

IN THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT RESERVED ON : 18.06.2018

JUDGMENT PRONOUNCED ON : 03.07.2018

CORAM

THE HON'BLE MR. JUSTICE S.MANIKUMAR
and
THE HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

C.M.A.No.844 of 2018
and C.M.P.No.6984 of 2018

M/s. Irbaz Shoe Co.,
Chinnavarikkam, Ambur,
Vellore - 635 811,
Tamil Nadu. ... Appellant

Vs.

The Commissioner of Central Excise and Central Tax,
Chennai Outer Commissionerate,
Newry Towers, No.2054, I Block,
II Avenue, 12th Main Road, Anna Nagar,
Chennai - 600 040. ... Respondent

PRAYER: Civil Miscellaneous Appeal has been filed under Section 35G of the Central Excise Act, 1944, against the Final Order No.41549 of 2017 dated 09.08.2017 passed by the Customs, Excise and Service Tax Appellate Tribunal, Chennai Bench, in Appeal No.E/111/2009-DB.

For Appellant : Mr.S.Jaikumar

For Respondent : Ms.Hema Latha

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J U D G M E N T

SUBRAMONIUM PRASAD, J.

The present Civil Miscellaneous Appeal has been filed under Section 35G of the Central Excise Act, 1944, against the Final Order No.41549 of 2017 dated 09.08.2017 passed by the Customs, Excise & Service Tax Appellate Tribunal, Chennai Bench, in Appeal No.E/111/2009-DB.

2. The appellant/Irbaz Shoe Company manufactures leather shoe uppers classified under Chapter 6406.10.20 of the Central Excise Tariff Act, 1985. While scrutinizing the balance sheet of the appellant for the year 2004-2005, it was noticed that the appellant had sold leather shoe uppers to M/s.Metro & Metro, Agra. The goods were removed without Central Excise Registration, without payment of duty and without filing returns.

3. A statement was recorded from the authorised signatory and the General Manager of the appellant, wherein, it was stated that the appellant had manufactured and cleared leather shoe uppers to M/s.Metro & Metro, Agra to the value of Rs.1,61,12,084/- during the year 2004-2005. He stated that these leather shoe uppers were sold, to M/s.Metro and Metro and they have been removed only by paying Central sales tax and that no excise duty on the said leather shoe uppers were paid. This was so because they felt that they would be used by M/s.Metro & Metro for the manufacture and export of full shoes and that no duty was required to be paid. The said authorised signatory also stated that they have not filed any declaration to the Department nor did they get themselves registered with the Department for manufacture of shoe uppers.

4. The appellant was categorical in their stand that they have not removed and sold shoe uppers in the local market and they have made sales only to M/s.Metro & Metro without payment of Excise duty as they thought that the shoe uppers would be used in the manufacture and export of full shoes and therefore, they were not liable to pay duty.

5. Show cause notice dated 20.10.2006 was issued stating that the appellant had manufactured and cleared 70,840 pairs of leather shoe uppers and they sold the same to M/s. Metro & Metro, Agra, during the period of December, 2004, to February, 2005 in contravention of Rules, 4, 6, 8, 9, 10, 11 and 12 of the Central Excise Rules, 2002 i.e., sale without Central Excise registration, without assessment, without payment of excise duty, without maintaining the statutory records, and without filing the statutory returns.

6. The show cause notice also stated that since the appellant has not disclosed the fact of removal and sale of the said goods to the Department and that they did not approach the Department for guidance or clarification, it appears that they have wilfully suppressed the fact of removal of said goods without payment of duty and contravened various provisions of Central Excise Rules, 2002 with an intention to evade payment of duty. The show cause notice, further, stated that the extended period under the proviso of Section 11-A of the Central Excise Act, 1944, is invokable. The show cause notice also stated as to

why interest and penalty should not be levied on the appellants.

7. The appellant submitted its reply stating that the leather uppers manufactured and removed by them and sold to M/s.Metro & Metro, were used for making finished shoes and such shoes were exported and were not cleared locally and that therefore, no excise duty was payable. It was stated that the non-observance of the procedure in Notification No.43 of 2001 cannot be so fatal, so as to lead to payment of duty, in as much as the fact of subsequent export of all the manufactured shoes by M/s.Metro & Metro, Agra, is verifiable.

8. The Assessment Authority, i.e., the Commissioner of Central Excise by order dated 31.05.2007, rejected the submission of the appellant. The relevant portion of the order reads as under:-

16. M/s. ISC's contention is that the shoe-uppers were cleared for the use in the manufacture of shoes which were finally exported and they had merely not followed the procedures prescribed under Notification No.43 of 2001. Their plea that they had merely not followed the procedures prescribed under Notification No.43 of 2001 would be acceptable if they had cleared the shoe-uppers without payment of central sales tax under the invoices with an endorsement "sale under Form H" by complying Section 5(3) of Central Sales Tax Act, 1956.

17. But, their clearance of shoe-uppers to M/s.Metro & Metro was an inter-state sale on payment of central sales tax as per proviso to section 6 of Central Sales Tax Act, 1956, and it was not the clearance of goods as per section 5(3) Central Sales Tax Act, 1956.

18. Hence, their contention that they have not merely followed the procedures prescribed under Notification No.43 of 2001 does not have any basis as

(i) they did not produce any documentary evidence to show that their goods were used in the manufacture of final goods that were finally exported.

(ii) they cleared the shoe-uppers in the course of inter-state sale on payment of central sales tax which is normal practice for sale of goods within the country and not the sale of goods that were meant for the use in manufacture of export goods.

19. In the case of Jay Engg. Works Limited Vs.

CCE - 2001 (137) ELT 454, there was no doubt about the clearance of goods for job work, but there was only the procedural lapses in following chapter - X procedures and question of unjust enrichment.

20. In the case of Krishna Filaments - 2001 (131) ELT 726, it was a rebate claim where the duty was paid and relevant documentary proof for export was submitted. There was no dispute in export of goods.

21. The ratio of the above decisions is not applicable to the instant case, since it had not been proved before me that the shoe-uppers cleared from M/s. SC had been used in the manufacture of shoes that were finally exported. M/s.ISC have not produced any documentary evidence to prove that the shoe-uppers cleared from their factory were used in the shoes which was finally exported. It is not just procedural lapse in following Notification No.43 of 2001, but the use of shoe uppers in manufacture of shoes that were finally exported is in doubt. The question of procedural lapse would come in to picture, had the shoe-uppers been cleared under Form H for export purpose.

22. I observe that M/s.ISC have cleared the shoe-uppers without payment of duty, suppressed the fact of such clearances and contravened the various provisions Central Excise Rules, 2002, with the intent to evade payment of duty. Hence, the proviso to Section 11A(1) is applicable to the instant case.

23. The show cause notice prime facie made a case for the clearance of goods without payment duty with an intent to evade, but M/s.ISC did not rebut with documentary evidence to show that the shoe-uppers were used in the goods that were finally exported. Hence, the decision of the Apex Court in the case of TNHB Vs. Collector of Central Excise, 1994(74) ELT 9 SC could not come to their support.

9. The matter was taken up in an appeal before the Commissioner of Central Excise (Appeals), wherein, the same contention was raised that since leather uppers manufactured by the appellant and sold to M/s. Metro & Metro, Agra, were used in production of finished shoes, which were exported, did not attract the payment of excise duty and that therefore, non-observance of the procedure laid down under the Central Excise Rules, is only a procedural lapse and that duty, therefore, was not leviable.

10. During the hearing, the appellant submitted proof of export and a sworn affidavit of one Shri. Hari Ram Kalsi, Partner of M/s. Metro & Metro, dated 31.03.2006 as evidence to substantiate the contention that the leather uppers purchased from the appellant used and in manufacturing their finished goods, i.e. shoes, which were ultimately exported.

11. The appellate authority by its order dated 28.11.2008, rejected the appeal, holding as under:-

7.6 During the Personal Hearing, the Id.Counsel for the appellant stated that they would submit proof of the export for the goods. Subsequently, he submitted the proof of export and the sworn affidavit of Shri. Hari Ram Kalsi, Partner of M/s.Metro & Metro dated 31.03.2006 for having utilized the shoe uppers purchased from the appellants in their finished goods viz., shoes, which were ultimately exported by them. As already stated, the appellant had not observed any conditions or followed any procedures stipulated in the said Notification, while clearing the goods. The very purpose of such procedure is in order to ensure that it is very same uppers that were used in the exported shoes. Non observance of such procedure has landed the appellant in a position where he cannot prove by acceptable evidence and proof that the goods he had cleared from the factory were the very ones used in the manufacture of the final products that were exported. An affidavit under such circumstances cannot be considered as an acceptable verifiable proof. Moreover, these evidences were not produced before the original adjudicating authority and produced before the appellate authority for consideration. Hence, the additional evidence submitted at the appellate stage cannot save the case of the appellant.

7.7 The lower adjudicating authority has accepted the payment of the duty on the basis of cum-duty-price and accordingly he had confirmed the demand.

7.8 The appellant neither informed the department about the clearance of the goods nor paid appropriate duty on the goods. This fact came to light only after the visit of the officers to the factory and perusal of the documents and the extended period under the proviso to Section 11 A of the

Central Excise Act, 1944 was rightly invoked. When the proviso to Section 11 A of the Act *ibid*, it is also correct to impose penalty equivalent to duty so determined under Section 11 AC of the Act *ibid*. In view of the above, the citations viz., TNHB [1994 (74) ELT 9 SC], Rashtriya Ispat Nigam Ltd., Vs. CCE [2003 (161) ELT 285], CCE Vs. Sree Krishna Pipe Industries [2004 (61) RLT 17 Kar - HC], CCE Vs. Ikon Engineering P Ltd., [2003 (151) ELT 453] are not relevant to this case.

12. The matter was taken up further by the appellant before the Customs, Excise and Service Tax Appellate Tribunal, in appeal No.E/Appeal No.111/09, raising very same contentions.

13. The Tribunal set aside the penalty imposed under Section 11 A of the Act, but, confirmed the duty by observing as under:-

4. Apart from the main contention that the appellants were not aware that they are liable to pay duty, there is no valid defense put forward by the appellants. But taking into consideration that the goods have been entirely exported, we are of the view that the penalties imposed under Section 11 AC is unwarranted. We, therefore, modify the impugned order by setting aside the penalty imposed under Section 11 AC without disturbing the duty demand or the interest thereon.

14. This appeal under Section 35G of the Central Excise Act, 1944, has been filed against the order of the Tribunal on the following substantial question of law:-

a) Whether the Tribunal is right in upholding the confirmation the demand of duty on the appellant merely on the ground of procedural lapse when substantive condition of export of goods has been complied with.

b) Whether the Tribunal is right in upholding the confirmation of demand of duty by invoking extended period under proviso to Section 11A of CEA in the absence of any intent to evade payment of duty on the part of the appellant.

15. Heard Mr.S.Jaikumar, learned counsel appearing for the appellant and Ms.Hema Latha, learned Standing Counsel appearing for the Department and perused the materials on record.

16. The principle contention of the appellant is that when the Tribunal had come to the conclusion that all the leather uppers manufactured by the appellant and sold to M/s.Metro & Metro had been exported and that there is no finding that these goods were sold in the local market, the appellant should not be made to pay duty on the goods. It was contended that failure to adhere to the procedures, which enable them to avail benefit from payment of duty, is only a procedural lapse and that since the goods have been exported, no excise duty is payable by them.

17. Rule 19 of the Central Excise Rules, 2002, deals with exports without payment of duty. Rule 19 of the Central Excise Rules, reads as under:

19. Export without payment of duty

(1) Any excisable goods may be exported without payment of duty from a factory of the producer or the manufacturer or the warehouse or any other premises, as may be approved by the Commissioner.

(2) Any material may be removed without payment of duty from a factory of the producer or the manufacturer or the warehouse or any other premises, for use in the manufacture or processing of goods which are exported, as may be approved by the Commissioner.

(3) The export under sub-rule (1) or sub-rule (2) shall be subject to such conditions, safeguards and procedure as may be specified by notification by the Board.

18. The Central Government has brought out Notification Nos.42 of 2001 and 43 of 2001, notifying conditions and procedures under Rule 19. The present case is governed by Rule 19(2), since the appellant have sold the leather uppers to M/s.Metro & Metro for the use and manufacture of leather shoes, which were exported. Notification No.43 of 2001, dated 26th June, 2001, reads as under:-

G.S.R. In exercise of the powers conferred by of sub-rule (3) read with sub-rule (2) of rule 19 of the Central Excise (No.2) Rules, 2001, the Central Board of Excise and Customs hereby notifies the conditions, safeguards and procedures for procurement of the excisable without payment of duty for the purpose of use in the manufacture or processing of export goods and their exportation out

of India, to any country except Nepal and Bhutan, namely:-

(i) the manufacturer or the processor intending to avail benefit of this notification shall register himself under rule 9 of the Central Excise No.2) Rules, 2001;

(ii) provisions of the Central Excise (Removal of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules, 2002 shall be followed, mutatis mutandis;

(iii) the manufacturer or processor shall, while filing declaration under the Central Excise (Removal of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules, 2001, also declare ratio of input and output and rate of duty payable on excisable goods to be procured without payment of duty.

(iv) the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise shall also verify the correctness of the ratio of input and output and other particulars mentioned in the declaration filed before commencement of export of such goods. He may, if necessary, call for samples of finished goods or inspect such goods in the factory of manufacture for verifying the declarations. He shall, after being satisfied about the correctness of declarations, countersign the application in the manner specified in the Central Excise (Removal of Goods at Concessional Rate of Duty for Manufacturer of Excisable Goods) Rules, 2001;

(v) The manufacturer or processor may remove the excisable goods so received as such or after these have been partially processed during the course of manufacture or processing of finished goods to a place outside the factory-

(a) for the purpose of test, repairs, refining, reconditioning or carrying out any other operation necessary for the manufacture or processing of the finished goods and return the same to his factory without payment of duty for further use in the manufacture or processing of finished goods or remove the same without payment of duty in bond for export, provided that the waste, if any, arising in the course of such operation is also returned to the said factory of the manufacture or processing; or

(b) for the purpose of manufacture of

intermediate products necessary for the manufacture of processing of finished goods and return the said intermediate products to his factory for further use in the manufacture or processing of finished goods without payment of duty or remove the same, without payment of duty in bond for export, provided that the waste, if any, arising in the course of such operation is also returned to the factory of manufacturer or processor; and

(c) any waste arising from the processing of the excisable goods any be removed on payment of appropriate duty as if such waste is manufactured in the factory of the manufacturer or processor;

(vi) the goods shall be exported on the application in Form A.R.E 2 specified in the Annexure and the procedures specified in Ministry of Finance (Department of Revenue) notification No.40/2001-Central Excise (N.T) dated 26th June, 2001 or in notification No.42/2001-Central Excise dated 26th June, 2001 shall be followed.

Notification No. 42 of 2001 deals with the conditions imposed on the exporters, which have not been reproduced as it is not relevant for the purpose of this case.

19. Perusal of Notification No.43 of 2001, dated 26th June, 2001, would show that in order to get exemption from paying excise duty, the manufacturer or processor has to follow the following conditions:-

a) the manufacturer has to register himself under Rule 9 of Central Excise Rules.

b) the manufacturer, while filing declaration under the Central Excise (Removal of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules, 2001, has also to declare ratio of input and output and rate of duty payable on excisable goods to be procured without payment of duty.

20. Conditions have been laid in the Notification to ensure that only such goods are exempted from duty which are actually exported. The authorities have to satisfy themselves of the claim for exemption and it is only after such satisfaction by the authorities that the manufacturer or processor can remove the excisable goods to a place outside the factory in order to

avail the benefit of exemption from paying excise duty.

21. In the present case, the appellant was not registered under Rule 9 of the Central Excise Rules, 2001. The appellant has also not informed the department about the clearance of the goods. Complete non-observance of procedure cannot be said to be a mere procedural lapse. The appellant has not fulfilled any of the conditions. Merely stating that they have not paid the Central Excise Duty as they felt that they would be used by M/s.Metro & Metro for export purposes would not be sufficient. The authorities have to get satisfied that the goods cleared were the one, which were actually used for export.

22. It is well settled that the stringency and the mandatory nature of any notification is decided on the basis of the purpose it seeks to achieve. The purpose of Notification No.43 of 2001 dated 26.06.2001 is to ensure that excise duty should not be evaded under the garb of export sales. The Hon'ble Apex Court in Indian Aluminium Company Limited Vs. Thane Municipal Corporation reported in 1992 Supp (1) SCC 480 in paragraph No.6 at page No.488 and paragraph No.3 at page No.485, has observed as under:-

"6.....There is an understandable reason for the stringency of the provisions. The object of S. 5(2) (a) (ii) of the Act and the rules made thereunder is self-evident. While they are obviously intended to give exemption to a dealer in respect of sales to registered dealers' of specified classes of goods, it seeks also to prevent fraud and collusion in an attempt to evade tax. In the nature of things, in view of innumerable transactions that may be entered into between dealers, it will wellnigh be impossible for the taxing authorities to ascertain in each case whether a dealer has sold the specified goods to another for the purposes mentioned in the section. Therefore, presumably to achieve the twofold object, namely, prevention of fraud and facilitating administrative efficiency, the exemption given is made subject to a condition that the person claiming the exemption shall furnish a declaration form in the manner prescribed under the section. The liberal construction suggested will facilitate the commission of fraud and introduce administrative inconveniences, both of which the provisions of the said clause seek to avoid".....

3.....The declaration contemplated in Form 14 is to the effect that the goods imported shall not be used for any other purpose for sale or otherwise etc. It can thus be seen that an incentive is sought to be given to such entrepreneurs by such concession if the raw material which is imported is also utilised in the industrial undertaking without selling or disposing of otherwise. That being the object a verification at the relevant time by the octroi authorities becomes very much necessary before a concession can be given. In the absence of filing such a declaration in the required Form 14, there is no opportunity for the authorities to verify. Therefore the petitioner Company has definitely failed to fulfil an important obligation under the law though procedural. The learned counsel, however, submitted that even now the authorities can verify the necessary records which are audited and submitted to the authorities and find out whether the material was used in its own undertaking or not. We do not think we can accede to this contention. Having failed to file the necessary declaration he cannot now turn-around and ask the authorities to make a verification of some records. The verification at the time when the raw material was still there is entirely different from a verification at a belated stage after it has ceased to be there. May be that the raw-material was used in the industrial undertaking as claimed by the petitioner Company or it may not be. In any event the failure to file the necessary declaration has necessarily prevented the authorities to have a proper verification."

The Hon'ble Apex Court in *Kedarnath Jute Manufacturing Co. Vs. CTO* reported in (1965) 3 SCR 626 at page No.630 has observed as under:-

It can thus be seen that the submission namely that the dealer, even without filing a declaration, can later prove his case by producing other evidence, is also rejected. This ratio applies on all fours to the case before us. As already mentioned the concession can be granted only if the raw material is used in the industrial undertaking seeking such concession. For that a verification was necessary and that is why in the rule itself it is mentioned that a declaration has to be filed in Form 14 facilitating verification. Failure to file the same would automatically disentitle the Company from claiming

any such concession.

23. The learned counsel appearing for the appellant has placed reliance on a judgment dated 12.06.2017 passed by the Division Bench of this Court in C.M.A.No.3044 of 2011, wherein, this Court observed as under:-

13. Therefore, what emanates from the facts obtaining in the present case is that, there was a non-disclosure of information by the Assessee. The Assessee has taken a stand that, since, it was always below the monetary limit fixed for clearances qua SSI Units, it never had an occasion to make any disclosure via a classification list.

13.1. In our view, this cannot be construed as suppression of fact, within the meaning of Section 11A (1) of the 1944 Act. Mere non-disclosure of facts, in such like circumstances, cannot constitute suppression of facts. Given the way the Section is framed, the expression "suppression of fact", appears in the company of words and expressions, such as, fraud, collusion, willful misstatement. Therefore, the expression "suppression of facts", has to take colour from the words whose company, it appears in. A mere non-disclosure of information, when there is no obligation in law to furnish the same, will not amount to, in our opinion, fraud or collusion or even, willful misstatement and, hence, trigger the extended period of limitation [See Collector of Central Excise, Hyderabad V. M/s.Chemphar Drugs and Liniments, Hyderabad, 1989 (40) ELT 276 (SC).; Padmini Products V. Collector of C.Ex., 1989 (43) ELT 195 (SC) and Pushpam Pharmaceuticals Company V. Collector of Central Excise, Bombay, 1995 (78) ELT 401 (SC)].

24. The ratio of the said judgment, cannot be applied to the facts of the case for availing benefit of Rule 19 of the Central Excise Rule. The purpose of Notification No.43 of 2001, dated 26th June, 2001, is to ensure prevention of evasion of duty under the garb of export sales. Keeping the purpose in mind, it is not sufficient for a manufacture to come up and say that all the goods manufactured by him have been exported and therefore, he is entitled to the benefit of Rule 19 of Central Excise Rules. If such a view is taken that the conditions prescribed in Notification No.43 of 2001, is only procedural then the entire purpose of issuing the said Notification, would be defeated.

25. The appellant has removed the goods without informing the Department. The appellant has also not registered under Rule 9 of the Central Excise Rules. The contention, even if the appellant is not registered under Rule 9, still the appellant can avail exemption from paying excise duty cannot be accepted. The removal of goods came to light only after the visit of the officers to the factory and perusal of the documents. Complete non-adherence to the procedure, which has been prescribed to avail exemption from payment of excise duty leads to a presumption that this was done with intend to evade payment of duty and therefore, the authorities were justified in invoking Section 11-A for recovery of excise duty.

26. None of the conditions prescribed in Notification No.43 of 2001 have been followed, the appellants are not entitled to exemption from payment of duty under Rule 19 of Central Excise Rules. The order of the Customs, Excise and Service Tax Appellate Tribunal in confirming the levy of duty by invoking extended period of limitation, does not requires any interference.

27. Accordingly, this Civil Miscellaneous Appeal is dismissed. There shall be no order as to costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar (CS-II)

//True Copy//

Sub Assistant Registrar

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To

The Customs, Excise & Service Tax Appellate Tribunal,
Chennai Bench.

+1cc to Mr.S.JAIKUMAR, Advocate, S.R.No.42466
+1cc to Mr.R.HEMALATHA, Advocate, S.R.No.42924

C.M.A.No.844 of 2018
and C.M.P.No.6984 of 2018

RJ(CO)
TR(20/07/2018)