IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

CENTRAL EXCISE APPEAL NO. 71 OF 2014

M/s. Rathi Re-Rolling Mills and Ors. } Appellants
versus
The Commissioner of Central Excise } Respondent

Mr. Prakash Shah with Mr. Jas Sanghavi i/b.M/s. PDS Legal for the Appellants.

Mr. Pradeep S. Jetly for the Respondents.

CORAM :- S. C. DHARMADHIKARI &
SUNIL P. DESHMUKH, JJ.

DATED :- FEBRUARY 25, 2015

P.C. :-

This Appeal of the Assessee challenges the order passed by the Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench at Mumbai.

2) By the impugned order dated 24th July, 2013, the Tribunal has affirmed the findings in the order of the First Appellate Authority, namely, the Commissioner (Appeals). The Commissioner (Appeals) confirmed the findings in the order-in-original, both, on duty liability and penalty.

3) Mr. Shah would submit that this Appeal raises substantial questions of law and those formulated at pages 7 and 8 of the Appeal

paper book. He would submit that the Tribunal's order is unjust and unfair, because it contains no reasons. Here, a partnership firm has been charged with not paying total duty, though shortages have been admitted. Mr. Shah submits that the Tribunal has proceeded on the footing that because the shortages are admitted, there is no adjudication required and the liability is undisputed. Therefore, it proceeded to confirm the demand.

4) Mr. Shah alternatively submits that given the admission of shortages, there cannot be penalties in law on both, the partnership firm and the partners. Similarly, if penalties have to be imposed on the firm alone, there is a requirement in law of recording a satisfaction that it was an intentional or deliberate act, which resulted in evasion of duty. He has invited our attention to the finding of the Commissioner (Appeals) and particularly in para 10 of his order to contend that the penalties could not have been imposed in view of the same. Therefore, he submits that the Appeal be admitted.

5) On the other hand, Mr. Jetly would submit that the concurrent findings of fact are not perverse not vitiated by any error of law apparent on the face of the record. He therefore submits that the Appeal be dismissed.

6) After hearing both sides and perusing the orders under challenge, we are of the view that the Appeal does not require admission on the finding with regard to shortage of duty paid inputs, on which credit was availed. The Assessee is engaged in the business of manufacture of MS Square, Bars and MS Ingots falling under Chapter 72 of the Central Excise Tariff. On 17th June, 1994, the unit of the Assessee was visited by officers of the Revenue and on physical stock taking, shortage of 810.076 metric ton ingots was found. In respect of finished products, there was a shortage of 439.932 metric tonne. The partners of the Appellant/Assessee could not explain the shortage of raw material as well as the finished products and admitted a short levy. There was a deposit of a sum of Rs.11,14,868/-.

7) In the circumstances, the finding of fact and consistent with the admission as also the figures of physical stock taking do not suffer from any perversity or any error of law apparent on the face of the record. The findings of fact are consistent with the factual materials.

8) The Appeal therefore does not raise any substantial question of law insofar as the duty liability is concerned.

9) However, on the question of penalty, we have found that in the order of the Commissioner (Appeals) and particularly in para 10 thereof, there is a finding and that finding reads as under:-

> "10. As appellant stated that the department has not established the fact that the goods have been actually removed by the appellant from the factory premises and as such there was no such papers or register found with the excise department to prove their bonafide case against the case and the department's contention on assumption and presumptions. I find from the records that no proper explanation given by the appellant. The reason given by the appellant is burning loss to the extent of 4.7% to 10%. But in factual the losses of not only in inputs but also found in finished goods in huge quantity. The appellant stated that the department have not found any documentary evidence like paper, register found in the premises of the appellant. This shows that the appellant have used proper mind in consultation with the partners of the firm and with intention of clandestine removal of inputs as well as finished goods and during the recording of their statements they have passed the responsibility to each others. During the course of hearing the appellant promised to submit the balance sheet of the firm with the responsibility of the each partners showing the role of each partner in the firm, but till the date they have failed to produce the same. As per C. Ex. Rules, 1944 certain records have been prescribed like RG-1 Register, RG-23A-I, RT 12s which are required to be maintained by each assessee. It was noticed by the preventive officers that as per books of account/records the inputs and finished goods was not tallied. The physical shortage of the inputs and finished goods can not be ignored and this was admitted by the appellants and they have paid the duty of Rs.11,14,868/- in RG-2 All vide entry No. 284/24.6.94 and further promised to pay the remaining amount and requested to waive the SCN and for lenient action vide their letter dated 21.6.1994. This is more than sufficient to establish the suppression of fact. I have also found that the appellant have not produced any documentary evidence before me. The appellant further stated in the grounds of appeal that their submission vide letter dated 30.3.2000 has not been considered by the adjudicating authority is also not acceptable. It is seen from the OIO No. 45/2000 the adjudicating authority has taken care of their submission made vide letter dated 30.3.2000."

10) The order-in-original proceeds to impose penalties and the penalties have been imposed in terms of Rule 173Q of the Central Excise Rules, 1944 of two lacs on the Assessee. Insofar as the partners are concerned, under Rule 209A of the Central Excise Rules, 1944,

penalty of Rs. 25,000/- each on all partners has been imposed. We do not think that the Commissioner was justified in confirming imposition of penalties vide the order-in-original. The Tribunal, as a last fact finding authority, was expected to apply its mind independently to the issue as to whether imposition of penalties could be justified with the above finding recorded by the Commissioner (Appeals) and particularly can separate penalty be imposed on the firm and the partners, in law. In the circumstances and the matter being old, without entering into the larger controversy, we are of the view that the Appeal raises substantial questions of law. It is admitted on the following substantial questions of law:

> "(i) Whether in the facts and circumstances of the case, the Appellate Tribunal was right in sustaining the penalty imposed on the Appellant No. 1 under erstwhile Rule 173Q of the Central Excise Rules, 1944?
>
> (ii) Whether in the facts and circumstances of the case, the Appellate Tribunal was right in sustaining the penalty imposed on the Appellant No. 2 to 4 under erstwhile Rule 209A of the Central Excise Rules, 1944?
>
> (iii) Whether in the facts and circumstances of the case, the Appellate Tribunal was justified in sustaining the penalties solely based on the findings recorded by the Respondents and without recording its own findings?"

11) In view of the above discussion and reasoning by us, we are of the view that the part of the order passed by the adjudicating authority and confirmed in Appeal by the Commissioner (Appeals) and the Tribunal cannot be sustained. While confirming the duty liability,

we set aside the directions to pay the penalties. The Appeal is allowed in part. There would no order as to costs.

(SUNIL P. DESHMUKH, J.) **(S.C.DHARMADHIKARI, J.)**