IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 18.12.2015

CORAM:

THE HONOURABLE MR.JUSTICE R.MAHADEVAN

WP.No.22239 of 2002

M/s.Sri Gajanand Coaters
Hyderabad 500252 Petitioner

Vs

1.Customs and Central Excise Settlement Commission
Additional Bench, Narmada Block, II Floor
Custom House, Chennai-1

2.The Commissioner of Central Excise
Commissionerate II, Hydrabad Respondents

Prayer:- This Writ Petition is filed under Article 226 of the Constitution of India to issue a Writ of Certiorarified Mandamus, to call for the records of the 1st Respondent in Final Order No.6/2002(Ce), dated 13.5.2002 to quash the same', and to direct the 1st Respondent to extend the benefit of SSI Notification for the payment of AED also and to apply the provisions under Section 4(4)(d)(ii) of the Central Excise Act, 1944, while computing the duty demand.

For Petitioner : Mr.T.Ramesh

For Respondent : Mr.Rajanish Pathiyil,
Standing Counsel

ORDER

The challenge in this Writ Petition is to the order of the 1st Respondent, dated 13.5.2002, in and by which, a demand was made for differential duty including basic excise duty and additional excise duty.

2. The case of the Petitioner is that the Petitioner is a small scale unit, engaged in the manufacture of book binding cloth, falling under the Tariff Heading 5901.10 to the Central Excise Tariff Act, 1985 and the Petitioner has been availing the benefit of the SSI Notification No.1/93, dated 28.2.1993. For the periods from 1995-1996 to 1999-2000, the goods cleared by SSI Unit are exempted from excise duty upto the specified value of Rs.30 lakhs and Rs.50 lakhs, over and above which, the

concessional rate of duty has to be paid. On intelligence, the Department conducted an investigation and on verification of the records, issued a show cause notice dated 29.6.2000, alleging that the Petitioner clandestinely removed certain quantities of final product during the period from 1995-1996 to 1999-2000 and demanding the differential duty of Rs.17,92,650/-. The Petitioner filed a written submission, dated 11.3.2002, before the 1st Respondent. Thereafter, the 1st Respondent passed the impugned order, dated 13.5.2002, determining the total liability of differential duty to the tune of Rs.14,13,921/- (Rs.7,88,627 as basic excise duty and Rs.6,25,294/- as additional excise duty). Hence, this Writ Petition has been filed.

3. The 2nd Respondent filed a counter affidavit, wherein it is averred as follows:-

a. The goods manufactured by the Petitioner attracts basic excise duty under Section 3 of the Central Excise Act, 1944 and additional excise duty under Section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957. The Petitioner has been availing the benefits of the SSI Notification issued. On getting intelligence, inspection was conducted by the Department and after recovering various records and evidence, it was found that the transaction of the Petitioner as well as the whole sale distributors, have been clandestinely done without payment of duty. Hence, the goods were detained and the Petitioner did not apply for the release of the goods. The firm, to which it was shown as if sales were effected, did not exist in their respective addresses. The Petitioner had also not accounted for various transactions purchased from the third parties. For the period from 1996-1997 to 1999-2000, the Petitioner had availed MODVAT facility under the Rule 57A of the Central Excise Rules, 1944 and availed the benefit of the said SSI Notification. The Petitioner had not discharged the basic excise duty though they availed the benefit of exemption of SSI Exemption notification. It was found based on the records available that the total duty evasion found was for the period from 1995-1996 to 1999-2000. Hence, the 2nd Respondent issued a show cause notice dated 29.6.2000, calling upon the Petitioner to show cause as to why the differential duty of Rs.17,92,650.25 should not be levied with interest and penalty. Without submitting a reply to the show cause notice, the Petitioner approached the 1st Respondent for settlement.

b. The Petitioner before the 1st Respondent admitted the entire quantity indicated in the show cause notice as clandestine clearances along with the values adopted by the Department. As per Section 32M of the Act, the order by the Settlement Commission shall be conclusive. When there has been a concealment or fraud played on the Department, the importer cannot be considered as a person acting bona fidely. The

Petitioner, having clandestinely removed the goods, cannot seek for any indulgence. The 1st Respondent considered the entire issue in detail and by the impugned order dated 13.5.2002, settled the issues in accordance with the provisions under Section 32F(7) of the Central Excise Act, 1944, determining the differential duty payable by the Petitioner at Rs.14,13,921 (Rs.7,88,627 as basic excise duty and Rs.6,25,294/- as additional excise duty).

4. The learned counsel for the Petitioner contended that exemption of excise duty under the SSI notification would include additional excise duty also and just because the additional excise duty is not specifically included in the said notification, it cannot be said that the additional excise duty is not exempted and that what is applicable to main levy would be applicable to additional levy also and for exemption. The learned counsel further contended that the value for the purpose of payment of central excise duty will not include the excise duty payable on the goods and that the 1st Respondent erred in not applying the provisions of the Section 4(4)(d)(ii), while determining the value of the goods for the purpose of payment of central excise duty also. The learned counsel, in support of his contentions, relying upon various decisions reported in 1988-38-ELT-535-SC (Ujgar Prints Vs. Union of India) , 1992-62-ELT-253 (Parekh Prints Vs. Union of India) and 1997-96-ELT-251-Bom (Nirlon Synthetic Fibres and Chemicals Limited Vs. State of Maharashtra), sought for quashing of the impugned order.

5. On the contrary, the learned Standing Counsel for the Respondents reiterated the averments made in the counter affidavit and supported the impugned order, relying upon the decision of this court reported in 2003-85-EC-215-Madras (Commissioner of Customs (AIR), Chennai Vs. Customs and Central Excise Settlement Commission).

6. This court heard and considered the submissions made by the learned counsel on either side and also perused the materials placed on record.

7. The admitted facts are that the Petitioner has been availing the benefit of the SSI Notification, dated 28.2.1993 for the goods manufactured by them. On getting intelligence, investigation was done and after completing the investigation, a show cause notice dated 29.6.2000 was issued, alleging that the Petitioner clandestinely removed certain quantities of final products during the period from 1995-1996 to 1999-2000 and demanding a differential duty of Rs.17,92,650/- including basic excise duty and additional excise duty, to which, the Petitioner filed a written submission dated 11.3.2002, before the 1st Respondent, admitting such clandestine removal of goods along with the values adopted by the Department . By the impugned

order dated 13.5.2002, the differential duty was determined at Rs.14,13,921/- (Rs.7,88,627 as basic excise duty and Rs.6,25,294/- as additional excise duty), however, immunity from penalty and prosecution were granted.

8. It is the contention of the Petitioner is that the exemption of excise duty under the SSI notification would include the basic excise duty and the additional excise duty also and just because the additional excise duty is not specifically included in the said notification, it cannot be said that the additional excise duty is not exempted and that what is applicable to main levy would be applicable to additional levy also and for exemption.

9. On the other hand, it is the contention of the Respondents that the goods manufactured by the Petitioner attracts basic excise duty under Section 3 of the Central Excise Act, 1944 and additional excise duty under Section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 and total duty evasion was found for the period from 1995-1996 to 1999-2000. The Petitioner also admitted such clandestine clearances without payment of duty in their written submissions dated 11.3.2002 and hence, the 1st Respondent decided the issues in accordance with the provisions under Section 32F(7) of the Central Excise Act, 1944, determining the differential duty.

10. Though there are several grounds raised by the learned counsel on either side in support of their respective cases, in the case on hand, it is suffice to adjudicate the issue as to whether there was clandestine clearance of the goods without payment of duty by the Petitioner or not, since there was a categorical admission by the Petitioner in this regard and hence, the other issues need not be gone into.

11. The charge of clandestine removal of goods is a serious charge, which should be established by the Revenue by adducing sufficient and tangible evidence. In the case on hand, there are enough evidences and statements, corroborating the same, inasmuch as it is seen from the show cause notice dated 29.6.2000 that thorough investigation and verification of the records seized revealed that the firms, to which sales were made, were not at all in existence and that there were shortage of accounts and that there were no proper accounts for certain quantities and that therefore, it was ultimately held that the Petitioner clandestinely cleared the excisable goods without payment of duty payable. For coming to such a conclusion, year wise data based on the records seized and the break up details given in the show cause notice were relied upon. Further, in the written submissions dated 11.3.2002 made by the Petitioner pursuant to the show cause notice dated 29.6.2000, the Petitioner has categorically admitted as under:-

"... The Applicant has admitted entire quantity indicated in the SCN as clandestine clearances with the values adopted by the revenue, thereby made the true and full disclosure in the application." "

In this regard, no arguments or no grounds have been raised by the learned counsel for the Petitioner on the seized documents showing the clandestine removal of the goods. In fact, the Petitioner categorically admitted such clandestine removal of goods in their written submissions dated 11.3.2002 and that the payment of duty has not been done in respect of such clearances. In view of such clear-cut and categorical admission, it is difficult to accept any other pleas raised by the Petitioner in regard to the clandestine removals of the goods. Hence, the goods clandestinely cleared without any payment of duty calls for determination of assessable value afresh. Therefore, it can safely be concluded that the Petitioner wilfully intended to evade payment of duty by concealment and by suppressing the procurement of raw materials, production and sale of the finished goods clandestinely without accounting.

12. In so far as the decisions relied on by the learned counsel for the Petitioner are concerned, viz. 1988-38-ELT-535-SC (Ujgar Prints Vs. Union of India) , 1992-62-ELT-253 (Parekh Prints Vs. Union of India) and 1997-96-ELT-251-Bom (Nirlon Synthetic Fibres and Chemicals Limited Vs. State of Maharashtra), they are not applicable to the case on hand, inasmuch as they are different and distinct from the facts and circumstances of the case on hand, since there was no plea of clandestine clearance of goods was raised.

13. On the other hand, the decision of this Court reported in 2011-269-ELT-465-Mad (Marshal Power and Telecom (India) Limited Vs. Customs and Central Excise Settlement Commission and others), relied on by the Respondents can be made applicable to the case on hand, inasmuch as there was a plea of clandestine clearance raised by the Revenue and while dealing with the said issue, it has been held as under:-

"12. The petitioner was engaged in manufacturing and clandestine removal of excisable goods without the permission of the competent authority, viz., the Development Commissioner of MEPZ of the Central Excise Department. As the result of the finding as above, the Commissioner confirmed the demand of the duty in terms of the show-cause notice. The Commissioner in paras 25 and 26 dealt with the manner in which the manufacture and clearance of the goods were done in a clandestine manner contravening the provisions of the Central Excise Act, resulting in the Commissioner passing an order in paras 25, 26 and 27 which reads as follows:-

"25. As the activities relating to manufacture and clearance of the ACSR conductors have been suppressed from the department with an intent to evade payment of duty, the proviso under Sec.11A(1) of the Act has been rightly invoked in this case. As these allegations stand proved MPTEL is liable for penalty under Sec.11AC of the Act. As the contravention of various provisions of the Act and the rules made thereunder with an intent to evade payment of duty is proved, MPTEL is also liable for penalty under Rule 209 of the Central Excise Rules, 1944 and Rule 25 & Rule 27 of the Central Excise (No.2) Rules, 2001 and Central Excise Rules, 2002.

26. The notice has brought out the roles of Dr.B.A.Rajagopalan, as the main person who was actively and personally involved in the various aspects of MPTEL's activities, which were in contravention of the statutory provisions. The seized documents reveal the fact of the above allegation and depositions of the personnel of MPTEL corroborate the same and as promoter of MPTEL and as its Senior President, he had approved the unaccounted manufacture and clandestine removal as is evident especially from the statement of Shri Dumenil, President of MPTEL given on 14.10.2003 apart from the statements of others and other seized documents, especially those from his house. Similarly, it has also been established that Shri.B.Muralidhar, Shri Adelwert S. Dumenil and have concerned themselves in organizing the manufacture and clearance of ACSR conductors without payment of duty by MPTEL knowingly as they were aware of the unaccounted and clandestine removal of the goods as evidenced by the seized documents and statements. Ms.Subhadra Kunduri as Head-Corporate Planning was aware that no excise duty was paid on the goods cleared and yet knowingly signed the packing slips for goods consigned to APTRANSCO. None of these individuals have put forth any denials against the allegations nor come forward with any evidence to contradict the findings narrated in the notice. Therefore, their roles in the clandestine removal of ACSR Conductors by MPTEL during the period from March 2000 to March 2002 stand proved beyond any doubt. Therefore they are liable for penalty under Rule 209A of the Central Excise Rules, 1944 and Rule 26 of the Central Excise (No.2) Rules, 2001 and Central Excise Rules, 2002.”

14. In India Tin Industries (P) Limited Vs. CCE (1999 (80) ECR 371 Tri Bangalore), it has been held as under:-

"The Second issue dealt with by the Collector pertains to clandestine removal of Tin containers. We have heard the learned Counsel on this point. We find that this is merely a general grievance and no arguments have been raised by the learned Counsel on the detailed admissions made by all the officers including the MD of the appellants company on this point. No grounds have been raised on the various debit notes and the seized documents showing the clandestine removal of the goods. It is difficult to understand the arguments raised against the clear admissions and meticulous and enormous documentary evidence found by the investigation officers. In fact the General Manager Shri A. Rajagopal in his statement dated 20.12.1986 clearly admitted that the payment of duty has not been done in respect of such clearances and he would prevail upon the management to pay the duty on this score. He also admitted about non-payment of duty on the various discrepancies noticed, in his statement. Therefore, there is also evidence in support of the department by the statement given by Shri V. Srinivasan, Proprietor of M/s. Venson Transport and also that of the Factory manager and the General Manager of the appellants who have also come out with clear admissions. In view of these clear-cut, admissions it is difficult to accept any other plea raised by the appellants in regard to the clandestine removals of the goods. There is also statement given by S/Shri Murty, N. Prakash of M/s. ITI, Bangalore, Shri RSA Khan G.M. of M/s. HVOC, Madras who also admitted about this aspect of the matter. Therefore, the finding arrived at by the Collector that the entire statements of each other persons being corroborative in nature the charge against the appellants cannot be doubted.

15. In Reliable Safety Glass Vs. CCE (2004 (95) ECC 602:2004 (173) ELT 289 Tri Del), it has been held as below:-

However, the case is very different in respect of mirrors which had been removed after misdescribing them as toughened safety glass, that too at the lower price applicable to toughened safety glass. This activity is clearly clandestine. Correct description of the goods had been suppressed and the goods had been mis-described and non-existing values declared in the central excise documents, while correct nature of the goods as well as transaction values were being entered in the commercial invoices. The duality in description and statement of price is clearly a duplication and fraudulent practice attracting proviso to Section 11 A. In regard to these goods, the entire particulars entered in the central excise documents were false. Revenue authorities, therefore, charged the appellant with clandestine removal of the goods. We are clear that the appellant's activity was clandestine and duty demand has been correctly made in terms of the proviso to Section 11A. We are not able to find merit in the appellant's submission that charge of clandestine removal is not sustainable inasmuch as correct quantity of clearance had been mentioned in the excise invoices and the show-cause notice does not allege under-valuation of these consignments. Removal of goods under a false description and value, that too when the goods are cleared by the appellant under self-made procedure himself without any check by Revenue as to correctness of description clearly come within the scope of clandestine removal. The duty demand in relation to such removals amounting to Rs. 5,87,595 is clearly recoverable from the appellant by invoking the proviso to Section 11 A.

16. In Raj Petroleum Products Vs. Commissioner Of Central Excise (2005 (100) ECC 153: 2005 (192) ELT 806 Tri Mumbai), it has been held thus:-

"d) From above paragraphs it is clear that RP-M has clandestine removed the finished goods in guise of clearances by JIT.RP-M also received the raw materials in the name of JIT and also in the name of fictitious firm i.e. Jalaram Trading Company. It is proved that RP-M had used the money received from various recipients of clandestinely removed goods, towards purchase of raw materials, which were not accounted and used in the production. Hence, it is appropriate to club the clearances of JIT which were not accounted in their books as well in the gate Register and the clearances which were made without bills for which Octroi details were gathered with RP-M, because RP-M has taken the advantage of independent status of JIT to clear the finished goods manufactured by them and removed clandestinely. The Hon'ble Supreme Court in the matter of Gajanan Fabrics Distributors v. CCE, Pune-1997 (92) ELT 451 (SC), observed that......." The principal factor that leads us to this conclusion is the findings of the Collector, upheld by the Tribunal, that the seven units which are appellants before us 'are only a corporate facade although registered with various authorities with camouflage their actual identity and there by avail of exemption which, otherwise, would be in admissible to them' ...." This observation of the Apex Court fairly & squarely applies in the instant case. Hence the proviso to Section 11A (1) has been correctly invoked in the instant matter as the suppression of fact, wilful misstatement & malafide intentions to evade the Central Excise Duties are established. And the duty of Rs. 97,21,742/- demanded from RP-M under the said proviso is required to be confirmed.

17. In the case on hand, on the basis of the investigation and enquiry, the Petitioner was issued with show cause notice. The Petitioner also filed a detailed reply, admitting the said allegation. As seen from the show cause notice, the seized documents reveal the fact of the said allegation and the depositions obtained from various persons of the various distributors corroborate the same. None of these individuals have put forth any denials against the allegations nor come forward with any evidence to contradict the findings narrated in the notice. Therefore, their roles in the clandestine removal of the goods by the Petitioner during the relevant periods stand proved beyond any doubt.

18. Further, the 1st Respondent has analysed the evidence on record and the statements recorded from several persons, including the admission of the Petitioner and scrutinised the entire records seized to confirm the allegations in the show cause notice. After a detailed hearing, the 1st Respondent passed a detailed speaking order dealing with each and every aspect raised in the show cause notice. Ultimately, in terms of the show cause notice, the 1st Respondent held that in the face of non availability of records in respect of the clandestinely cleared goods, which fact was also admitted by the Petitioner, it was not possible to consider the claim of the Petitioner and hence, the differential duty payable was determined, including both basic excise duty and additional excise duty, by settling the case under the provisions of Section 32F(7) of the Act, which warrants no interference by this Court.

19. In the result, this Writ Petition is dismissed. No costs.

-s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

Srcm

To:

1.Customs and Central Excise
Settlement Commission, Additional Bench,
Narmada Block, II Floor,
Custom House,
No.33, Rajaji Salai, Chennai-01

2.The Commissioner of Central Excise, Commissionerate II,
Hydrabad

+1 cc to Mr.T.Ramesh Advocate sr.68474/16
+1 cc to Mr.Rajnish Pathiyil, Advocate sr.68685/16

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