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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **CEAC 11/2016**

COMMISSIONER OF CENTRAL EXCISE DELHI-II ...Appellant
Through: Mr Harpreet Singh, Sr. Standing Counsel with Ms. Namrata Bharti, Advocates

versus

BALAJEE PERFUMES .... Respondent
Through: Mr. A.K. Prasad and Ms. Priyanka Goel, Advocates

CORAM: JUSTICE S.MURALIDHAR
JUSTICE NAJMI WAZIRI

O R D E R

% **11.04.2017**

CM 34509/2016 (delay)

1. For the reasons stated therein, the delay of 4 days in re-filing of the appeal is condoned.

2. The application is allowed.

CEAC 11/2016 & CM 34508/2016 (for stay)

3. This is an appeal by the Commissioner of Central Excise, Delhi-II under Section 35G of the Central Excise Act, 1944 ('the CE Act') against the final order dated 15th January, 2016 passed by the Customs Excise Service Tax Appellant Tribunal ('CESTAT') allowing the appeal filed by the

Respondent against an Order-in-Original dated 25th March, 2008 passed by the Commissioner of Central Excise.

4. The background facts are that the Respondent has its factory at GT Road, Shahdara, New Delhi and holds a Central Excise Registration. It is engaged in the manufacture of 'Maruti', 'Ajeet' and 'Kaveri' branded Gutkha, falling under Chapter Sub Heading 2404.49 of Central Excise Tariff Act, 1985 (‘CETA’). It is stated that the commodity was covered under the products to be assessed based on Maximum Retail Price (‘MRP’), in terms of Notification No.13/2002 CE (NT) dated 1st March, 2002 as amended. The subject product i.e. Pan Masala contain Tobacco (Gutkha) was entitled for 50% abatement on the MRP. The MRP of 'Maruti' and 'Ajeet' branded Gutkha was Rs.0.50 per pouch and 'Kaveri' branded Gutkha was Rs. 1/- per Pouch. The Respondent was a partnership firm. Its partners are Mr Varun Gupta and Smt. Deepa Gupta.

5. On the basis of the intelligence gathered to the effect that the Respondent was manufacturing and clearing excisable goods clandestinely without payment of Central Excise duty by suppressing the production, simultaneous searches were undertaken by the Directorate General Central Excise Intelligence (‘DGCEI’) on 7th October, 2004 at several premises including some in Karnataka. It is stated that as a result of the searches, records and documents were recovered which bore out the main allegation that the Respondent had been manufacturing aforementioned branded Gutkha and despatching them to their distributors/dealers located in Karnataka without invoices/bills by rail or sometimes by road and through transporters viz.,

M/s. Lion Roadway, M/s. Uday Roadlines, etc. Further, unaccounted quantities of Gutkha and the raw-material used in their production were also seized from the aforementioned premises.

6. A show cause notice (SCN) dated 21st March, 2005 was issued to the Respondent inter alia seeking explanation as to why Central Excise duty amounting to Rs.4,25,226/- for the seized goods should not be demanded and why the goods should not be confiscated under the CE Act. Notices were also issued to the main distributors or the traders at Hubli, Belgaum and Mangalore to show cause as to why penalties should not be levied on them under Rule 26 of the Central Excise Rules, 2002 ('CE Rules') for aiding the manufacture in evasion of CE duty.

7. During the course of investigation, statements were recorded of Mr Varun Gupta under Section 14 of the CE Act whether he (purportedly admitted to the manufacture of the aforementioned brands gutkha) and the fact that they were sold to Devakikrishna Traders, Hubli. In his further statement on 30th January, 2006, he is purported to have made some more admissions as regards the documents seized from the above traders at Hubli, and those seized from the premises of and Shri Avinash M Baliga, and the premises of M/s. Maruti Agency, Belgaon.

8. Mr Abhay Gupta, father of Mr Varun Gupta is stated to have given a separate statement on 7th October, 2004. Further statements were recorded of Mr Pawan M Prabhu proprietor of M/s Devakikrishna Traders, Hubli on 7th October and 14th December, 2014; of Mr Avinash M Baliga, proprietor of M/s Damodar Traders, Belgaum on 8th October, 2004 and 14th October,

2005; of Mr Suresh Rao, Proprietor of M/s Maruthi Agencies, Mangalore on 7th October, 2004 and 14th October, 2005; of Mr H.S. Sooryanarayan, the GPO holder of M/s Hostota on 14th March, 2006. It was noticed that during the course of investigation, the Respondent deposited a sum of Rs.35 lacs with the Department.

9. It was concluded that a CE duty of Rs.7,88,64,986 was recoverable from the Respondent under the proviso to the Section 11A (1) of the CE Act for the extended period inasmuch as they had "deliberately suppressed the fact of their activities from the department with an intention to evade payment of Central Excise duty and contravened the provisions of the act as well as the rules made thereunder". It was further concluded that they had also rendered themselves liable to mandatory penalty under Section 11 AC of the CE Act, 1944 and interest under the provisions of Section 11 AB thereof. They had also contravened the provisions of Rule 4, 6, 8 10, 11 and 12 of the CE Rules 2001 as well as 25 thereof.

10 A further SCN was accordingly issued on 26th October, 2006 by the Additional Director, DGCEI, Bangalore. An SCN was also issued to Mr Varun Gupta, Mr Pawan M Prabhu, Mr Avinash Baliga and Mr Suresh Rao.

11. *Inter alia*, before the Adjudicating Authority i.e., the Commissioner of Central Excise (CCE) it was pointed out on behalf of the Respondent that the record/documents recovered from the third parties could not be relied upon for substantiating the allegations against the Respondent of clandestine removal. Likewise, the said finding could not be sustained only on the basis of the record recovered from the transporters. It was further pointed out that

the confessional statements were retracted and they could not be relied upon without sufficient corroboration by other independent material. It was pointed out that the CCE had not permitted the Department's witnesses to be cross-examined and, therefore, their statements could not be relied upon.

12. Two of the issues framed for determination by the CCE were as under:

"(i) Whether the cross examination should have been allowed and whether in absence thereof, the statement of such persons could be relied upon? And

(ii) Whether further retraction on behalf of Mr Varun Gupta, Mr Suresh Rao and Mr Avinash Baliga could be held to be valid?"

13. In para 10.1 of the impugned Order-in-Original dated 25th March, 2008 the Commissioner recorded the fact that cross-examination had been sought of Mr Pavan Prabhu, Mr Avinash Baliga, Mr Suresh Rao and Mr H.S. Sooryanarayana. Further cross-examination of Mr Abhay Gupta had been asked for on the ground that his statement, although in his own handwriting, appeared to be dictated. Further, it was not corroborated by any documentary evidence. Cross-examination was also sought of the *panch* witnesses Mr Shiv Kumar and Mr Md. Anwar as well as of Mr Rakesh Garg, IO, DGCEI, New Delhi. The above request was declined by the CCE by referring the decision in ***Jethmal Pithaji v. Assistant Collector of Customs, Bombay AIR 1974 SC 699*** followed in ***Jagdish Shankar Trivedi v. Commissioner of Customs 2006(194) EL T 290***. Reference was also made to the decision in ***Surjeet Singh Chhabra v. Union of India 1997 (89) ELT 646 (SC)*** where it was held that, not allowing of cross-examination was

not violative of principles of natural justice even if such confession was retracted within six days. Reference was also made to the decision in ***Kanungo & Co. v. Collector of Customs, Calcutta 1983 (13) ELT 1486 (SC)***. On the other hand, on behalf of the Respondent, reliance was placed on the decisions in ***Superintendent of Customs v. Banabhai Kalphabhai 1995(76) ELT 508 (SC)*** and ***Jagmohan Singh Sawhney v. Collector of Customs 1995(75) ELT 350 (Tri.- Delhi)***.

14. Accepting the case of the Department, the CCE justified the denial of cross examination of its witnesses. The CCE further held that the retraction by Mr Varun Gupta was by an affidavit dated 5th December, 2006 whereas the original statement was recorded on 30th January, 2006. Three others retracted their statements by filing affidavits. The Commissioner rejected all these affidavits on the ground that the statements made in the first instance were voluntary, while the affidavits appeared to have been given be under compulsion. Thereafter, the material documents seized were analyzed including the statements made (which were subsequently retracted) and on merits the allegations in the SCN were held to be proved. As a result, the CCE confirmed the demand of Rs.3,73,39,131/- and penalty of an equal amount apart from personal penalty of Rs.5 lakhs each on Mr Pavan M Prabhu, Mr Avinash Baliga and Mr Suresh Rao.

15. Against the above order, appeals were filed before the CESTAT by the Respondent and the aforementioned persons. The said appeal were allowed by the CESTAT by the common impugned order dated 15th January, 2016.

16. In the impugned order, the CESTAT noted that the case of the Department against the Respondent hinged on (a) Railway receipts (b) diaries recovered from the premises of dealers /distributors; and c) on the basis of statements of Varun Gupta, Pawan M Prabhu, Avinash M Baliga and Suresh Rao. The CESTAT held that the statements given at the time of investigation were followed by their affidavits. However, the affidavits had not been examined by the CCE. Further, no cross examination was granted. It was therefore held that the statements were themselves not reliable in the absence of corroboration. Reliance was placed on the decision of the CESTAT in ***M/s. Aswani & Co.*** [Final Order No. Al54559-54565/2014 dated 2nd December 2014]. It was further noticed that Mr Ajay Gupta who was a witness was not examined and was not made a party to the case. It was accordingly held that the investigation conducted by the Department was not proper.

17. This Court has heard the submissions of Mr Harpreet Singh, learned Senior Standing Counsel for the Appellant and Mr A.K. Prasad, learned counsel for the Respondent.

18. The Court is required to examine if the impugned order of the CESTAT gives rise to any substantial question of law in this appeal under Section 35G of the CE Act.

19. It was submitted by Mr Harpreet Singh, learned Senior Standing Counsel for the Appellant that the retracted statements of the aforesaid persons might require corroboration but not in material particulars. According to him, as long as the material available on record provided a general corroboration of

the retracted statements, that would be sufficient to sustain the SCNs issued to the Respondent. Secondly, it was submitted that the retraction took place only when the cross-examination of the persons who gave statements in the course of investigation was denied and not earlier thereto. Therefore, the CCE was justified in ignoring such retraction.

20. On the other hand, Mr A.K. Prasad, learned counsel appearing for the Respondent pointed out that although the impugned order of the CESTAT in the Respondent's case has been appealed against, no appeal has been filed against the three other noticees on whom penalty was levied and whose appeals had been allowed by the CESTAT by the same common impugned order. In other words, the Department was being selective. Secondly, he pointed out that there was no justification in denying cross-examination of the persons who gave statements against the Respondent. It was a prerequisite of the principles of natural justice that the person against whom statements were made should be given an opportunity to test the veracity of such statements. That could be done only by way of cross-examination. The view taken by the CESTAT could not be said to be contrary to law. He submitted that in any event, the impugned order does not give rise to any substantial question of law.

21. The Court has considered the above submissions. The Court is unable to find any justifiable reason for the Department to deny the Respondent the opportunity of cross-examining the persons who made statements against the Respondent during the course of the investigation. This was all the more necessary since the statements made by Mr Varun Gupta and other noticees

during investigation stood retracted by their subsequent affidavits. Unless the makers of the statements were not available for some reason, there was no justification to simply deny the right of cross-examination.

22. In this connection, it is necessary to refer to Section 9D (1) (a) of the CE, 1944 which incorporates the rule of natural justice. The relevant portion of the said provision reads thus:

"(1) A statement made and signed by a person before any Central Excise Officer of a gazetted rank during the course of any inquiry or proceeding under this Act shall be relevant, for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which it contains-

(a)when the person who made the statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable;"

23. In a similar situation, this Court in its decision dated 2nd December, 2015 in CEAC No.62/2014 (***Commissioner of Central Excise, Delhi-1 v. Vishnu & Co. Pvt. Ltd.***) upheld an the order of CESTAT that had set aside the adjudication order on the ground that it proceeded on the basis of the retracted statement of the persons who were not offered for cross examination. It was observed in that case "where such statements are subsequently retracted or resiled form, it becomes necessary for the Department to produce other evidence which is of an independent nature which corroborates the retracted statements." In that case, the Commissioner had proceeded on the basis of the retracted statements of persons not offered for cross examination. There again, it was contended by the department that

the retraction made beyond 20 months after the initial statement, would have no effect in the eyes of law. The Court negated the above statements and held as under:

> "41. What the above submission overlooks is the 'reliability' of such statements. Once it is shown that the maker of such statement has in fact resiled from it, even if it is after a period of time, then it is no longer safe to rely upon it as a substantive piece of evidence. The question is not so much as to admissibility of such statement as much as it is about its 'reliability'. It is the latter requirement that warrants a judicial authority to seek, as a rule of prudence, some corroboration of such retracted statement by some other reliable independent material. This is the approach adopted by the CESTAT and the Court finds it to be in consonance with the settled legal position in this regard."

24. Likewise, in its order dated 17th September, 2015 in CEAC 6/2013 (***Flevel International v. Commissioner of Central Excise***) dealing with a similar situation where the Adjudicating Officer had denied the noticee the right of cross examination, the Court observed as under:

> "45. As regards the request for cross-examination of the other witnesses, the adjudication order again dealt with this perfunctorily. It simply stated in para 36 that if the request made by the Appellant in the letter dated 31st January 1985 for cross-examination of "such a large number of persons was granted it would have take the case to a non-ending process." This cannot be a justified reason within the meaning of Section 9D of the Act to deny that opportunity to the Appellant. .....
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> 46. The CCE also wrongly proceeded on the basis that there was no right of cross-examination overlooking the fact that Section 9D of the Act restricts the grounds on which the cross-examination can be denied. It also overlooks the decision of the Supreme Court in ***Swadeshi Polytex Ltd. v. Collector of***

> ***Central*** **Excise (2000) 122 ELT 641 (SC)** and ***Laxman Exports Ltd. v. Collector of Central Excise (2002) 143 ELT 21 (SC)*** to the effect that when a statement is used against an Assessee an opportunity of cross-examining the persons who made those statements ought to be given to the Assessee.
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> 47. In ***GTC Industries Limited v. Collector of Central Excise, New Delhi 1997 (94) ELT 9 (SC)***, the Supreme Court has frowned upon the practice of the adjudicating authority looking into allegations contained in another SCN to return a finding against the Assessee."

25. For all of the aforementioned reasons, the Court finds that the impugned order of the CESTAT does not give rise to any substantial question of law. The appeal is accordingly dismissed.

S.MURALIDHAR, J

NAJMI WAZIRI, J

APRIL 11, 2017
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