

(2001) 05 AHC CK 0007

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 152 of 2000

Quality Exports and Chemicals

APPELLANT

Vs

CEGAT and Others

RESPONDENT

Date of Decision : 17-05-2001

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35C

Citation : (2001) 75 ECC 505

Hon'ble Judges : P.K. Jain, J

Bench : Single Bench

Judgement

P.K. Jain, J.—The petitioners are partnership concern engaged in manufacturing of menthol and DMO and are registered with the Central Excise Department for the same. On 12.7.95 the Central Excise Officer inspected the premises of the petitioners and found that the petitioners were clandestinely clearing the excisable goods manufactured by them and there was excess stock of finished goods which was not accounted for in their books. The department issued notices proposing a demand of Rs. 53,55,862.15 paise as Central Excise duty on clearing of goods valued at Rs. 2,71,54,179.00 without paying excise duty, proposing to demand Central Excise duty of Rs. 33.22.722.00 on the basis of assumption of abstract of menthol produced and cleared by the petitioners during June and July 1995 and further calling upon them to show cause why proposed penalty be not levied. The Adjudicating authority passed various orders whereby the goods worth Rs. 99,39,334.00 seized from the petitioners on 12.7.95 were directed to be confiscated, demand of duty of Rs. 53,55,862.00 was confirmed, penalty of Rs. 55,00,000 was imposed on the petitioners and further penalty of Rs. 10 lacs each were imposed on Shri Mukul Gupta partner of M/s. Q.E.C. and on Smt. Bandana Gupta and Smt. Veena Gupta partners of M/s. Quality Chemicals and M/s. Flavour and their units u/s 209A of the Act and a penalty of Rs. 10 lacs was imposed on one Alok Kumar Tewari proprietor of M/s. West Roadways u/s 209A. Against the orders passed by the Adjudicating authority the appeals were filed which were dismissed by Respondent No. 1, Customs Excise and Gold (Control),

Appellate Tribunal, New Delhi vide order dated 14.5.99 as contained in Annexure-4 to the writ petition. Thereafter the petitioners moved various applications u/s 35C(2) of the Central Excise Act for rectification of the mistake in the order passed under Sub-section (1). These applications were originally heard by a Bench comprising of two members. There was difference of opinion between the members who passed the orders dated 27.9.99. Thereafter the matter was referred to the President of the Tribunal who passed the order dated 25.1.2000. In view of the majority view of the Tribunal the rectification of mistake applications were rejected by the Tribunal. By filing the present writ petition the petitioners have made following prayers:

1. To issue a writ of certiorari quashing the order dated 25.1.2000 read with order dated 27.9.99 passed by the Tribunal on rectification of mistake applications and to quash the order dated 14.5.99 dismissing the appeal by the Respondent No. 1 filed by the petitioners.

2. To issue a writ of mandamus directing the Tribunal to decide the appeal afresh without pressing for the deposit of the adjudged dues or in the alternative to remand the matter to the Commissioner, Merrut for adjudication afresh.

2. The main ground on which the aforesaid prayers have been made is that the entire demands have been raised and confirmed against the petitioners on the basis of surmises and presumption; that they cleared the goods surreptitiously and clandestinely; that the G.Rs. found on 12.7.95 were not fake and the consignors and consignees' names were there on the G.Rs. and the officers did not make any enquiry from the consignors and consignees and wrongly presumed that the goods belonging to the petitioners factory were being cleared under the cover of the said G.Rs. in order to avoid payment of Central excise duty; that the finding of the authority was that total value of the excisable goods manufactured and cleared on the basis of the G.Rs. worked out at Rs. 2,71,54,179 on which Central Excise duty payable was Rs. 53,55,862, yet additional demand of Rs. 33,22,22 was made separately even though the said amount was included in the demand of Rs. 53,55,862. The goods produced and cleared after 14.6.95 to July 1995 could not be covered by the G.Rs. which were seized on 12.7.95 which pertains to the period from 14.10.93 to 14.6.95; that on the basis of assumptions that by processing mentha oil by freezing method 60-70 kg. of menthol is obtained and 30-40 kg. of D.M.O. is generated as by-product is imaginary and not based on scientific method; that a specific plea was taken that the entire demand raised in the instant case was time barred but this question has not been considered by the Tribunal while deciding the appeal and that the rectification of mistake applications have been wrongly rejected.

3. The respondents have contested the petition and in their counter-affidavit they have stated that the Tribunal while dismissing the appeals have considered various circumstances holding that the three units i.e., unit of the petitioners and two alleged Trading units are being operated by the petitioners and as a matter of fact the two Trading units were non-entity; that the team visiting the premises

of the petitioners on 12.7.95 conducted physical verification of the finished goods and raw materials and the presumptions drawn on the material found during the inspection were justified. The petitioners did not submit satisfactory reply to the show cause notice and no evidence was adduced to indicate that the goods found in the premises of the petitioners belonged to some other persons. The goods found in the premises have rightly been scribed to the petitioners. The Tribunal after examining the arguments raised by the parties rightly rejected the rectification of mistake applications as being not maintainable.

4. The petitioners have filed rejoinder affidavit reiterating almost the same facts and grounds as stated in the petition.

5. Shri A.P. Mathur, learned Counsel for the petitioners and Sri Shishir Kumar learned Counsel for the respondents have been heard.

6. So far as the rejection of the rectifications of mistake applications is concerned, I do not find any error in the order passed by the Tribunal. Section 35-C(2) provides that the appellate Tribunal may, at any time within 4 years from the date of the order with a view to rectify any mistake apparent from the record, amend any order passed by it under Sub-section (1) and shall make such amendment if the mistake is brought to its notice by the Commissioner Central Excise or the party to the appeal. In view of this provision only the mistake from, the record can be rectified. The mistake to not (that) requires meticulous examination of the record and reappraisal of the material and fresh findings on such reappraisal do not amount to mistake apparent on the record. The Tribunal rightly held that none of the submissions made seeking modification/rectification of mistakes came under the category of mistakes apparent on the face of the record. The Tribunal relied upon the recent decision of the Supreme Court reported in Dwaraka Das Vs. State of Madhya Pradesh and Another, , in which it was held that the omissions or mistakes that can be corrected in a ROM application were only of the nature of clerical or typographical errors. The Tribunal observed that the scope and meaning of the words mistake apparent from records should be glaring mistake of fact or law which should be apparent from the record. If those mistakes are to be made out by process of argument such mistakes are outside the purview of Section 35C(2). Reference in this regard may be made to the decision of Supreme Court in Commissioner of Income Tax (CNTL), Ludhiana Vs. Hero Cycles Pvt. Ltd., Ludhiana, . It would be seen that various grounds raised in the rectification of mistake applications related to factual and legal aspect which required reappraisal of evidence and this was not permissible and was not within the scope of Section 35C(2) of the Central Excise Act. Therefore, in my view, the order dated 25.1.2000 read with order dated 27.9.99 cannot be quashed.

7. Order dated 14.5.1999 dismissing the appeal of the petitioner is challenged mainly on the ground that all the questions raised in the memo of appeal have not been dealt with or decided by the Tribunal. Such questions were also raised at the time of hearing of the rectification of the mistake application which have

been enumerated in the order dated 27.9.99. It is submitted that the Tribunal did not give any finding on the plea that the entire demand was barred by limitation; that the Tribunal's order has not taken into account the fact that out of 28562 kgs. of D.M.O. and its derivatives, 42843 kgs. of Menthol could not have been obtained and, therefore, the department's allegation of suppression of production and clandestine removal was baseless; that the tribunal has failed to consider the appellant's contention about the manner of verification of stock by departmental officers inasmuch as the verification was done on the basis of assumptions instead of actual weighment; that the stocks recovered from the premises also included stocks belonging to trading units and if these had been segregated, there would have been no excess as alleged; that the principles of natural justice has been violated by the authorities inasmuch as the copies of all the statements of witnesses were not supplied to the petitioners; that as long as the goods were lying manufactured in the factory premises, no duty was payable; that the demand of Rs. 53,55,862 cannot be confirmed without deducting the demand of Rs. 33,23,722. On perusal of the order dated 14.5.99, it would be found that some of the grounds on which the order of the adjudicating authority was challenged before the appellate tribunal were not considered while disposing of the appeal. The question of limitation was specifically taken in ground No. 23 of the memo of appeal, copy of which is Annexure, A-3 to the writ petition. The tribunal has not given any finding in this regard while deciding the appeal. The petitioner had also taken one of the grounds that the estimation of the stocks found in excess was made on the basis of estimation and not actual verification, this ground and its effect was also not considered by the tribunal. Only findings which have been recorded by the Tribunal while deciding the appeal are reproduced below:

After considering the submissions made and on perusal of the records, we find that the appeals filed by the present appellants lack merit. We find that the manufacturing firm namely, QEC was established in 1990 and they were engaged in the production of menthol and DMO. It consists of three partners M/s. QEC has claimed that at the time of visit of the officers on 12.7.95 their unit was not functioning but in the adjacent premises, the distillation plants were operating on trial basis and excisable goods found in the premises were either stocks or production of M/s. QEG before its closure or goods purchased by the two trading units in the course of their business. The appellants have not denied the fact that all the 3 units namely one manufacturing unit and two trading units operating from the same premises within common boundary wall and common gate were owned by the members of the same family. The defence taken by QEC for the presence of unaccounted quantity of mentha oil and essential oil was that their production relating to the day previous to the visit of the officers on 12.7.95 could not be recorded due to absence of their employee incharge of recording the same in the RG-1 register. As regards the further quantity found in the premises, it is claimed that these were stocks belonging to the other units and the goods were in fact manufactured goods and received from the manufacturers at

Rampur and were fully duty paid. The appellants have not been able to establish this claim by proper documents. The other defiance of the QEC that their distillation plant had been sent for repairs outside and, therefore production had been stopped prior to the visit of the officers also does" not sustain in view of their not being able to give fuller details about the repairs and their failure to inform the authorities about the transfer of the machinery, as has been observed by the Commissioner. The claim of the appellants that it was for the department to show that the appellants had manufactured and cleared goods in clandestine manner does not deserve merit since it is an admitted fact that the goods were not accounted for and no evidence of duty paying character of the goods have been brought from the manufacturer at Rampur. We find that the allegation of clandestine production against QEC is clearly established in the facts and circumstances of the case. In view of this the penalty on M/s. QEC also appears to be fully justified. Having regard to the failure of the appellants to produce any duty paying documents and their failure to account the excisable goods for the period 1993-94 and 1994-95, the duty demand of Rs. 53,55,862 does not suffer from any infirmity. We confirm the same as well as penalty on Shri Mukul Kumar, partner of M/s. QEC who cannot absolve his responsibility for this deliberate act of suppression of fact. However, as regards penalties on the appellants Smt. Vandana and Smt. Veena, proprietors of M/s. Quality Chemical and M/s. Flavour and their units, we find that their active involvement in evasion of duty has not been established. We, therefore, set aside the penalty on Smt. Veena and Smt. Vandana. As regards penalty on Shri Alok proprietor of M/s. West Roadways Under Rule 209A it is seen from the statement given by him that he has admitted that he has authorized Shri Sunit (sic) Kumar to make use of GR Books belonging to West Roadways and he had not denied the misuse of the said GR Books by Shri Sunil Kumar. All the same, having regard to the overall facts and circumstances, we reduce the penalty imposed by Shri Alok Tiwari from Rs. 10 lacs to Rs. 1 lac.

8. After considering the submission, on perusal of the above findings of the Tribunal, the Court comes to the conclusion that all the grounds taken before the Tribunal in the memo of appeal as enumerated above have not been considered by the Tribunal while deciding the appeal. The Tribunal's order, therefore, cannot be sustained and it deserves to be quashed. It is deemed necessary to direct the Tribunal to decide the appeal afresh after considering each and every ground taken in the memo of appeal and pressed before the Tribunal.

9. The petition is, therefore, partly allowed. The order dated 14.5.1999 as contained in Annexure-4 to the writ petition is quashed and the matter is sent back to the Tribunal with the direction that it will decide the appeal afresh after hearing the learned Counsel for the parties and decide the same by giving finding on each ground taken in the memo of appeal and pressed before the Tribunal. The Tribunal shall decide the appeal as expeditiously as possible.

No order as to costs.