself in the clandestine manufacture, clearance of the goods, falsification of accounts and fraudulent availment of Modvat credit, hence a different penalty is warranted against him. The Noticee Nos. 3 and 4 are Registered Dealers. They had connived with the Noticee No. 2 and were responsible for fraudulent availment of Modvat credit by the Noticee No. 1. The Noticee Nos. 5 and 8 had dealt with the excisable goods cleared by the Noticee No. 1 without payment of duty. They had reason to believe that the goods are liable for confiscation. The Noticee Nos. 6, 7, 9 and 10 had also acted in manner of furtherance of the act of Noticee No. 2 to facilitate the Noticee No. 1 in fraudulent availment of Modvat credit, therefore all the Noticee Nos. 2 to 10 have rendered themselves liable for penal action under Rule 209A of the Central Excise Rules, 1944."

The above findings of the learned Commissioner do not come anywhere near satisfying the essential requisites for penalty under Rule 209A. There is no finding that the appellants had dealt with any excisable goods in any manner specified or contemplated under Rule 209A, let alone any finding of mens rea."

5. In view of entire above discusison, I hold that the Order-In-Original concerning the penalizing the appellant under Rule 209 A of the Central

Excise Rules, 1944 is concerned, same is without any merit and therefore, I set aside the same . Accordingly, the appeal is allowed.