
(2015) 09 AHC CK 0090

In the Allahabad High Court

Case No : Central Excise Appeal No. 22 of 2004

Sharp Carbon India

APPELLANT

Vs

Commissioner of Central Excise

RESPONDENT

Date of Decision : 04-09-2015

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11-A, 11-A(1)

Citation : (2015) 10 ADJ 681 : (2016) 331 ELT 513 : (2015) 52 GST 1117

Hon'ble Judges : Tarun Agarwala and Surya Prakash Kesarwani, JJ.

Bench : Division Bench

Advocate : Pankaj Bhatia and Gopal Verma, for the Appellant; K.C. Sinha, S.K. Misra and S.P. Kesarwani, for the Respondent

Judgement

Surya Prakash Kesarwani, J.—Heard Sri Pankaj Bhatia, learned counsel for the appellants and Sri B.K. Singh Raghuvanshi, learned senior standing counsel for the respondent.

2. Learned counsel for the appellant submits as under:

"(i) The impugned final order No. 895-897/2003-B dated 3.12.2003 passed by the Customs, Excise and Service Tax Appellate Tribunal, New Delhi, is wholly erroneous, inasmuch as, the Tribunal has not recorded any finding on invocation of the extended period of limitation under the proviso to Section 11-A of the Central Excise Act, 1944 (hereinafter referred to as the Act)

(ii) The Adjudication Order was passed without supplying copies of the relied upon or non relied upon documents and thus rules of natural justice were violated.

(iii) In the absence of any wilful suppression of fact or commission of any fraud with intent to evade payment of Central Excise Duty, extended period of limitation under the proviso to Section 11-A of the Act was not invocable.

(iv) The burden to prove the suppression of fact of clandestine manufacture was

on the Department which it failed to discharge.

(v) The order was delivered by the Tribunal after 11 months of the hearing of the case and thus the order is bad in view of the law laid down by Hon"ble Supreme Court in the Case of Anil Rai Vs. State of Bihar, ."

3. In support of his submissions learned counsel for the appellants has relied upon the judgments of Hon"ble Supreme Court in the case of Collector of Central Excise, Hyderabad Vs. Chemphar Drugs and Liniments, Hyderabad, , Collector of Central Excise Vs. H.M.M. Limited, , Aban Loyd Chiles Offshore Limited and Others Vs. Commissioner of Customs, Maharashtra, , Nestle India Ltd. Vs. Commnr. of Central Excise, Chandigarh, , Continental Foundation Joint Venture Sholding, Nathpa H.P. Vs. Commissioner of Central Excise, Chandigarh-I, , Larsen and Tubro Ltd. Vs. The Commissioner of Central Excise, Pune-II, , Joint Commissioner of Income Tax, Surat Vs. Saheli Leasing and Industries Ltd., , Chandna Impex Pvt. Limited Vs. Commissioner of Customs, New Delhi, Anil Rai Vs. State of Bihar, , Uniworth Textiles Ltd. Vs. Commissioner of Central Excise, Raipur, and Commissioner of Central Excise v. Triveni Sheet Glass Works Ltd. 2005(11) SCC 443.

4. Sri B.K.S. Raghuvarshi referred to the show cause notice, the finding recorded in the Adjudication Order as well as the findings of the Tribunal in the impugned order and submits that under the facts and circumstances the Adjudicating Authority was justified to invoke the proviso of Section 11-A of the Act.

5. He also referred to the findings recorded by the Adjudicating Authority and the Tribunal and on that basis contended that even on merit there is no error in the impugned order of the Tribunal. The findings recorded by the Adjudicating Authority and the Tribunal are findings of fact based on consideration of relevant material and evidence on record and as such they can not be interfered with in appeal.

6. He relied upon the judgments of Hon. Supreme Court in the case of Usha Rectifier Corpn. (I) Ltd. (Presently known as Usha (I) Ltd.) Vs. Commissioner of Central Excise, New Delhi, , The Commissioner of Central Excise, Visakhapatnam Vs. Mehta and Co., and a Division Bench Judgment of this Court in the case of Commissioner of Customs, and Central Excise, Ghaziabad v. M/s. Rathi Steel and Power Ltd. decided on 4.5.2015.

7. We have carefully considered the submissions of the learned counsel for the parties and perused the record.

8. Briefly stated the facts of the present case are that M/s. Carbon India was a partnership firm consisting of partners namely, Sri Deepak Agarwal, Sri Praveen Agarwal, Sri D.C. Agarwal, Smt. S. Agarwal and Smt. Krishna Agarwal. The said firm was converted into a Pvt. Ltd. Company on 1.7.1990, in the name and style of M/s. Sharpe Carbon India Pvt. Ltd. The said Firm/Company was engaged in the manufacture of various stationery items including carbon papers and Sealing

Wax etc. The Sector Officer of the respondent-Department wrote a letter dated 10.1.1990 followed by reminders dated 23.1.1990, 5.3.1990, 27.3.1990, 24.4.1990 and 14.5.1990 requesting the appellants to furnish invoices. Neither invoices were submitted nor any intimation in this regard was given by the appellants. Acting on an intelligence report that the appellants are indulged in suppression of production of goods and clandestine removal thereof under the cover of duplicate set of documents, a team of Central Excise officers of Kanpur visited the manufacturing unit of the appellants on 17.5.1990. During the course of checking goods valued at Rs. 71,502/- were found in excess of the recorded balance and were seized. Certain documents were also recovered under the resumption memo dated 17.5.1990. When the records were asked to be produced, Sri Deepak Agarwal partner and General Power of Attorney holder of the appellants stated that the records were burnt in a fire accident on 20th April 1990 and an FIR was lodged with the concerned police station and intimation to the Central Excise Department was sent under Certificate of Posting on 20th April 1990. On the basis of the evidences available on record, a detailed show cause notice dated 25.11.1992 for the year 1987-88 and 1989-90 followed by corrigendum dated 12.5.1993 was issued to the appellants, Sri Deepak Agarwal and M/s. Rohit enterprises.

9. The said show cause notice was a joint show cause notice in which an allegation with reference to certain evidence was made that M/s. Rohit Enterprises was a dummy concern. The said show cause notice was replied by the appellants. The appellants did not produce any Books of Accounts and other documents but stated that the same were burnt in a fire accident. The Adjudicating Authority considered the matter in detail and passed the order in original No. 14 dated 4.2.2000 confirming the demand of Central Excise duty of Rs. 27,32,902.02 and also imposed penalty of Rs. 2 lakhs on the appellants under Rule 173-G of the Central Excise Rules 1944 and the penalty of Rs. 2 lakhs each on Sri Deepak Agrawal and M/s. Rohit Enterprises.

10. Being aggrieved, the appellants and other co-noticees filed separate appeals before the Customs & Excise Appellate Tax Tribunal, New Delhi.

11. The appeal of the present appellants was numbered as Appeal No. 2755/2000-NB (B). By the impugned final order dated 3.12.2003 the Tribunal upheld the demand of duty except the demand on account of sale of Sealing Wax for which matter was remanded. The Tribunal reduced the penalty to Rs. 1.5 lakhs and set aside the penalty imposed on M/s. Rohit enterprises and Sri Deepak Agarwal on the ground that penalty was already imposed on the appellants partnership firm.

12. Being aggrieved the appellants have filed the present appeal.

13. In the impugned order the Tribunal has recorded following findings of fact:

"We have considered the submissions of both the sides. We observe from the perusal of the impugned order that the Commissioner has not accepted the plea

of the appellants about purchase of carbon paper from M/s. AJAY TRADERS on the ground that the consignment Notes were dated 28.11.89, 10.12.89, 20.12.89 and 11.2.90 whereas the Bills raised by Ajay Traders are dated 11.3.90 only and that their purchase order is dated 21.1.90. In view of these facts, we do not find any reason to interfere with the finding of the Adjudicating Authority that the appellants had not established the fact that they had purchased carbon papers from Ajay Traders for trading purposes. Regarding resale of damaged goods received from M/s. Silverline Steel Industries Ltd., the Commissioner has relied upon the Insurance Report according to which goods were damaged beyond use and could not have been resold and further no bill or vouchers for resale of their goods had been submitted by the appellants even if the goods were resold, the figure cannot be taken into record as it does not amount to any additional sale. We also not find any substance in the submission of the learned Advocate that the quantum of excisable goods could not be arrived at from the Balance Sheet. The Balance Sheet is an important document which contains details of the entire year and the figures mentioned therein cannot be simply brushed aside. It is for the appellants, who have prepared the Balance Sheet, to prove how the figures mentioned therein are false.

7. The Commissioner has held that Rohit Enterprises was a dummy unit as the same was started by M/s. Shailja Agarwal, wife of Praveen Agarwal, partner of the appellant, employed as an engineer with U.P. Electricity Board and executed a Joint Power of Attorney in favour of Deepak Agarwal, partner and K.K. Tripathi. Shri K.K. Tripathi, in his statement dated 3.6.91, had deposed that Rohit Enterprises did not possess any machine for the manufacture of carbon paper, no technically qualified person had been employed in that unit. The Commissioner has rightly discarded the affidavit of K.K. Tripathi which has been given to the Department after more than one year. Even in the affidavit, he had confirmed that Rohit Enterprises had taken machines from the appellant. This shows that the appellants were having the capacity to manufacture the carbon paper. The finding of the Commissioner that both Sh. K.K. Tripathi and Mrs. Shailja Agarwal had stated that finished goods and raw-materials were given back to the appellants on closure of Rohit Enterprises, nothing had been said regarding disposal of the machine, is quite significant. The Commissioner has also given a specific finding that no financial withdrawal could be made by M/s. Rohit Enterprises without the consent of one of the partners of the appellant and this has not been controverted. We, therefore, do not find any reason not to treat M/s. Rohit Enterprises as a dummy unit and the clearances shown against its name are, in fact the clearance made by the appellants.

8. Regarding Sealing Wax, we observe that the learned Advocate has shown a Sales Tax form reflect the sale of the same to Dilip Enterprises. The learned Advocate has also mentioned that the Tariff rate of duty is nil in respect of Lack falling under sub-heading 13.01.10 of the Schedule to the Central Excise Tariff Act. This aspect has to be looked into by the Adjudicating Authority the these facts were before him at he time of adjudicating the matter. Except the demand

on account of sale of sealing wax, the demand of duty upheld. Accordingly, penalty imposed on the appellants reduced to Rs. 1.5 lakh from Rs. 2 lakh to make it clear that it is open to the Adjudicating Authority to collect imposition of duty, while re-adjudicating the matter regarding sealing wax. The penalty on Rohit Enterprises is set aside as it has been held to be a dummy unit. Penalty on Sh. Deepak Agarwal is also set aside as penalty has already been imposed on the partnership firm."

14. From the facts noted above, it is clear that the respondent Department had asked the appellants to furnish invoices vide letter dated 10.1.1990, followed by reminders dated 23.1.1990, 5.3.1990, 27.3.1990, 24.4.1990 and 14.5.1990, but the appellants did not comply. On an intelligence report that the appellants are indulging in suppression of production of goods and clandestine removal thereof under the cover of duplicate set of document, a team of Central Excise Officers visited the manufacturing unit of the appellants on 17.5.1990. When they asked Sri Deepak Agarwal, the partner and General Power of Attorney Holder of the appellants to produce the records, it was stated by him that they have no records for the period prior to April 1990 which have burnt in fire accident on 20th April 1990 and the intimation to this effect was sent to the Central Excise Department under Certificate of Posting. The Central Excise Department Officers also inquired about the fire accident and raised doubt about the occurrence of fire accident and burning of Central Excise related records, since no damage was caused to furnitures etc. The Adjudicating Authority required the appellants to produce the records and Books of Accounts but they were not produced on the ground that records were burnt in fire accident.

15. Thus we find that firstly the assessee had not produced invoices etc. despite being demanded by the Central Excise Officers vide letters dated 10.1.1990, 23.1.1990, 5.3.1990, 27.3.1990, 24.4.1990 and 14.5.1990 and when the Central Excise Officers visited the manufacturing unit on 17.5.1990 then the appellant took the stand that the records have burnt in a fire accident on 20.4.1990. The inquiry made by the Central Excise Officers revealed that neither fire brigade was called in the alleged incident of fire accident nor any furniture in the premises get damaged. It is also relevant to note that although the appellants were knowing well that the Central Excise Officers are repeatedly asking certain documents to be produced yet they had not given any intimation with regard to the alleged fire accident to the concerned Central Excise Officers about the alleged fire accident except stating that the intimation was sent by letter under Certificate of Posting. All these facts and circumstances were clearly indicative of suppression of material facts by the appellants.

16. The storey developed by the appellants was disbelieved by the Adjudicating Authority holding as under:

"There are no records in this case available for the period prior to April, 1990 since all the records have been claimed to have been destroyed in a fire accident on 20.4.90. The party has contended that this was a genuine accident and due

intimation was sent to various government department including the Central Excise department on 21.04.90. They have further stated that just prior to the fire accident, the Budget day stock taking and annual stock taking had been conducted in March 1990 and nothing adverse was noticed, the department, on the other hand, has expressed doubts on this version of the party in view of non-receipt of any intimation of fire, non-submission of documents despite repeated queries and the report of the sector officer who had investigated the fire accident and found that neither was the fire brigade called nor was the furniture of the party damaged. It observe that the basic purpose of the department's investigator was to obtain the records of the party prior to April 1990 which were allegedly destroyed in the fire accident. Since the records are admittedly not available now, the case shall have to be processed on the basis of records and facts available at this stage."

17. The Tribunal has recorded the findings of fact that the appellants could not establish that they purchased carbon papers from M/s. Ajay traders. To uphold the finding of Adjudicating Authority in this regard, the Tribunal observed that the alleged bills of Ajay Traders are dated 11.3.1990 against the alleged purchase order dated 21.1.1990 whereas the alleged consignment notes were dated 28.11.1989, 10.12.1989, 20.12.1989 and 11.2.1990. The Tribunal found that the balance sheet was an important document, figures of which can not be simply brushed aside. The Tribunal also recorded a finding of fact that M/s. Rohit Enterprises was a dummy unit and the clearance shown against its name were the clearance made by the appellants.

18. The concurrent findings of fact recorded by the fact finding authorities, as briefly noted above, clearly attracted the proviso to Section 11-A(1) of the Act. Removal of goods in the name of dummy unit and unestablished purchases from one M/s. Ajay Traders for trading purposes were clearly the result of suppression of facts and fraud by the appellants and, therefore, the Adjudicating Authority has not committed any error of law to invoke the extended period of limitation under the proviso to Section 11-A(1) of the Act.

19. The judgments relied by learned counsel for the appellants do not support the case of the appellants on the facts of the present case which we have briefly noted above. In view of the above discussions, we do not find any merit in this appeal.

20. We also do not find any force in the submission of learned counsel for the appellants that the impugned order of the Tribunal is bad since it was passed after several months of the hearing. Considering the facts of the present case, we find that on merit the impugned order of the Tribunal does not suffer from any error of law or facts.

21. We further find that the Adjudicating Authority as well as the Tribunal have well considered the relevant evidences and materials with regard to the alleged trading activity. On the facts of the present case, we also find that the appellants

were afforded several opportunities of being heard and there was no breach of principles of natural justice.

22. In view of the above discussion we do not find any error of law in the impugned order of the Tribunal. The appeal fails and is hereby dismissed. The questions of law are answered accordingly.