Rathi Super Steels Limited Vs. C.C.E.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Mar-14-2000

Reported in : (2000)(69)ECC712

Judge : S Peeran, G B Deva, S T G.R.

Appellant : Rathi Super Steels Limited

Respondent : C.C.E.

Judgement :

1. By the captioned stay petition, the applicants have sought waiver of pre-deposit of duty amounting to Rs. 57,68,933 and a penalty of Rs. 40 lakhs on the applicants.

2. Arguing the stay petition, Shri M. Chandrashekhar, Ld. Senior Advocate with Shri Kamaljit Singh, Ld. Advocate for the applicants submitted that the applicants started their activity in trading of iron and steel products at Ghaziabad some time in July 1993; that the applicants entered into an agreement with M/s. Rathi Alloys and Steels Limited for purchase of the manufacturing unit at A-1, Industrial Area, G.T. Road, Ghaziabad with effect from 16.8.93; that the applicants got themselves registered with the Central Excise Department with effect from 16.8.93; that the applicants were engaged in the manufacture of bars and rods; that the raw materials for the said products being ingots and billets etc.; that the Government of India allowed deemed Modvat credit on the inputs procured by the applicants from the market.

The Ld. Sr. Counsel for the applicants argued the applicants have filed a copy of the Order in the case of M/s. Rathi Udyog Limited whereby the demand of duty against M/s. Rathi Udyog Limited on almost identical grounds was dropped; that the appellants wanted a date of hearing on any day after 2.11.97 by their letter dated 20.10.97; that this hearing was necessary to clarify the position of the applicants vis-a-vis the Order in the case of M/s. Rathi Udyog Limited. It was argued by the Ld.

Senior Counsel that as major amount of duty was relating to the period when the factory was owned by M/s. Rathi Alloys and Steels Limited. It was contended by the Ld. Senior Advocate M/s. Rathi Alloys and Steels Limited had another factory at Rajkot which was still operating; that M/s. Rathi Super Steels Limited, the applicants in this case had nothing to do with M/s. Rathi Alloys and Steels Limited and M/s. Rathi Alloys and Steels Limited had two companies and were independent entity. Elaborating the position, the Ld. Senior Advocate submits that the applicants purchased the manufacturing unit on 16.8.93 and the period for which the demand of duty has been confirmed is from April 1993 to October 1993; that the total quantity of goods allegedly involved in the instant case is 6,188 390 MT of M.S. Billets for the period April 1993 to October 1993; that out of the total quantity 6,188 390 MT of M.S. Billets only 144.260 MT related to the applicants and the balance quantity was relating to M/s. Rathi Alloys and Steels Limited; that if at all any demand of duty can be confirmed against the applicants, then it can be only in respect of 144.260 MT received by the applicants and not for the quantity of 6,188 390 MT of M.S.Billets. The Ld. Senior Advocate submitted that this Tribunal in the case of Bhuvaneslwari Chemicals v. CCE in para 5 of its judgment held as under-- We have carefully considered the submissions made by the learned Counsel and the learned SDR. The question here is whether the appellants' firm and its partners can be fastended with the duty liability and penalty for the irregularity committed by the previous firm and its partners from whom the appellants had purchased the firm. In other words whether the duty for the period 1985-86 could also be demanded from the appellants for the reasons that they are the present owners of the firm whose previous owners had failed to take out a Central Excise Licence and pay duty on the goods cleared from the factory. Examining this issue with reference to the provisions of the Act and the Rules, it is

seen that under Rule 9 of the Central Excise Rules, the liability to pay duty is on the persons who are actual manufacturers of the goods. Similarly under Section 6 of the Act read with Rule 174 of the Rules, an obligation to take out a licence is also upon the manufacturers. The Scheme of the Act and the Rules contemplates that the person actually manufacturing the goods is the manufacturer of the goods and liability to pay duty will be on the manufacturer. This position of the Rule and the Act is supported by the provisions of Rule 225 which lays down that if any excisable goods are removed by any person from the place where they are produced or manufactured in contravention of the Rules, the producer or the manufacturer or the licensee shall be held responsible for such removal and shall be liable to be dealt with according to the provisions of the Act or the Rules as if he had removed the goods himself. Therefore, in the present case, the question here is who was the actual manufacturer during the period 1985-86. Surely, the present appellants were not, because they had purchased the firm only on 10.5.86 which was clearly after the end of the financial year 1985-86. The Collector's reasoning that the appellants herein should pay the duty demanded and collect it from the erstwhile partners of the firm has omitted to consider the terms of sale because it is seen from the sale deed dated 10.5.86 that it has been specifically provid ed therein "The purchaser shall not be liable for any debt liabilities outstanding loans, taxes and charges standing in the name of the said firm upto this date". Apart from this, the legal position in terms of Transfer of Properties Act is that dues from the previous firm is always first charge on the immovable property of the firm and in view of this position, the Department even now is not de-barred from taking steps for the recovery of the amount due from the erstwhile firm and its partners in accordance with law. In any case the demand for the period 1985-86 from the appellants' firm is not well-founded and this demand of duty from the appellants is therefore set aside. As regards the penalty, the appellants have pleaded that it is dis-proportionate having regard to the duty involved. Considered the fact that the appellants themselves have come forward initially with their declaration about their manufacturing activity, there is some ground for reducing the quantum of penalty which is accordingly reduced to Rs. 5,000. The appeal is disposed of in the above terms." The Ld. Senior Counsel further submitted that this view was further supported by the decision of this Tribunal in the case of Makers Development

Services (P) Limited 1988 (33) ELT 126.

3. The Ld. Senior Counsel also submitted that similar ruling was issued by the Apex Court in the case of Deputy Commissioner of Sales Tax v.Shah Shukhraj Peerajee AIR 1968 SC 67. He submitted that in view of these decisions, the liability for the major period should have fastened on M/s. Rathi Alloys and Steels Limited. He submitted in Annexure 'M' to the show cause notice the Department itself had treated both M/s. Rathi Alloys and Steels Limited and M/s. Rathi Super Steels Limited as separate entities, therefore, the case should have been decided on that basis which was not done. He submitted that the applicants had received alleged quantity on which the total amount of duty works out to Rs. 1,33,741 and that if all the grounds taken for defence were rejected the only amount that could be recovered was only Rs. 1,33,741. He also submitted that the Commissioner has seriously erred in imposing a penalty under Rule 173Q; that the said Rule can be invoked Against the manufacturer, producer, registered person or registered dealer; that in the instant case, the applicants were not covered under any of the category of Rule 173Q prior to 16.8.93 and, therefore penalty cannot be imposed on the applicants for the act of omission of any other persons; that in the show cause notice, there was no charge at all of collusion or connivance; that no fact has been proved that there was collusion or connivance; that the entire order of the Commissioner talks of collusion and connivance; that thus the Commissioner had travelled beyond the scope of show cause notice; that the transporter's statement which had been relied upon by the Department has not proved the receipt of the goods by the applicants as no acknowledgment or receipt or payment of cost of raw materials has been proved or brought on record.

4. The Ld. Senior Counsel also submitted that deemed Modvat credit taken by the applicants which has been denied by the Commissioner would be available to them either way. He submitted that M/s. Novo Udyog is the main accused and payment of duty or otherwise is the main allegation against them. He submitted that in case the case is proved against M/s. Novo Udyog, they will have to pay duty and this payment as a consequence make the applicants entitle to Modvat credit. He submitted that in the alternative, if the case is not proved against them then the duty paid character of the goods manufactured by them would be proved

and in the instant case also the deemed Modvat credit would be available to the applicants. The Ld. Senior Counsel also submitted that reasoning given for disallowance is based on wrong impression of the Commissioner inasmuch as deemed Modvat credit of duty on rerollable material is covered by another letter of Government of India which does not stipulate the provisions that the goods should be clearly recognisable as non-duty paid for disallowance of deemed Modvat credit. On the financial condition, the applicants submitted that they were facing financial hardship and, therefore even on this count alone pre-deposit of duty and penalty may be waived.

5. Opposing the request for waiver of pre-deposit of duty and penalty, Shri P.K. Jain, Ld. SDR submitted that some points now brought and pleaded by the applicants were not agitated before the Collector; that M/s. Rathi Alloys and Steels Ltd. is a different company; that the duty for past period is recoverable from the new unit despite transferee manufacturing unit. The Ld. SDR submitted that under Rule 230(2) a specific provision existed which lays down that duty can be recovered even where licensed manufacturer transfers its business and such recovery is permissible whether such duty has been assessed before such transfer but has remained unpaid or is assessed thereafter. Morever, the fact of the present case have to be kept in minl and cannot be ignored while dealing with this contention. The Ld. SDR also submitted that the similar directions were given by the Apex Court in the case of Chandrakanta Kisha, ECR C-Cus 174 (SC) Volume-1. Reading profusely from the impugned order, Ld. SDR submitted that all these points have been discussed and decided by the Commissioner and that he reiterated the findings of the Collector.

6. Heard the submissions of both sides. We find that detailed arguments on the issue involved in the case were adduced. In the instant case prima facie the only part of demand covered is from the date when the unit was taken over by the applicants. We also note that deemed Modvat credit disallowed in the order is a disputed item. Similarly, disallowance of Notif. No. 202/88 is an arguable matter. Looking to the facts of the case as well as financial condition of the applicants, we direct the applicants to deposit a sum of Rs. 5 lakhs on or before 12.6.98 and report compliance on 19.6.98.

7. On compliance of this order, deposit/recovery of the balance amount of duty and penalty shall remain stayed during the pendency of the appeal. Non-compliance of this order shall lead to dismissal of the appeal without any further notice. Stay petition is disposed of in the above terms.

8. I have carefully gone through the order proposed by my learned Brother directing the applicant to deposit only Rs. 5 lakhs against the demand of Rs. 57,68,933 and penalty of Rs. 40 lakhs on the ground that the appellant had made out a prime facie case to pay the duty only from the date on which the unit was taken over by the applicants. At this point, I am not in a position to agree with my learned Brother. The appellants have not raised this point of taking over only assets and not the liabilities of M/s. Rathi Alloys and Steels Limited. In all the statements, even to the investigating agency they had admitted the liability. They had replied to the show cause notice and had contested the case. Even before the Commissioner this plea had not been taken up.

Even in the grounds of appeals this plea has not been raised. This plea has been raised only by the Counsel and not supported by any evidence or any material evidence on behalf of the appellants. This plea cannot be considered as a legal plea which could be raised by the Counsel during the course of arguments. This plea is a plea of fact and it is required to be established by evidence. The evidence on record is contrary to the plea taken and hence at this stage this plea cannot be accepted to grant full waiver or partial waiver on the premise that the appellant's liability arises from the date of taken over of the unit.

It is also clear form the agreement that the appellants had undertaken to take the liabilities also. There is nothing in the agreement to specifically show that they will take over only assets and not the liabilities. It is a settled proposition of law that where the company is sold, it is sold with its liabilities and assets. In a partnership agreement, partners cannot agree to take only profits and not losses.

Such a proposition is against the fundamental principles of law.Bhuvaneshivari Chemicals v. CCE, the ratio was in the facts and circumstances of that case which pertain to a firm.

The partners of a firm are individually and collectively responsible for the acts of the firm. Their personal acts and their tortuous liability cannot be shifted to another person who has taken over the firm. In that context, the Tribunal had made an observation that the purchaser/ appellant cannot be fastended with the contravention of the Rules 225 and Rule 174 which causes the appellants to register with the authorities and maintain certain records and about duty compliance in accordance with the provisions of law. The provisions of law required the individuals to perform certain acts and their failure to comply with the same calls for penal action in the form of penalty. If the individual has failed to comply that provision then the said individual is required to be penalised and this penal provision cannot be transferred to an innocent transferee. The judgment rendered is in that context and not on legal proposition that a partner can only take profits and not losses and such a proposition has not been supported by any legislation or citation from the counsel. The magnitude of fraud involved in the present case is immense and on prima facie going through the records, it cannot be said that the appellant/transferor firm were innocent of any contravention. The allegations prima facie appear to be plausible. However, taking into consideration the financial hardships pleaded, I direct the appellants to deposit a sum of Rs. 35 lakhs. On deposit of 35 lakhs, the balance of duty and penalty shall stand waived. I have taken into consideration the plea of disallowance of Modvat credit and also of Notification No. 202/88 while fixing the amount to be deposited. Further, financial hardships has also been considered by me while arriving at this figure.

Whether the appellants are required to deposit only Rs. 5 lakhs on a prima facie view that the appellants are liable to pay duty only from the date on which unit was taken by them and for the reasons as held by the Member (T)? The appellants prima facie had not pleaded the ground that they are not liable for liabilities of transferor firm and this plea cannot be accepted; even otherwise the evidence on record prima facie is against the appellants and therefore, they are required to deposit Rs. 35 lakhs for the reasons stated by the Member (J).

1. In view of the difference of opinion in between the Hon'ble Member (J) and Hon'ble Member (T), the following points have been referred to me to express my view as a third member: Whether the appellants are required to deposit only Rs. 5

lakhs as a prima facie view that the appellants are liable to pay duty only from the date on which unit was taken by them and for the reasons as held by the Member (T)? The appellants prima facie had not pleaded the ground that they are not liable for liabilities of transferor firm and this plea cannot be accepted; even otherwise the evidence on record prima facie is against the appellants and therefore, they are required to deposit Rs. 35 lakhs for the reasons stated by the Member (J).

2. Shri M. Chandersekharan, learned Senior Counsel, submitted that this is only stay matter and difference between the Hon'ble Members is very narrow and limited. Both of them differed on quantum of pre-deposit while disposing of the stay petition. He said that the difference itself constitutes prima facie case in favour of the party to grant stay as proposed by the Hon'ble Member (T). In the instant case, the Member (T) was of the view that appellants were to deposit Rs. 5 lakhs whereas the Member (J) has taken the view that Rs. 35 lakhs is to be deposited for the purpose of hearing the appeal in terms of Section 35F of the Act.

3. The question here is whether the appellants can be fastened with the duty liability for the irregularity committed by the previous manufacturer. The appellants had purchased the unit on entering into an agreement. Agreement does not speak of any liability. Member (Judicial) has taken the view that there is nothing in the agreement to specifically show that they will take over only assets and not the liabilities. It was argued on behalf of the assessee that even if there was such clause to take liability in the agreement that is contrary to law and the same cannot be enforced by the department. He submits that if there was a duty liability in respect of the transferor, that can be recovered by attaching the property/assets even if it continues with the transferee. The liability of the transferor cannot be fixed on the transferee. In support of his contention, he referred to the decision in the case of Bhuvanesivari Chemical v. Collector of Central Excise, and theMakers Development Services (P) Ltd. v. Collector of Central Excise, Bombay, was held that "it is well settled that the liability for payment of excise duty would always be on the manufacturer only and not on the purchaser of manufactured articles. It may be true that in the instant case the appellants had undertaken, as part of their purchase agreement, the liability to pay the excise duty, on the goods already manufactured but not yet removed. That would not mean that the Department

would be entitled to enforce that liability as arising under that agreement. The agreement in respect of that liability was between the appellants and M/s. ACC Ltd. If, subsequently, contrary to the terms of the agreement, the appellants do not discharge that liability and M/s. ACC Ltd. are compelled to discharge that liability, it may be open to M/s. ACC to seek recovery of the said amount through the civil court from the appellant in pursuance of the sale agreement between them. This would not mean that the Department would be equally entitled to step into the shoes of M/s. ACC Ltd. and seek recovery of that amount by taking proceedings under the Central Excises and Salt Act".

4. I have carefully considered the matter. There is lot of force in the argument advanced on behalf of the appellant that liability for the payment of duty in respect of the previous manufacturer cannot be fixed on the transferee irrespective of the agreement to take liability, if any, in the agreement. The case law referred to by him strengthens this view. I find that this position has been properly analyses by Member (Technical) with reference to the facts and case law. Accordingly, the view expressed by the Member (T) is concurred with. The file is returned to the original Bench to pass an appropriate order in accordance with law.

The majority decision in the case is that the appellants are directed to deposit a sum of Rs. 5 lakhs on or before 10.6.2000 and to report compliance on 19.6.2000.