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IN THE HIGH COURT OF DELHI AT NEW DELHI

DECIDED ON: 01.10.2012

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CEAC 29/2012
CM APPL.14924-14926/2012

ASHUTOSH METAL INDUSTRIES Appellant
Through: Mr. S. Ganesh, Sr. Advocate with
Mr. P.C. Jain, Mr. Naveen Mullick,
Mr. Prakash Kumar and Mr. Parth Mullick,
Advocates.

versus

COMMISSIONER OF CENTRAL EXCISE Respondent
Through: Mr. Kamal Nijhawan, Sr. Standing
Counsel with Mr. Sumit Gaur, Advocate.

CORAM:

MR. JUSTICE S. RAVINDRA BHAT

MR. JUSTICE R.V. EASWAR

MR. JUSTICE S.RAVINDRA BHAT (OPEN COURT)

% ADMIT.

1. With consent of counsel for the parties, the following question of law is urged in this case: -

“Did the Tribunal fall into an error in rejecting the appellant’s Rectification Application seeking recall and modification of the previous order dated 8.4.2011 directing payment of Rs.6 Crores as pre- deposit, pending the appeal?”

2. The appellant was issued a show cause notice seeking to impose

Central Excise duty in terms of Section-3A of the Central Excise Act, 1944. The appellant denied any liability; during the course of proceedings, statements of witnesses including its employees were recorded. By order dated 30.3.2009, the show cause notice was confirmed and among others, the demand for ₹ 8,30,53,761/- (Rs. Eight crore thirty lakh fifty three thousand seven hundred sixty one) of duty and penalty of the equal amount was imposed. The appellant carried the matter in appeal to the CESTAT (Tribunal for short) which by order dated 08.04.2011 directed payment of ₹ 6 Crores as pre-deposit amount. The appellant moved an application for rectification urging *inter alia* its extreme financial hardship and also contending that the impugned Order in Original itself reveal that production capacity was 5 MT per day and by no stretch of imagination, the duty is to be exceeded the sum of ₹ 73 Lakhs. The Tribunal, however, rejected the application for rectification without any reasons.

3. Learned counsel relied upon paragraph-41 of the Order in Original and submitted that having noticed and taken into consideration the fact that the production capacity of the appellant was 75 MT per month and the total production which could have been achieved for the period in question was 600 MT, the Commissioner, could not have directed payment of an astronomical amount of ₹ 8,30,53,761/- (Rs. Eight crore thirty lakh fifty three thousand seven hundred sixty one) with like penalty. It was urged that the Order in Original completely overlooked this fact which also escaped the attention of the Tribunal. Counsel further emphasized that in the application for rectification, other facts too had been eluded to and were even urged during the hearing, with reference to financial hardship which were not taken into consideration.

4. Counsel for the Revenue, on the other hand, urged that the Commissioner while making the Order in Original did not take into consideration only the production capacity of the assessee but also took note of other evidence which appeared on the record such as details of the sales made which were contained in a pen drive seized from the premises of one Ms. Janki Sharma, an employee of the assessee. It was submitted that the statement of the said Ms. Janki Sharma was recorded in which she had mentioned that the pen drive contained the details of sales made by the assessee through *kachi parchi*. It was also urged that during the course of the proceedings, the Commissioner noticed that the assessee had purchased an excessive quantity of diesel oil (to the tune of an amount in excess to ₹ 89 Lakhs) which only meant that there was substantial production which was withheld from the assessment.

5. This Court has considered the submissions as well as the materials on record including the Order in Original and the impugned order.

The Order in Original in this regard states as follows: -

“I find that, M/s. Ashutosh Metal Industries (ATM) had a capacity to manufacture 50-75 MT per month, which would entail a production of 600 MT over the period from March 2005 to November 2005, such production required consumption of 60 K. Ltrs. of LDO. Considering these facts, I observe that M/s Ashutosh metal indulged in unaccounted production and clandestine clearance of copper ingots, bars and rods on the basis of kachhi parchies/chits, which on the directions of Shri Jatinder Kumar Aggarwal was fed into computer by Smt. Janki Sharma and a ledger was created. Some of the parchies/chits were recovered from Smt. Janki Sharma during the period of search and was kept in the made up file so prepared (containing page number from 1 to 56) on the basis of such data entry. The pen drive, which was given by Shri Aggarwal to Smt. Janki Sharma as stated by her, was used to save the data. The pen

drive was seized during the search of the residence of Smt. Janki Sharma. The data generated from the pen drive pertained to account of sale of 'ATM' and one 'SHIVA' indicating sale of goods to the tune of Rs.18,22,35,303/- and Rs.35,02,87,889/- respectively for a specific period. As per the statement of Smt. Janki Sharma, all the sales were unaccounted and clandestine sale recorded in the account of 'SHIVA' were sale by M/s. ATM only, as ATM was abbreviated form of M/s Ashutosh Metal. The above facts were also corroborated by the statements of Shri R.S. Aggarwal and Shri Manish Sethi, who prepared such kachhi parchies at different times on directions of Shri Jatinder Kumar Aggarwal.

41.1 Shri Jatinder Kumar Aggarwal (Proprietor of M/s. ATM), however, in his statement denied the above facts. He states that M/s Ashutosh Metal has got no connection with ATM and Shiva account generated from the pen drive; they do not prepare any kachhi parchi and the kachhi parchies recovered from Smt. Janki Sharma has got nothing to do with him; Smt. Janki Sharma never worked with Ashutosh Metal and he has never given her any kachhi parchi for data feeding, neither he has given any pen drive. He has further stated that he did not agree that he has given directions to prepare Kachhi parchi to R.S. Aggarwal or Shri Manish Sethi. He thus disowned the documents and contents in the documents the made up file and printouts), being in any way related to M/s Ashutosh Metal Industries or him."

6. The Commissioner was considerably influenced by the fact that Ms. Janki Sharma was concededly an employee of the appellant and that the explanation given by the proprietor of the assessee could not be accepted. In addition, the Commissioner took note of some of the other documents on the record such as statements recorded by other employees of the company. At the same time, the Commissioner, even after noticing the production capacity of the assessee did not further verify other objective facts such as the purchase of the goods manufactured and clandestinely removed from the

unit. Similarly, there is no discussion as to the linking of the substantial amount spent towards the diesel oil and the corresponding likely consumption of the diesel oil for the production by the assessee's unit.

7. *Prima facie*, Section-3A imposes liability on the basis of the assumptions which can be drawn. However, the assumptions have to be linked to or based upon some objective materials based upon the available evidence. No doubt, the data in the pen drive indicated certain figures and the person from whom it was seized suggested that these reflected the sales figures of the assessee. At the same time, the Commissioner was also alive to the fact that the production capacity of the Unit was 75 MT per month which would have worked out to maximum of 600 MT. In the eventuality, the duty liability would have been in the range of ₹ 74-75 Lakhs. Then there is absolutely no discussion on this aspect in the Order in Original. Though this appears to have been urged before the Tribunal, the latter did not give sufficient weightage to this aspect and appears to have adopted a rough and ready rule while directing pre-deposit of ₹ 6 Crores which it refused to alter when the rectification application was made. This Court has also considered the rectification application which specifically states in paragraph-5.1 as follows: -

“5.1 Applicant further submits that during the course of arguments, through an oversight, pleading on financial hardship likely to be caused by predeposit could not be made, although this pleading was taken in the said stay application, as follows: -

“7. Appellant also pleads financial hardship.”

8. The Tribunal's order does not reflect any discussion on the relative hardship which would be visited upon the appellant in the light the latter is constrained to make the deposit.

9. Having regard to the above factors, this Court is of the opinion that the directions of the Tribunal are required to be altered. Instead of ₹ 6 Crores, the appellant shall deposit a sum of ₹ 1.5 Crores. The balance of the demand shall be secured through bond to the satisfaction of the excise authorities. The appellant is permitted to make the deposit of ₹ 1.5 Crores in two instalments provided the entire amount is deposited on or before 31.12.2012.

10. The Appeal is allowed to the above extent. All the pending applications are also disposed of.

Order *dasti*.

S. RAVINDRA BHAT
(JUDGE)

R.V.EASWAR
(JUDGE)

OCTOBER 01, 2012
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