
(2010) 12 BOM CK 0031

In the Bombay High Court

Case No : Central Excise Appeal No. 26 of 2004

The Commissioner of Central Excise and Custom

APPELLANT

Vs

Gujchem Distillers India Ltd.

RESPONDENT

Date of Decision : 16-12-2010

Acts Referred:

Central Excise Rules, 1944 — Rule 140, 173(Q)(1), 223(B), 226, 47
Central Excises and Salt Act, 1944 — Section 34

Citation : (2011) 183 ECR 195 : (2011) 270 ELT 338

Hon'ble Judges : R.M. Savant, J;J.P. Devadhar, J

Bench : Division Bench

Advocate : P.S. Jetly, for the Appellant; Sushant Murthy, instructed by y., M.R. Baya, for the Respondent

Final Decision : Allowed

Judgement

R.M. Savant, J.—The above Appeal filed by the Revenue against the judgment and Order dated 13th January 2004 passed by the Customs Excise & Service Tax Appellate Tribunal, Mumbai raises following substantial questions of law:

- i) Whether on the facts and circumstances of the case, the Tribunal was right in law in holding that the goods were not required to enter in RG I ?
- ii) Whether on the facts and circumstances of the case, the Hon''ble Tribunal is right in law in holding that since there is no confirmation from the buyer that the goods were as per specification and therefore justified in not entering in the RG I?
- iii) The Hon''ble Tribunal had failed to take into account the provisions of Rules 173 Q (1) of the Central Excise Rule, 1944?

2. The facts necessary to be cited for adjudication of the said substantial questions of law can be conveniently stated thus:

The Respondents herein are engaged in manufacture of various products, which are, excisable goods falling under Chapters 22, 28, 29, 34, 38 and 39 of the

Central Excise Tariff Act, 1985 and are also availing modvat facility under Rule 57A of the Central Excise Rules, 1944 (herein after for the brevities sake referred to as "the Rules"). In so far as the present proceedings are concerned, the goods in question are 672 bags of sodium salt. The officers of the Appellant Revenue during the routine P.B.C. Checks conducted on 12.4.1994 in the factory premises of the Respondents found that the finished stock of 24D sodium salt duly packed and in stitched condition in plastic bags with complete marking on it totally numbering 672 bags weighing 16800 kgs, valued at Rs. 11,08,800/were lying in the packing section of the auxiliary department of the factory premises of the Respondents. The officers of the Appellant on reconciliation/comparison with Central Excise statutory records i.e. RG I register found that there was balance of only 400 kgs of the said product in B.S.R. and also in RG I register, whereas the said goods comprising 672 bags weighing 16,800 kgs. were not taken into account while maintaining statutory record. On further inquiry, it was revealed that the Respondents had not declared the said stock in the declarations made by them for prebudget day and budget day. On further scrutiny of production register maintained by the said unit, it was disclosed that the above production was made during the period from 28.2.1994 to 12.04.1994. From the said facts it was revealed that the said stock had not been purposely accounted for 45 days in the RG I register.

The Officers of the Appellant, therefore, seized the unaccounted goods under the Panchanama dated 12.4.1994 in the presence of two independent panchas.

Thereafter the statements of two officers of the Respondents as well as Excise Officer on site were recorded. A show cause notice thereafter came to be issued to the Respondents on 23.9.1994 by the Assistant Collector of Central Excise, Valsad.

The gravaman of the allegations contained in the said show cause notice can be culled out as follows:

i) The said goods contained in 672 bags weighing 16800 kgs.>valued at Rs. 11,08,800/not duly accounted for in their statutory records should not be confiscated under Rules 53 and 223B of the said Rules 1994, as though the goods were totally in manufactured and packed condition duly stitched Bags ready for dispatch.

ii) basic duty of Central Excise @ 20% Adv. amounting to Rs.

2,21,760/should not be demanded and recovered from the said Assessee under Rule 9(2) of Central Excise Rules, 1944 read with proviso to Section 11A of Central Excise & Salt Act, 1944

3. The said show cause notice was adjudicated upon by the Order in Original dated 6/6/1996. The Adjudicating Authority i.e. The Deputy Commissioner (Prev), Central Excise & Customs, Surat confirmed the said show cause notice. The Adjudicating Authority recorded a finding that the goods were fully

manufactured and were in a ready for despatch condition, but the same have not been accounted for in the RGI register and the Respondents therefore had contravened the provisions of the Rules. The Adjudicating Officer further recorded a finding that the said action was indicative of the fact that there was some deliberate and ulterior intention to deal with the said goods in a manner than otherwise provided in the Central Excise & Salt Act, 1944 (for brevities sake herein after referred to as "the said Act"). The Adjudicating Authority, therefore, ordered confiscation of 672 bags. However, since the said goods were provisionally released on execution of bond for full value and since the same were not physically available for confiscation, the Adjudicating Authority imposed redemption fine of Rs. 1,11,000/under Section 34 of the said Act and directed appropriation of the same from the bank guarantee. The Adjudicating Authority confirmed the Basic Central Excise Duty amounting to Rs. 2,21,760/paid by the Respondents at the time of clearance of 672 bags. The Adjudicating Authority imposed penalty of Rs. 30,000/on the Respondents u/s 173Q(1) of the said Rules.

4. Aggrieved by the said Order in Original dated 6/6/1996, the Respondents filed an Appeal before the Commissioner (Appeals). The Commissioner (Appeals) by order dated 29/12/1999 allowed the Appeal filed by the Respondents. The Appellate Authority recorded a finding that since there was no finding recorded by the Adjudicating Officer in the Order in Original of clandestine removal and intention to evade duty, the Appellate Authority was of the view that it could not uphold the confiscation of the seized goods, however, it was of the view that the penalty can be imposed by reducing it to Rs. 2000/which is maximum under Rule 226 for no entry. Accordingly, the penalty imposed upon the Respondents was set aside.

5. Being aggrieved by the said judgment and Order dated 29.12.1999 passed by the Commissioner (Appeals), the Revenue filed Appeal being Appeal No. E/1541/00 before the Customs Excise & Service Tax Appellate Tribunal, West Zonal Bench at Mumbai (for brevities sake herein after referred to as the "CESTAT"). By judgment and Order dated 13.1.2004 the said appeal came to be dismissed by the CESTAT. The CESTAT was of the view that the revenue was required to establish beyond doubt that the goods which were not entered in the RGI register were such that the same should have been so recorded. At least a comparison between the goods found in B.S.R. and entered in RG1 and those found unaccounted for in the Auxiliary Department ought to have been made. The CESTAT also took into consideration the fact that there was no confirmation from the buyer that the goods were as per their specification and yet the Respondents failed to enter the production in the RG1 register. As there was no need to enter the said goods in the RG1 register, the question of consequent failure and penal consequences did not arise. The CESTAT further recorded a finding that the entire process of adjudication being based on assumptions and presumptions. The CESTAT upheld the order passed by the Commissioner (Appeals) in setting aside the Order in Appeal.

6. We have heard the learned Counsel appearing for the parties.

7. SUBMISSIONS ON BEHALF OF THE APPELLANT:

i) That since the goods in question i.e. 672 bags containing 24D sodium salt weighing 16800 kgs were duly packed and in stitched condition in plastic bags with complete marking on it, were not entered in the RGI register as semi finished or finished goods, the Respondents had contravened Rule 53 of the Rules;

ii) That the Tribunal failed to appreciate that non accountal of goods in the prescribed form at fully finished stage even if they were defective or damaged amounts to violation of the Rules and it was, therefore, not required to prove the attempt or otherwise of clandestine removal;

iii) That in terms of Rule 173Q(1) of the Rules, non accounted goods were liable to confiscation and in lieu of confiscation, the Assessee was liable to pay redemption;

iv) That the Tribunal erred in accepting the case of the Respondents that the goods were not approved by the buyer. The said point was never raised before the Adjudicating Authority and, therefore, could not be raised at the stage of Second Appeal as the same entails a finding to be recorded on facts;

v) That the Tribunal erred in recording a finding that since the goods were not approved by the buyer, the said goods cannot be said to be fully finished and, therefore, require no entry in the RGI Register. The Tribunal failed to appreciate that once the manufacturing takes place, the goods are required to be entered in the RGI Register.

vi) That the Tribunal erred in adjudicating the appeal on other grounds than the grounds on which the appeal was allowed by the Commissioner (Appeal). The Commissioner (Appeal) had only allowed the appeal on the ground that no finding of clandestine removal and intention to evade duty was alleged to be found.

vii) On the point of "Preparation" and "attempt" the learned Counsel for the Appellant sought to rely upon the judgment of the Apex Court in the case of State of Maharashtra Vs. Mohd. Yakub and Others, and in the case of Narayandas Bhagwandas Madhavdas v/s, State of West Bengal, reported in 1999 (110) ELT 85 (SC)

SUBMISSIONS ON BEHALF OF THE RESPONDENTS:

i) That the goods were not required to be entered in the RGI Register since they were not marketable as they were awaiting quality control test results. In support of the said submission, the Respondents placed reliance on the judgment of a learned single Judge of the Madhya Pradesh High Court in the case of Supreme Industries Ltd v/s. C.E.S.T.A.T., New Delhi, reported in 2007(214) E.L.T. 187 (MP).

ii) That there is no provision under the act which covers a case of "attempt to clandestinely remove goods" and, therefore, the Appellant could not fasten the said charge upon the Respondents;

iii) That mere non accounted goods in the RGI Register cannot lead to a conclusion that the goods were meant for clandestine removal;

iv) That mere no entry of goods in the RGI Register is a contravention of Rule 226 and not Rule 173Q.

8. In the context of the questions of law involved in the above Appeal, it would be apposite to reproduce the relevant statutory provisions. Rules 47, 53, 226, 223B and Rule 173Q(1) of the Rules are reproduced herein under:

Rule 47. Goods may be stored without payment of duty

(1) A manufacturer shall provide a storeroom or other place of storage at his premises for depositing goods made on the same premises without payment of duty;

Provided that, where the manufacturer undertakes to pay duty on all such goods and clears them immediately on completion of manufacture, the [Commissioner] may exempt him from providing storeroom or other place of storage]

(2) No duty paid goods and no goods other than excisable goods made in the factory shall be deposited in such storeroom or place.

[(2A) Notwithstanding anything contained in Sub-rule (2), the Board may, subject to such conditions and limitations as may be laid down by it, permit duty paid ice cream falling under Heading No. 21.05 of the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) to be deposited in storeroom or other place of storage]

(3) Every such storeroom or place shall be declared by the manufacturer and approved by the [Commissioner].

[(3A) Where the provisions of Chapter VII of these rules have been extended by the Central Government by notification in the Official Gazette to any excisable goods, every such storeroom or other place of storage in the premises of a factory manufacturing such goods shall be deemed to be a warehouse [registered] under Rule 140]

(4) The manufacturer shall maintain an Entry Book in the proper Form in which he shall on the same day on which goods are deposited in or removed from such storeroom or other place of storage, write and enter in the proper column the date of such deposit or removal, the full description, quantity, weight and value of the goods so deposited or removed, the number of and the marks and numbers on, the packages (if any) in which they are contained and such other particulars as the [Commissioner] may by general or special order require.

[(5) Notwithstanding anything contained in Sub-rule (1), the Central Board of

Excise and Customs may, in exceptional circumstances having regard to the nature of the goods and shortage of storage space at the premises of the manufacture where the goods are made, permit a manufacturer to store his goods in any other place outside such premises, without payment of duty subject to such conditions as it may specify; and the provisions of Sub-rules (2) to (4) shall apply to such place of storage as they apply for storage of goods in a store room or other place of storage within the premises of the manufacturer, where the goods are made]

Rule 53. Daily stock account (1) Every manufacturer shall maintain a stock account in such Form as the [Commissioner] may in any particular case or class of cases allow, and shall enter in such account daily(

- a) description of goods,
- (b) opening balance,
- (c) quantity manufactured,
- (d) quantity deposited in the storeroom, or other place of storage approved by the [Commissioner] under Rule 47,
- (e) quantity removed, after payment of duty from such storeroom or other place of storage or from the place or premises specified under Rule 9,
- (f) quantity delivered from the factory without payment of duty of export or other purposes, and
- (g) the rate of duty and the amount of duty;

Provided that a manufacturer who furnishes a declaration in the Form annexed hereto may be exempted by the Commissioner from making `nil" entries in the above account on days on which there is no production, receipt in storeroom, or clearance of excisable goods.

[Provided further that the Chief Commissioner of Central Excise may allow by, general or special order, a manufacturer, to make entries in respect of such goods, in such manner, at such interval, and subject to such conditions and limitations, as may be specified [in such order]

Rule 226. How entry books, stock accounts and warehouse registers should be maintained Where any person is required by these Rules to maintain an entry book, stock account, or warehouse register in respect of goods produced, manufactured or stored by him, he shall

- (i) at the time of making any entry, insert the date when the entry is made;
- (ii) correctly keep such book, account or register in the manner required, and shall not cancel, obliterate, or alter any entry therein, except for correction of any errors, with the sanction and in the presence of the proper officer, and shall not make any entry therein which is untrue in any particular;

(iii) keep the book, account or register at all times ready for the inspection of the officers, and shall permit any officer to inspect it and make any such minute therein or any extract there from, as the officer thinks fit, and shall, at any time, if demanded, send it to the proper officer

and any person who fails to enter the required particulars within the time prescribed in the relevant rule, or who fails to keep such book, account or register, as the case may be, or to deliver it up to the officer on demand or who obstructs or hinders such officer in making any minute therein or extract there from, or conveys away or conceals it, or destroys or tears out any leaf there from, or makes any false entry therein or fraudulently alters any entry therein, shall be liable to a penalty which may extend to two thousand rupees and all the goods of which due entry has not been made in such book [account or register] shall be liable to confiscation.

Rule 223B. Declaration of stock of goods and information regarding the serial number of the last gate pass issued at 6.00 P.M. on the day preceding the Budget day.(1) A [registered person] shall furnish to the proper officer a declaration in writing in such form and in such manner as the [Commissioner] may require regarding the stock of excisable goods remaining in a factory, warehouse or storeroom [registered] or approved for the storage of such goods, and the serial number of the last gate pass issued as remained, at six 'O' clock in the afternoon of the day preceding the day appointed for the presentation of the annual or any Supplementary Budget of the Central Government to the Parliament or for the introduction in the House of the People of any Finance Bill or any Bill for the imposition or increase of any duty.

(2) Any person who fails to furnish the declaration in the manner prescribed under Sub-rule (1) or makes any false entry therein shall be liable to a penalty which may extend to two thousand rupees and all the excisable goods in respect of which due declaration or due entry has not been made shall be liable to confiscation.]

[173Q. Confiscation and penalty (1) [Subject to the provisions contained in Section 11AC of the Act and Sub-rule (4) of Rule 57I and [Sub-rule (6) of Rule 57 U]], if any manufacturer,] producer, registered person of a warehouse or a registered dealer-

(a) removes any excisable goods in contravention of any of the provisions of these rules; or

(b) does not account for any excisable goods manufactured, produced or stored by him; or

(bb) takes [credit of duty or money] in respect of [inputs or capital goods] for being used in the manufacture of final products [or capital goods for use in the factory of the manufacturer of final product, as the case may be] wrongly or without taking reasonable steps to ensure that appropriate duty on the said

[inputs or capital goods] has been paid as indicated in the [invoice] or any other document approved under these rules evidencing the payment of excise duty or the countervailing duty, as the case may be, accompanying thereof, or takes [credit of duty or money] which he knows or which he has reason to believe, is not permissible under these rules, or does not utilise the [inputs or capital goods] in the manner provided for in these rules, or utilises [credit of duty or money] in respect of [inputs or capital goods] in contravention of any of the provisions of these rules, or does not render proper and true account of the receipt and disposal of the said [inputs or capital goods] and the [credit of duty or money] taken thereon as required under these rules, or contravenes any of the provisions contained in [Section AA or AAA or AAAA of Chapter v. of these rules]; or

(bbb) enters wilfully any wrong or incorrect particulars in invoice issued for the excisable goods dealt by him with intent to facilitate the buyer to avail of credit of the duty of excise in respect of such goods which is not permissible under these rules;] or

(c) engages in the manufacture, production or storage of any excisable goods without having applied for the [registration certificate] required u/s 6 of the Act; or

(d) contravenes any of the provisions of these rules with intent to evade payment of duty,

then, all such goods shall be liable to confiscation and the [manufacturer, producer, registered person of a warehouse or a registered dealer], as the case may be, shall be liable to a penalty not exceeding three times the value of the excisable goods in respect of which any contravention of the nature referred to in Clause (a) or [clause (b) or [clause (bb) or Clause (bbb)] or Clause (c) or Clause (d) has been committed, or five thousand rupees, whichever is greater.

[Explanation For the purposes of Clause (bb) of Sub-rule (1), a person availing of credit of duty on inputs received by him shall be deemed to have taken "reasonable steps" if he satisfies himself about the identity and address of the manufacturer or supplier, as the case may be, issuing [invoice] or any other document approved under these rules evidencing the payment of excise duty or the countervailing duty, as the case may be, either(a) from his personal knowledge; or (b) on the strength of a certificate given by a person with whose handwriting or signature he is familiar; or (c) on the strength of a certificate issued to the manufacturer or the supplier, as the case may be, by the Superintendent of Central Excise within whose jurisdiction such manufacturer has his factory or the supplier has his place of business;

Provided that where the identity and address of the manufacturer or the supplier is satisfied on the strength of a certificate, the person availing of credit of duty shall retain such certificate for production before the proper officer on demand.

9. In terms of Rule 47 (4) the manufacturer is obligated to make an entry on removal of goods from the storeroom or other place of storage, write and enter in the proper column the date of such deposit or removal, the full description, quantity, weight, and value of the goods so deposited or removed, the number of and the marks and numbers on, the packages (if any) in which they are contained and such other particulars as the Commissioner may by general or special order require.

Rule 173Q postulates, if the manufacturer does not account for any excisable goods manufactured, produced or stored by him, then all such goods shall be liable to confiscation and the manufacturer or producer, as the case may be, shall be liable to a penalty not exceeding three times the value of the excisable goods in respect of which any contravention of the nature referred to in Clause (a) or Clause (b) or Clause (bb) or Clause (bbb) or Clause (c) or Clause (d) has been committed, or five thousand rupees, whichever is greater. Under Rule 226, the penalty for no entry of the goods in the register is prescribed.

10. In the light of the above mentioned statutory provisions, the facts of the instant case would have to be considered. In the instant case, on 12.4.1994 the officers of the Appellant Revenue, during the routing PBC checks, found that the finished stock of 24D sodium salt duly packed and in stitched condition in plastic bags with complete marking on it totally numbering 672 bags weighing 16800 kgs valued at Rs. 11,08,800/were lying in the packing section of the auxiliary depart of the factory premises of the Respondents. On inspection of the records of the Respondents, it was found that the said goods were not accounted for, though they were fully manufactured, in a finished condition and ready for despatch. The Respondents had therefore contravened the aforesaid statutory provisions. It was also noticed from the records of the Respondents that the seized goods were manufactured 45 days prior to the date of seizure and, in spite of the same, they were not accounted for in the RGI register and, therefore, it was ex facie clear that though the goods under seizure were fully processed manufactured, they were not accounted for in the RGI Register, though the Respondents had ample time to do so from the date of manufacture till the time when the officers of the Appellant visited the factory premises of the Respondents. In the light of the material that was on record, the Adjudicating Authority, in the Order in Original had recorded a finding that the above mentioned rules had been contravened and that the goods were liable for confiscation. However, since the goods were provisionally released on execution of bond for full value of the seized goods and since the same were liable for confiscation, the Adjudicating Authority directed the Respondents to pay redemption fine of Rs. 1,11,000/under Section 34 of the Act.

The Adjudicating Authority also imposed a penalty of Rs. 30,000/on the Respondents which was directed to be appropriated from the Bank guarantee furnished by the party. Thereafter the First Appellate Authority i.e. the Commissioner (Appeals), on the basis that there was no finding of clandestine

removal and intention to evade duty, nor there was any allegation in that regard as also on the basis that there was a doubt created regarding the fully manufactured status of the goods; as the goods were lying in the packing section of auxiliary department, observed that the penalty imposed by the Adjudicating Authority in the Order in Original could not be confirmed.

11. As indicated above, the matter was thereafter carried to the Customs Excise & Service Tax Appellate Tribunal (CESTAT). The finding of the CESTAT as can be seen from Para 5, 6 and 7 of it is order reproduced herein under:"

5. In the order in original the Deputy Commissioner, comments that consequent to provisional release of the seized goods, the party claimed to have reprocessed the goods after obtaining permission from the Range Superintendent which is not correct since the Assistant Commissioner denied of having given any such permission. This again in my view is a very strange disposal of the claim. In any case, the Department was required to establish beyond doubt that the goods which were not entered in the RG1, were such that these should have been so recorded. At least a comparison between the goods found in B.S.R. And entered in RG1 and those found unaccounted for in the Auxiliary Department ought to have been made. There is also no confirmation from the buyer that the goods were as per their specification and yet the Respondentss failed to enter the production in the RG1. There was no need to enter the said goods in the RG1, the question of consequent failure and penal consequences do not arise.

6. The entire process of adjudication being based on assumption and presumptions, I hold that the learned Commissioner (Appeals) was right in setting aside the order in appeal.

7. Consequently, the revenue appeal fails and the same is rejected

12. As can be seen, the CESTAT observed that the Adjudicating Authority proceeded on the basis that the goods were claimed to have reprocessed by the Respondents after obtaining permission from the Range Superintendent which was according to it not factually correct, as the Assistant Commissioner concerned denied of having given any such permission and had therefore according to the CESTAT adopted a strange way of disposal of the appeal. The CESTAT has also proceeded on the basis that since there is no confirmation from the buyer that the goods were as per its specifications and yet the Respondents failed to enter the production in the RG1 and since there was no entry of the said goods in the RG1, consequent failure and penal consequences do not arise. The CESTAT observed that the entire process of adjudication being based on assumptions and presumptions and the Commissioner (Appeals) was therefore right in setting aside the order in appeal.

Thus, as can be seen, the CESTAT has disposed of the Appeal on a ground which was not urged by the Respondents before the Adjudicating Authority. Thereby the CESTAT has disposed of the Appeal on a totally new ground which was not before the Adjudicating Authority and which would entail a finding on facts. If the

CESTAT was not satisfied with the approach of the Adjudicating Authority, the least it could have done, was remanding the matter back to the Adjudicating Authority but could not have assumed to itself the jurisdiction to decide the Appeal on a ground which was not urged before the lower authorities.

13. In our view, since the CESTAT has not considered the issue from the point of contravention of the rules and especially whether the confiscation of goods for violation of Rule 173Q1 was warranted. In our view the matter is required to be remitted back to the CESTAT for a de novo consideration. It is therefore not necessary for us to go into the rival contentions as urged by the parties as also refer to the case law cited on behalf of the parties as the parties would be free to do so before the CESTAT on remand of the matter by us.

14. Resultantly, the above Appeal filed by the Revenue would have to be allowed and is accordingly accordingly. The impugned order dated 13.1.2004 is quashed and set aside and the matter is remitted back to the CESTAT for a de novo consideration in accordance with law. On such remand, the CESTAT is directed to hear and dispose of the Appeal within a period of three months from date. All the contentions are kept open. The Appeal is accordingly disposed of.