

(2016) 02 AHC CK 0249

In the Allahabad High Court

Case No : Central Excise Appeal No. 316 of 2010

Triveni Engineering and Industries Ltd.

APPELLANT

Vs

Commissioner of Central Excise

RESPONDENT

Date of Decision : 23-02-2016

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11-A, Section 11AC, Section 11-AC, Section 35-G

Customs Act, 1962 — Section 114A, Section 114-A, Section 28(1)

Citation : (2016) 3 ADJ 545 : (2016) 334 ELT 595

Hon'ble Judges : Tarun Agarwala and Vinod Kumar Misra, JJ.

Bench : Division Bench

Final Decision : Allowed

Judgement

Tarun Agarwala, J.—1. The appellant is a Company incorporated under the Indian Companies Act and is engaged in the manufacture of sugar. During the course of manufacture of sugar, molasses emerges as a by-product. This molasses is stored in steel tanks/pucca pits and are cleared on payment of duty from time to time. The storage and clearance of molasses is physically controlled by the State Excise Department as molasses is a raw material for the manufacture of potable alcohol. An Excise Inspector stays in the factory premises and undertakes frequent physical verification of the stock of molasses. This physical verification is done at random by a dip rod method. Whenever a physical verification is undertaken, the physical stock of molasses is ascertained and the same is intimated to the State Excise Department as well as to the Central Excise Department.

2. Molasses is a highly sensitive and volatile goods. The volume of molasses, which are stored in steel tanks and pucca pits, expands with the rise of temperature and there is a heavy risk of auto combustion. Consequently, the physical stock of molasses is affected due to a number of factors, namely, dip reading method which is not an accurate method and is based on estimation as it

also includes the foam level and the foam level is deducted only by estimation and, therefore, there is a margin of error. Further, volume of molasses increases with the rise in temperature, inasmuch as, carbon dioxide is generated and the carbon dioxide gas bubbles in the molasses increases the volume and consequently, shows a higher reading in the physical stock at the time of dip reading. Further, in order to ensure that the temperature of the molasses does not exceed beyond alarming limits, the steel tanks are frequently sprayed with water in order to avoid auto combustion and also to control the temperature. Not only the above, since sugar is present in the molasses due to decomposition foaming is generated in the molasses and consequently, water is sprayed on the outer surface of the steel tanks. The water so sprayed on the tanks often finds its way into the tanks through the gaps in joints and open spaces at the top. This ultimately results in the increase in the volume of molasses. Similarly, rain water also increases the volume of molasses which are kept in open pucca pits.

3. In view of the difficulty in the storage of molasses, physical verification is done from time to time and the volume of molasses is recorded. As per practice, a physical verification was done on 7.4.2006 and molasses to the tune of 5000 quintals was found in excess. Information of this excess stock was given to the U.P. Excise Department as well as to the Central Excise Department.

4. The Central Excise Department directed the appellant by letter dated 8.6.2006 to clarify the circumstances which caused an increase in the stock of the molasses. The query of the Department was duly replied, in spite of which, a show cause notice dated 26.6.2007 was issued alleging that the increase in the volume of molasses after closure of the factory indicated clandestine manufacture of sugar which was cleared without payment of duty and consequently, directed the appellant to show cause as to why duty on clandestine removal of sugar should not be imposed along with penalty, etc. The appellant filed a detailed reply to the show cause notice. The Commissioner of Central Excise passed an order in original confirming the duty demand and imposed penalty. Being aggrieved, the appellant preferred an appeal before the Tribunal, which was partly allowed.

5. The Tribunal set aside the duty demanded beyond one year prior to the issuance of the show cause notice dated 27.6.2007 holding that the extended period of limitation under Section 11-A of the Central Excise Act could not be invoked and, consequently, also set aside the imposition of penalty under Rule 25 of the Central Excise Rules, 2002 (hereinafter referred to as the Rules). The Appellate Tribunal, however, directed the appellant to pay the duty which fell within the period of limitation along with interest and further imposed penalty for this period under Section 11-AC of the Central Excise Act.

6. The appellant, being aggrieved, has filed the present appeal under Section 35-G of the Central Excise Act, which was admitted on the following substantial questions of law:

"A. Whether in facts & circumstances of present case, impugned order passed by Appellate Tribunal is liable to set aside in as much as even after holding that extended period of limitation cannot be invoked in present case, penalty under Section 11AC has been imposed ?

B. Whether the impugned order passed by Appellate Tribunal to the extent that Tribunal has directed for payment of duty along with interest is legally justified in as much as the same has been passed on the basis of assumptions, conjectures and surmises & ignoring evidence on record ?"

7. We have heard Sri Nishant Mishra, the learned counsel for the appellant and Sri Siddharth Shukla, the learned counsel for the Department.

8. We find that demand of duty is based on an assumption that declaration of excess quantity of molasses by the appellant is indicative that the appellant must have purchased and crushed the additional quantity of sugar cane and that corresponding quantity of sugar was manufactured and cleared clandestinely. This assumption for imposition of duty and penalty is based purely on surmises and conjectures and is totally unwarranted.

9. We find that the sugar industry is a completely controlled industry. Sugar cane is the basic raw material from which sugar is manufactured. Sugar cane is procured from the cane centers which are allotted by the Cane Commissioner. The sugar factory is under an obligation to purchase cane only from the cane centers and from nowhere else. The cane, which is purchased from the cane growers, is received in the factory premises which is weighed on computerized weigh bridge under the supervision of a representative of the Cane Society. The purchase and issue of sugar cane are accounted and documents are prepared on a daily basis. The sugar, which is manufactured is weighed and kept in gunny bags of one quintal each. Daily stock account is maintained under Rule 10 of the Central Excise Rules, 2002. Removal of sugar takes place under the cover of invoices issued under Rule 11 of the Central Excise Rule, 2002. The removal of sugar is accounted for in the daily stock account. The aforesaid procedure makes it apparently clear that every detail right from the stage of procurement of raw material till the stage of manufacture of sugar and molasses are maintained and clearances are also recorded in the appropriate registers.

10. The fact that temperature in the molasses tanks rises and foam is generated due to combustion of the chemicals present in the molasses is well known. It is also a known fact that if the temperatures are not controlled, it may result in auto combustion and, therefore, it is necessary to keep the temperatures at a lower level for which purpose water is sprinkled on the tanks in order to reduce the internal temperature. The sprinkling of the water at times seeps into the molasses tank and pucca pits, which results in the increase in the volume of molasses.

11. We are of the opinion, that the mere fact that the volume of molasses has increased after the closure of the factory, i.e., after the manufacturing of sugar

comes to an end cannot lead to a presumption of clandestine manufacture of sugar and consequently, removal of sugar without payment of duty nor can it lead to a presumption that a fraud has been played by the appellant.

12. We are of the opinion that there should also be clinching evidence in the nature of purchase of raw material, i.e., sugarcane, use of electricity, removal of the final product, i.e., sugar and its sale. Such evidence is missing. No investigation in this regard has been made by the Department. It is a known fact that if there was excess production in which case there would be excess consumption of electricity, which fact was not examined by the Department. Consequently, on the basis of presumption, a serious charge of clandestine manufacture and removal of sugar has been imposed, which in our opinion is wholly erroneous.

13. We are of the opinion that the charge of clandestine removal of sugar is required to be discharged by the Department by production of sufficient and tangible evidence, which in the instant case was lacking. In the absence of any evidence of extra consumption of electricity purchase of extra raw material, absence of evidence of extra goods being manufactured, we are of the opinion, that no case is made out for clandestine manufacture of sugar and its removal.

14. In *Continental Cement Company v. Union of India*, , 2014 (309)E.L.T. 411 (All.), a Division Bench of this Court held that the demand of duty on the ground of clandestine removal cannot be recovered on the basis of presumptions and assumptions. The Court held that clinching evidence is required with regard to purchase of raw materials, use of extra electricity, sale of final products and realisation of sale proceeds before imposing any demand. The Court held that in the absence of any such evidence demand cannot be imposed. The said decision is wholly applicable in the instant case.

15. Consequently, the authority including the Tribunal committed an error in imposing payment of duty on clandestine removal of sugar, which is based on surmises and conjectures and on assumption without there being any tangible evidence. The payment of duty, interest and penalty consequently cannot be sustained and are set aside. Question No. B is, accordingly, answered in favour of the appellant and against the Department.

16. In view of the aforesaid, it is not necessary for us to decide question No. A as the same has become academic. However, we are of the opinion, that once a finding has been given by the Tribunal that there has been no suppression or misstatement by the appellant under Section 11-A of the Act, consequently, imposition of penalty under Section 11-AC of the Act does not arise.

17. In *ECE Industries Limited v. Commissioner of Central Excise, New Delhi*, , 2004(164)E.L.T. 236, the Supreme Court held, that if there was no willful suppression or misstatement, the extended period under Section 11-A could not be invoked and since there was no suppression, penalty could not be imposed also. Similar view was also given by the Supreme Court in *Commissioner of*

Customs, Mumbai v. M.M.K. Jewellers, , 2008(225)E.L.T. 3 (S.C.), wherein the Supreme Court held:--

"42. Penalty under Section 114A is imposable only when the demand is confirmed under the proviso to Section 28(1) of the Act. In view of the clear findings of the Commissioner that the respondent-assessees are not guilty of suppression of facts or are guilty of collusion or misstatement and, therefore, duty cannot be imposed by invoking the extended period of limitation. When the duty itself cannot be imposed, no order of imposing the penalty under Section 114A of the Customs Act can be sustained."

18. The provision of Section 28(1) and Section 114-A of the Customs Act being *pari materia* with the provision of Section 11-A and Section 11-AC of the Act, the aforesaid decision is wholly applicable. Consequently, question No. A is also answered in favour of the appellant and against the Department.

19. In view of the aforesaid, the order in original as well as the Tribunal's order are quashed.

20. The appeal is allowed.