

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 04.09.2018

CORAM:

THE HONOURABLE Mr.JUSTICE T.S.SIVAGNANAM
and
THE HONOURABLE Mrs.JUSTICE V.BHAVANI SUBBAROYAN

Civil Miscellaneous Appeal No.1011 of 2017

Judgment reserved on 21.08.2018	Judgment pronounced on 04.09.2018
------------------------------------	--------------------------------------

M/s.Lawn Textile Mills Pvt. Ltd.,
S.F.No.37/1, Pulavapalayam, Nambiyur,
Gobichettipalayam Tk. ... Appellant

-vs-

1. Customs, Excise and Service Tax,
Appellate Tribunal, South Regional Bench,
Nungambakkam, Chennai.

[Respondent No.1-Deleted as per Court order
dated 24.03.2017 in C.M.A.No.1011 of 2017]

2.The Commissioner of Central Excise,
No.1, Foulks Compound,
Anai Medu, Salem. ... Respondents

Civil Miscellaneous Appeal filed under Section 35 G of the
Central Excise Act to answer the substantial questions of law
raised in favour of the appellant and consequently set aside the
Final Order No.41029 of 2016 dated 23.06.2016 passed by the
Customs, Excise and Service Tax Appellate Tribunal, South Zonal
Bench, Chennai.

Final order No. 41029 of 2016 dated: 23/06/2016 passed by the
customs, Excise and Service Tax Appellate Tribunal, South Zonal
Bench, Chennai against the Commissioner of Central Excise
(Appeals) No.1, Foulks Compound, Anaimeadu, Salem 636 001. in
A.No. 4/2003(FBE) dated 30/04/2004.

For Appellant : Mr.K.Jayachandran

For Respondent : Mr.V.Sundareswaran,
Standing Counsel

JUDGMENT
[Delivered by T.S.Sivagnanam, J.]

This appeal, filed by the assessee, is directed against the order passed by the Customs, Excise and Service Tax Appellate Tribunal (hereinafter referred to as "the Tribunal"), South Zonal Bench, Chennai in Final Order No.41029 of 2016 dated 23.06.2016.

2.The following substantial questions of law are framed for consideration:-

"(i) Whether mere storage of finished products and lying in the factory can be treated as unaccounted stock liable for confiscation?

(ii) Whether the Tribunal can ignore the plea of "defect in quantification" and impossibility of search operation within the short time and pass the order without reference to such issues?"

3.The assessee is engaged in the manufacture of cotton yarn falling under Chapter 52 of the Schedule to the Central Excise Tariff Act, 1985 (hereinafter referred to as "the Act"). An inspection was conducted in the assessee's manufacturing unit on 18.09.1999 during which, verification of the stock of raw materials and finished goods were made, certain documents were recovered and statements were recorded from the employee and Managing Director of the assessee. Pursuant to such investigation, show cause notice, dated 10.03.2000, was issued.

4.It was alleged in the show cause notice that the assessee has contravened the provisions of Rules 9(1), 52A, 53, 173G and 226 of the Central Excise Rules, 1944 (in short, "the CER, 1944"), inasmuch as they have not accounted the production of 1,21,338.665 kgs of cotton yarn in cones in their RG1 during the period from 01.01.1999 to 17.09.1999 by suppressing the fact with an intent to evade payment of duty; they have cleared 1,19,043,665 kgs of cotton yarn valued at Rs.1,05,05,505/- without payment of duty, without following the procedures under the Act and without accounting the same in their statutory records during the said period; and they have not entered the details of quantity of cotton purchased and issued for production during the period from 01.09.1999 to 16.09.1999 in their Form IV account and the quantity of cotton yarn produced and cleared in the RG1 account.

5.Further, it was stated that one Mr.C.Sundaramurthy, Commission Agent, has contravened the provisions of Rule 209A of

the CER, 1944, inasmuch as he has purchased 50 bags of cotton yarn in cones without invoices from the assessee and sold the same without raising invoices. Accordingly, the show cause notice was proposed to be issued to show cause as to why the extended period of limitation as provided under proviso to Section 11A of the Central Excise Act, 1944 (hereinafter referred to as "the CEA, 1944") should not be invoked to demand duty, as the assessee has suppressed the fact of production and clearance without accounting them in their statutory records, without payment of duty and without following the Central Excise procedures. The duty proposed to be demanded was quantified and there was a proposal to impose penalty under Section 11AC of the CEA, 1944. There was also a proposal to confiscate a quantity of 2,295 kgs of 30s cotton yarn (cones), which were seized under mahazar dated 17.09.1999. There was also a proposal to impose penalty on the Commission Agent under Rule 209A of the CER, 1944. The annexure to the show cause notice contained the facts, which formed the basis for issuing the notice. The assessee submitted their reply dated 11.09.2000, placing certain factual explanation, apart from relying upon various decisions.

6. The Adjudicating Authority, viz., the Joint Commissioner of Central Excise, Coimbatore, by order dated 27.09.2002, confirmed the proposals in the notice. Aggrieved by the same, the assessee preferred appeal before the Commissioner of Central Excise (Appeals), Salem. The Appellate Authority, by order dated 30.04.2004, while confirming the order of the Adjudicating Authority with regard to the quantity of clandestine removal, directed re-calculation of the duty amount in respect of clearances of cotton yarn without payment of duty during the said period and to that extent, the matter stood remanded to the Adjudicating Authority. The assessee preferred appeal to the Tribunal. The Tribunal, by the impugned order, dismissed the appeal as being devoid of merits. With regard to the appeal filed by the Commission Agent, the same was allowed and the penalty imposed on the Agent, which was reduced by the First Appellate Authority, was completely waived.

7. Mr. K. Jeyachandran, learned counsel appearing for the assessee, submitted that the entire demand was solely based on the diary notings maintained by the Manager and his statement recorded, which were retracted immediately, there was no investigation to the aspect of buyers of cotton yarn alleged to have been clandestinely removed by the assessee and the Department failed to note that there was no attempt to remove the goods, which were confiscated and there was no allegation that the assessee attempted to remove the goods clandestinely and therefore, the orders passed by the Adjudicating Authority, as confirmed by the First Appellate Authority and the Tribunal, are

erroneous. Though in the grounds of appeal, the assessee has stated that denial of cross examination of the factory Manager by the Lower Authority is in violation of principles of natural justice, the learned counsel for the assessee, on instructions, would submit that he is not pressing the said point.

8. It is submitted that the assessee specifically raised the plea that the search and seizure operation, taking inventory about stock of finished cotton yarn and stock of cotton in borahs, is impossible to be completed in 5 ½ hours and the Tribunal had not given any finding on this issue more particularly, the finding of the first appellate authority accepting the contention at para 5.8.1 wherein, the first appellate authority held that the average weight was taken. Further, the statement obtained from one Mahendran on 18.09.1999 was retracted on 20.09.1999 and the statement given by the Managing Director, Mr. Duraisamy on 30.09.1999 was retracted on 01.10.1999 and the statements were not voluntary and cannot be relied upon and it has no evidenciary value.

9. Further, it is submitted that when there is an allegation of clandestine removal, the Department must prove with the evidence that the raw materials were purchased from particular persons with details and evidence of clandestinely selling the finished goods to the parties, with their names and addresses. In this regard, there was no investigation with regard to the sources from which the assessee procured the raw materials without payment of duty; the names of purchasers to whom the finished products were sold without invoices and removed by the assessee without payment of duty; and no details of such a huge quantity alleged to have been removed from the factory were furnished such as lorry number, other mode of transport etc.

10. Thus, it is the submission of learned counsel that to corroborate excess production, it must be substantiated with excess consumption of power, which has not been shown in the present case, which would establish that there was no excess production. Consequently, there was no possibility of clandestine removal. Thus, in the absence of contrary evidence about the removal and to whom it was sold and the period of sale, it has to be held that the Department has failed to prove the charge of clandestine removal. Further, the Tribunal failed to appreciate that the finished products lying in the factory does not amount to an attempt to clandestinely remove the same. Only if the finished products are removed without invoices or payment of duty, it amounts to clandestine removal and stock lying in the factory cannot be presumed to be included as clandestine removal.

11. In support of his contentions, the learned counsel placed reliance on the decision of the High Court of Gujarat at

Ahmedabad in Commissioner of Central Excise vs. Saakeen Alloys Pvt. Ltd. [2014 (308) E.L.T. 655 (Guj.)].

12. Reliance was also placed on the decision of the High Court of Judicature at Allahabad in Continental Cement Company vs. Union of India [2014 (309) E.L.T. 411 (All.)].

13. On the above grounds, the learned counsel sought for setting aside the order passed by the Tribunal and answering the substantial questions of law in favour of the assessee.

14. Shri V. Sundareswaran, learned Standing Counsel, appearing for the Revenue submitted that there is sufficient proof and material to show that the assessee contravened the provisions of the Central Excise Act and Rules, and the Adjudicating Authority as well as the First Appellate Authority made a thorough factual exercise and that recorded the finding, which has been affirmed by the Tribunal and as such, no question of law arises for consideration in the instant case.

15. Further, it is submitted that the assessee is a person, who is habitually engaged in such clandestine removal and their yet another case against the assessee regarding clandestine removal which order, passed by the Adjudicating Authority, has been confirmed by the Tribunal in Lawn Textile Mills Pvt. Ltd. vs. Commissioner of C. Ex. Salem [2013 (297) E.L.T. 561 (Tri. - Chennai)]. Thus, it is submitted that the Adjudicating Authority, the Appellate Authority as well as the Tribunal, after having appreciated the factual position and rendered the finding, this Court, exercising its power under Section 35 G of the Central Excise Act, will not re-appreciate the evidence to come to a different conclusion.

16. We have heard the learned counsels for the parties and carefully perused the materials placed on record.

17. The sum and substance of the argument of the learned counsel for the assessee is that the Department has not proved the allegation of clandestine removal. There has been no investigation into the material aspects, which are required to be proved for establishing an allegation of clandestine removal. Further, it is submitted that a case cannot be drawn against the assessee solely based upon uncorroborated diary notings without any independent records.

18. By referring to the decision in Saakeen Alloys Pvt. Ltd. (supra), it was contended that there should be positive evidences for establishing the evasion by the Department and the assessee cannot be charged for clandestine removal of goods without payment of duty solely based upon the confessional statements

which in fact, were retracted.

19. In the case of Saakeen Alloys Pvt. Ltd. (supra), the said company was engaged in the manufacture of CTD/Round bars. Search and seizure operations were conducted in the factory premises and note-books and pendrive were recovered and there was an allegation of illicit clearance made by the said assessee. Based on the documents recovered, show cause notice was issued and ultimately, the Adjudicating Authority confirmed the proposal in the show cause notice and demanded duty. Aggrieved by the said order, the said assessee approached the Tribunal. The Court noted that the Tribunal extensively dealt with the entire factual matrices presented before it and rightly concluded that in case of clandestine removal of excess goods, there needs to be positive evidence for establishing the evasion.

20. It is further held that in the absence of any material reflecting the purchase of excessive raw material, shortage of finished goods, excess consumption of power like electricity, seizure of case, etc., the Tribunal held that there was nothing except a bare confessional statement, which was retracted immediately. Thus, the Court confirmed the order passed by the Tribunal holding that the appeal does not raise any question of law, much less substantial question of law. The appeal filed by the Revenue against the said order was dismissed by the Hon'ble Supreme Court reported in 2015 (319) E.L.T. A117 (SC).

21. We find from the said order, the appeal filed by the Revenue was filed with the delay and the delay was condoned and the Special Leave Petition was dismissed without a speaking order. In any event, in the said case, the Court held that the Tribunal made a thorough factual exercise and then came to conclusion that there was no positive proof.

22. The decision in the case of Saakeen Alloys Pvt. Ltd. (supra), can hardly come to the advantage of the assessee, as in the instant case, the two authorities and the Tribunal factually held that there has been proof to show that there is clandestine removal of goods without payment of duty. Therefore, the decision in Saakeen Alloys Pvt. Ltd. (supra) is distinguishable on facts.

23. So far as the decision in Continental Cement Company (supra) is concerned, the Court came to the conclusion that there was no clinching evidence of the nature of purchase of raw materials, use of electricity, etc. and came to the factual conclusion that there was no clandestine sale of consumption by two various parties. Thus, to apply the said decision to the assessee's case, necessarily we need to look into the factual

position, which weighed in the minds of the Adjudicating Authority to confirm the proposal in the show cause notice, which order was confirmed by the first appellate authority as well as the Tribunal.

24. On a perusal of the Order-in-Original dated 27.09.2002, one can easily come to the conclusion that a thorough inspection has been conducted in the factory premises of the assessee, in the presence of the factory Manager and in the presence of two independent witnesses. Mahazar was drawn and sent by the factory Manager, who also gave a statement under Section 14 of the Act. During the relevant time, the Managing Director was away from India and upon arrival, furnished a statement and accepted the deposition of the factory Manager. It is thereafter, the factory Manager as well as the Managing Director sent letters stating that the statements were not voluntary. This aspect was considered by the Adjudicating Authority and was rejected holding that if the Managing Director had doubts about the statements of the factory Manager, he can very well point out the same while giving statements subsequently. Further, in the retraction, the Managing Director has not questioned the facts and figures, which were available on record. Thus, the Adjudicating Authority, in our view, rightly rejected the retraction as an afterthought.

25. Further, the assessee alleged that the entire seizure could not have been completed within 5 ½ hours and the seizure operation itself was not free from doubt. Considering this aspect, the Adjudicating Authority referred to the details of production and clearance and pointed out the differences when compared to the diary notings containing daily production report and the RG1 as well as clearances. The differences were pointed out. After taking note of the reply given by the assessee as well as the judicial precedents relied thereupon, the Adjudicating Authority held that the assessee has not questioned the facts of the case. The Managing Director accepted the statement given by the factory Manager as true and correct. The retraction was an afterthought and no request was made by the Managing Director to record a further statement from him, apart from not denying the details mentioned in the statement given by the factory Manager. That apart, there was no denial of the allegation in respect of the production or clearances in the assessee's RG1 register, purchases of cotton made by the assessee, which were not accounted for in their Form IV register. Further, the assessee submitted no reply for the shortage of cotton to the tune of 129585.5 kgs while submitting their reply. Further, the Adjudicating Authority pointed out that a stock of 2295 kgs of cotton yarn in packed condition was found during surprise check, which was not accounted for in the RG1 register. Further, the packed stocks, which were in 45 bags, were found without any running serial number and therefore, the said

quantity was seized.

26. Further, the Adjudicating Authority pointed out that the assessee was maintaining two sets of invoices; one with pre-printed running serial number and other without any serial number which fact was not denied by the assessee during the personal hearing.

27. The learned Standing Counsel produced a photostat copy of one such invoice which did not contain any serial number, nor details, but contained the seal of the company along with the signature of the Managing Director. Thus, the Adjudicating Authority, on facts, concluded that the assessee failed to account for the goods manufactured as required under the provisions of the Central Excise Laws. The Adjudicating Authority also referred to each of the decisions relied on by the assessee and assigned reasons as to why those decisions will not apply to the facts of the assessee's case. With these findings, the proposal in the show cause notice was confirmed. The Appellate Authority, while considering the grounds raised before him, passed a speaking order by framing a point for consideration viz., whether the assessee had indulged in manufacture of cotton yarn cones without accounting them in the statutory records and clandestinely removed them without payment of duty and without statutory documents during the said period.

28. The Appellate Authority took note of the fact that the assessee has been maintaining two sets of invoices one with pre-printed running serial number and the other without any serial number, which had not been denied by the assessee. Further, the Appellate Authority pointed out that the demand was raised for the difference in quantities between the private records and the RG1 entries and this has been corroborated with shortage noticed in the raw material account apart from the statement given by the factory Manager and the Managing Director. Thus, the Appellate Authority concluded that the assessee did not dispute that there was no such unaccounted production and clearance of cotton yarn and especially when they had maintained private records in the form of diary to record the production and parallel set of invoices have come into existence goes to show that the owner of the property or the person in whose possession the factory is there ought to have explained the existence of the same. After considering all the grounds raised by the assessee, the appeal was dismissed.

29. On further appeal to the Tribunal, we find that the Tribunal also took note of the submissions made by the assessee both factually as well as on legal aspects and has rendered independent findings as to why the order passed by the First Appellate Authority should be confirmed. Even before the

Tribunal, the assessee did not have any explanation for the discrepancies in the quantity or for the matter with regard to the existence of parallel invoices. Thus, on facts, it was held that it is a case of clandestine removal and accordingly, the appeal filed by the assessee was dismissed.

30.The above facts will clearly show that the allegation is one of clandestine removal. It may be true that the burden of proving such an allegation is on the Department. However, clandestine removal with an intention to evade payment of duty is always done in a secrete manner and not as an open transaction for the Department to immediately detect the same. Therefore, in case of clandestine removal, where secrecies involved, there may be cases where direct documentary evidence will not be available. However, based on the seized records, if the Department is able to prima facie establish the case of clandestine removal and the assessee is not able to give any plausible explanation for the same, then the allegation of clandestine removal has to be held to be proved. In other words, the standard and degree of proof, which is required in such cases, may not be the same, as in other cases where there is no allegation of clandestine removal.

31.As noticed above, the assessee has not denied any of the allegations, which were put forth except for simple and flimsy retraction. If the assessee had sufficient records to establish their innocence, nothing prevented the Managing Director to say so while making the retraction. There was no attempt made by the assessee to state their case by coming forward to give a statement and producing records. The allegation of parallel invoicing has not been disproved in the manner known to law. Thus, we find that the Adjudicating Authority, the Appellate Authority as well as the Tribunal concurred on facts and each of them has given independent reasons for their conclusion.

32.Thus, in the absence of any perversity in the finding, the Court cannot interfere with the factual finding recorded by the authorities as well as the Tribunal, as the scope of the appeal before this Court under Section 35 G of the Central Excise Act is to decide of a substantial question of law. We find there is no question of law, much less a substantial question of law arising for consideration in the instant case. Thus, the appeal filed by the assessee is dismissed.

Sd/-
Assistant Registrar (CS-IX)

//True Copy//

Sub Assistant Registrar

abr
To

- 1.The Customs, Excise and Service Tax Appellate Tribunal,
South Zonal Bench, Chennai.
- 2.The Commissioner of Central Excise,
No.1, Foulks Compound,
Anai Medu, Salem.

+lcc to Mr.V.Sundareswaran, Advocate, S.R.No. 60972

C.M.A.No.1011 of 2017

RJI (CO)
GN(19/09/2018)



WEB COPY