

(2001) 11 AHC CK 0100

In the Allahabad High Court

Case No : Civil Misc. Writ Petition No. 1243 of 2000

Quality Exports and Chemicals

APPELLANT

Vs

CEGAT, New Delhi

RESPONDENT

Date of Decision : 29-11-2001

Acts Referred:

Central Excise Rules, 1944 — Rule 54

Central Excises and Salt Act, 1944 — Section 11A, 14, 35F, 35K

Citation : (2002) 140 ELT 362

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

Bench : Single Bench

Advocate : A.P. Mathur, for the Appellant; Shishir Kumar, for the Respondent

Final Decision : Allowed

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 12-7-1995 the Central Excise Officers 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 to raise 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 12-7-1995 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 Sri Mukul Gupta partner of M/s. Q.F.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 appeals were filed which were dismissed by Respondent No. 1, Customs, Excise and Gold (Control), Appellate Tribunal New Delhi vide order dated 14-5-1999 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 27-9-1999. 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.

2. Earlier Writ Petition No. 152 of 2000 was filed by the petitioner with the prayer (i) to quash the order dated 25-1-2000 read with order dated 27-8-1999 passed by the Tribunal on rectification application and the order dated 14-5-1999 dismissing the appeal filed by the Petitioners, (ii) remand the matter to Tribunal to decide the appeal afresh without pressing for demand of adjudged amount or in the alternative remand the matter to the Commissioner. That writ petition was decided by this Court by judgment and order dated 17-5-2000 as contained in Annexure-A8. The petition was partly allowed and matter was sent back to the Tribunal with direction that it will decide the appeal afresh by giving finding on each ground taken in the memo of appeal and pressed before the Tribunal. Consequently, the Tribunal redecided the appeal by judgment and order dated 15-9-2000 [2001 (135) E.L.T. 430 (T)] served on petitioner on 20-10-2000.

3. Petitioner feeling aggrieved by above order dated 15-9-2000 has filed the present Writ petition. Sri A.P. Mathur, learned Counsel for the petitioner and Sri Shishir Kumar, learned Standing Counsel for the respondent have been heard. It is submitted by Sri Mathur that impugned order is not sustainable under law and is liable to be quashed.

4. First submission of Sri Mathur is that the petitioner has been from the very beginning agitating that is only surmises that the seized G. Rs. are presumed by the department to be fake as the same show wrong names and addresses of the consignors and consignees and on the strength of presumption that the concerned goods belonging to the petitioner's factory, were cleared. It is submitted that repeated requests were made that in order to substantiate this contention of the petitioner, the department ought to have made inquiries from the consignors and consignees. Such a ground was taken in the earlier writ petition also and the Court had specifically directed that the Tribunal shall decide the appeal afresh giving finding on each ground taken in the memo of appeal and pressed before the Tribunal. The petitioner's plea could be decided only after verification from the concerned parties, i.e. the consignors and consignees. This has not been done despite repeated requests, hence the petitioners on their own

contacted the consignors and consignees and filed their affidavit that the goods covering the G. Rs. were dispatched by the respective consignors and received by the respective consignees. They also obtained photostat copies of the accounts of the consignors and consignees showing that the payments made for respective consignments through bank drafts and deposited in the respective account books prior to the date of the visit of the Central Excise Officers to the factory of the petitioners and the seizure of the G. Rs. in order to prove the genuineness of the seized G. Rs. The bank drafts and the bank accounts cannot be manipulated subsequently. The Tribunal while passing the impugned order did not give proper consideration and weight to the material furnished by the petitioners and passed the order.

5. On the other hand, Sri Shishir Kumar, learned Standing Counsel has submitted that the Tribunal has considered all the submissions made before it and material on record to arrive at a finding of fact that two trading units were in entity and two alleged units are being operated by the petitioners themselves. There is substance in the submission of Sri Mathur that once a specific plea was taken that without verification from the consignors and the consignees, no finding against petitioner could be recorded and in support of the such submissions the petitioners had produced certain documents viz. copies of the bank drafts and entries in the bank accounts of the consignors and consignees, the same should have been considered by the Tribunal and due weight ought to have been given to such evidence. The finding could not have been arrived at without verification from the alleged consignors and consignees about the genuineness of the seized G. Rs.

6. It is next submitted that the petitioners in support of their contention that the goods covered by the said G. Rs. did not belong to them as admittedly the seized G. Rs. pertained to the period 14-10-1993 to 14-6-1995, and any goods cleared from the factory after 14-6-1995 cannot be dispatched through the said G. Rs. A demand of Rs. 33,22,722/- has been raised in the show cause notice on the basis of alleging that the abstract of Menthol produced and used was cleared without payment of duty by the petitioners during June and July, 1995. The Commissioner Meerut had held that payment of Rs. 33,22,722/- is included in the total amount of duty of Rs. 53,55,862/- raised on the basis of the seized G. Rs. The contention of the petitioners is that this finding of the Commissioner is evident from perusal of the order passed by the Commissioner. Anything cleared after 14-6-1995 cannot be covered by the said G. Rs. If the allegation of the department cannot be sustained in respect of goods cleared from the petitioner's factory after 14-6-1995 to July, 1995 then there is no authenticity of the allegation of the department in respect of the alleged clearance made from the petitioner's factory during the period 14-10-1993 to 14-6-1995 on the basis of the said G. Rs. in the absence of investigations made from the consignors and consignees.

7. Perusal of the orders passed by the Commissioner as well as the Tribunal, it is

quite evident that while making the seized G. Rs. a basis for raising the demand no inquiries were made from the consignors and consignees of the said G.Rs. On the other hand, there was sufficient material to substantiate the plea of the petitioners as they had obtained certificates from the consignors and consignees. The genuineness of these certificates has not been doubted and the contents of the certificates are verifiable and supported by the factum that payments were made through bank drafts prior to the date of making survey. Thus, the entire case against petitioners has been made out merely on the basis of the surmises and presumptions without substantial evidence on record and without verification as claimed by the petitioners.

8. In Para 25 of the Tribunal's order it has been observed that some of the G. Rs. resumed indicated that the trading unit purchased goods from M/s. D.D. Shah Fragrances (P) Ltd., Bombay, Besta Laboratories Vapi, Bombay, Indian Flavours and Fragrances (Pvt.) Ltd., Bombay. Submission of Sri Mathur is that the G. Rs. are only transport documents, which show the quantity of the goods, dispatched by a particular consignor to a particular consignee. Sri Mathur has submitted that these G. Rs. do not show the source of purchases. Sri Mathur has rightly contended that the Tribunal has not looked into the records and passed the order mechanically taking the allegations made in the show cause notice to be correct and without realising that in the absence of inquiries made from the Bombay based firms, no adverse inference could have been drawn against the petitioners. Thus, in my view, the department has failed to corroborate its allegations. No statement of any of the workers was recorded by the Department to substantiate the allegations of the department that 8 distillation columns were found to be working behind the premises of the petitioners and there was nobody to claim the seized goods alleged to be belonging to the trading units on the visit of the Seizing Officer. When, on the other hand, the allegation is that the distillation plant installed in the unit was found operative which itself contradicts the allegations of the department that there was nobody to claim the goods from the trading units. Sri Mathur has further pointed out that if the department's allegations to the effect that the petitioner's factory was operating from 11-7-1995, and the products were being removed clandestinely and the distillation plant was being operated by the petitioners, and not by the trading unit which was running the same on the trial basis, is taken to be correct, in that event, it was incumbent for the Seizing Officer to record statement of the workers who were operating the deep freezers, centrifugals installed in the factory and distillation plant installed in the trading unit. The statements of the labourers or workers ought to have been recorded and they ought to have been made panch witnesses by the Officers.

9. Next submission of Sri A.P. Mathur is that the plea of the limitation has not been correctly dealt with by the Tribunal. It is submitted that in terms of Section 11A of the Central Excise Act if any excise duty has not been levied or paid or has been short levied or short paid or erroneously refunded the Central Excise Officer may, within six months from the relevant date serve the notice on the

person chargeable with duty requiring him to show cause as to why he may not pay the amount specified in the notice provided that where any duty of excise has not been levied or paid or has been short levied or short paid or erroneously refunded by reason of fraud, collusion or any willful misstatement or suppression of fact or contravention of any of the provisions of the Act or of the Rules made thereunder with intent to evade payment of duty by such person or his agent, the provisions of this subsection shall have effect as if for the words six months, the words five years were substituted. Submission of Sri A.P. Mathur is that duty has been demanded for the period 14-10-1993 to 14-6-1995 whereas the show cause notice has been issued on 3-1-1996 invoking the extended period of limitation. The Tribunal in Para 29 of the impugned order has observed that no intimation was sent to the Central Excise Authorities about stoppage of production. Thus, there was suppression and mis-statement inasmuch as on the date of visit of the Officers 8 fractional distillation columns, some deep freezers and two centrifugals were found working and the claim of the appellant that it was working on behalf of the trading unit on the trial basis was not substantiated by any documentary evidence. The Tribunal held that proviso to Section 11A(1) of the Central Excise Act has rightly been invoked and demand has rightly been confirmed beyond the period of six months and is sustainable under law. Submission of Sri Mathur is that this finding of the Tribunal is contrary to the records. 8 fractional distillation columns were found installed in one of the trading units which has separate identity. As the same does not come under the purview of the Central Excise, the petitioner was under no obligation to intimate the department. It is submitted that it is on record that the distillation plant installed in the trading unit was being operated by the said unit on the trial basis as they intended to manufacture distilled products in near future. It is submitted that the trading unit has produced the receipt of purchase of the distillation plant but the same was discarded on the flimsy ground without making inquiries from the selling dealers. The Tribunal has also not taken into account that deep freezers and centrifugals were found installed in the petitioner's factory which were duly licenced and no intimation was required to operate the same. In Para 23 of the memo of appeal before the Tribunal the petitioners categorically stated that RT 12 returns, which were required to be furnished every month showing details of production, clearances, stock of inputs and final products, stood finalized after June, 1995 and hence under the circumstances it cannot be said that there was any suppression on the part of the petitioners. There is substance in this submission of the learned Counsel for the petitioners. This aspect of the matter has not been considered by the Tribunal. The finding on the question of limitation, therefore, cannot be sustained.

10. Having carefully considered the rival arguments and the material on record. I find that the department has miserably failed to make out a case against the petitioners. The writ petition, therefore, deserves to be allowed.

11. The writ petition is hereby allowed. Impugned order so far it relates to petitioner passed by the Tribunal is set aside. The petitioners shall be entitled to

refund of the money deposited in compliance of Section 35F of the Central Excise Act, which shall be refunded to the petitioners in accordance with law.

12. No order as to the costs.