

**Columbia Electronics Ltd. Vs. Commissioner of C. Ex., Indore**

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**Court :** Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

**Decided On :** Mar-26-2002

**Reported in :** (2002)LC50Tri(Delhi)

**Judge :** S Kang, a T V.K.

**Appellant :** Columbia Electronics Ltd.

**Respondent :** Commissioner of C. Ex., Indore

**Judgement :**

1. The present appeal has been filed by M/s. Columbia Electronics Ltd. being aggrieved with the Adjudication Order No. 22/99, dated 25-5-1999 under which the Commissioner has demanded Central Excise duty amounting to Rs. 68,93,847.47 paise and imposed equal amount of penalty on the ground that they had suppressed the manufacture of Video Magnetic Tapes and Cassettes and cleared the same without payment of duty.

2. Shri Gopal Prasad, learned Advocate, submitted that the process of manufacture consists of coating the Polyester film with a slurry made of several chemicals and solvent; the coated film is calendared and slit to make tapes which are wound to form Pan-cakes for sale as such and for captive use for making cassettes; that rejection occurs at every stage of processing namely coating, calendaring, slitting and quality control stage; that they were clearing their goods from the factory directly to customers as also to different selling centers throughout the country known as Diagnostic Centers; that unsold tapes and cassettes from

Diagnostic Centers and sale returns from customers used to be received at Bhopal where from they were re-dispatched to other Diagnostic Centers for being sold; that the entire case of the department is based on surmises and conjectures and on insufficient evidence to establish suppression of production and clandestine removal; that the factory of the appellants is situated in a village which is 20 miles away from Bhopal and the excisable goods have to be transported to Bhopal; that if the case of the Department is true the goods were bound to be caught red handed while in the process of being removed/transported from the factory. The learned Advocate further mentioned that the allegation of suppression of production has been made on the basis of entry of 3800 E-185 cassettes made in a diary; that the note in the diary was rebutted by pointing out that note was to the effect that the production of 3800 cassettes of E-185 type was to be undertaken by the Executive Director; that the Executive Director had only deposed that as per his information the appellants were manufacturing cassettes of type E-150, E-120, E-90, E-60 and E-30; that no question was put to him about the manufacture of cassettes E-185; that their request for cross-examination of Shri R.K. Sharma who has made the note in the diary was not acceded to by the Adjudicating Authority; that accordingly his statement cannot be relied upon. He also mentioned that the Adjudicating Authority had sought to use the contents of telegram sent to Shri Narsimha Rao who allegedly placed order for the cassettes; that there is no evidence of record to show that Narsimha Rao had responded to the telegraphic message sent to him and taken delivery of the cassettes after making the payment of the price; that the account clerk who is examined by the officer had mentioned that he had no knowledge that E-185 type cassettes were ever manufactured by the appellants.

3. The second incidence of suppression of production is based on certain pieces of papers which are found in a waste paper basket in torn condition; that according to the department these pieces of paper when put together showed that they related to issue of video tapes for manufacture of cassettes but there was no entry in respect of cassettes; that they have rebutted this allegation by stating that the said papers related to the period namely 10 to 11 months back and there was nothing positive to show that they related to actual transaction; that the person who wrote on those papers was neither located nor interrogated; that such a

document cannot be made basis for holding for clandestine manufacture and removal of the goods. He, further, mentioned that third allegation was that the appellants were maintaining double sets of invoices and four instances relating to 1990-91 were cited in support; that there is no truth in this allegation as no evidence had been brought on record to show that the goods relating to the discounted bills had actually been removed and dispatched to the consignee. The learned Advocate contended that the defence pleas were not discussed by the Commissioner in the Adjudication Order; that such an order is liable to be quashed being non-speaking. Reliance was placed on the decision in the case of Gian Castings Ltd. v. CCE, Chandigarh, 2001 (131) E.L.T. 380 wherein it was held that the Adjudicating Authority is required to consider the stand taken by the assessee and give a finding in respect of such stand.

Reliance was also placed on the decision in the case of Ebemezer Rubbers Ltd. v. CCE, Ahmedabad, 1986 (26) E.L.T. 997 wherein it was held that charge of clandestine production and removal of goods merely on the basis of two sets of invoices is incorrect.

4. The learned Advocate also mentioned that the evidence in support of the charge of clandestine removal is that the figures of clearance as per gate-passes is different from the quantity of tapes/cassettes booked with railways as per certified copies of railway receipts and the statements recorded from Shri S.M. Rajadhayax, Shri S.R. Agrahari, Shri A.K. Godbole, Shri Shiv Kumar Jadav, Shri Sanjay Agarwal and Shri Harish Gupta. The learned Advocate mentioned that Shri Sanjeev Agarwal, Executive Director of the appellants, had deposed that the difference between the two quantities could be due to re-despatch of returned goods; that Shri Agarwal promised to produce the evidence regarding return of the impugned goods; that he could not, however, produce the evidence as he resigned from the appellant company and left the service; that Shri Harish Gupta who was entrusted the job also left the company soon after and did not produce any evidence; that it seems to avoid undertaking pains for locating the papers, he told the officers that it should be presumed that there was no paper; that this presumption of Harish Gupta is not correct because papers were located subsequently and produced before the Adjudicating Authority; that their request to

cross-examine these person was also not acceded to by the department and the burden was cast on them to produce them for cross-examination; that they could produce A.K. Godbole, Excise Asstt.

who mentioned in his cross-examination that difference between railway receipts figures and the gate-passes figures was on account of the fact that there was re-despatch of returned goods stored at Bhopal. He also submitted that Rajadhayax had only deposed that he had heard from the marketing personnel that tapes and cassettes booked by railway to Bombay used to be goods on which duty was not paid and as such this evidence is only a hear say evidence; that by declining the cross-examination of Shri S.K. Jadav, transporter, it cannot be presumed that the payment made to him was only for carrying goods from factory to Bhopal Railway office and did not include cost of transportation of tapes/cassettes from storing place in Bhopal to railway parcel office. Shri Gopal Prasad, learned Advocate, further mentioned that the deposition made by Shri A.K. Godbole makes it clear that duty paid goods used to be returned to Bhopal wherefrom they were dispatched; that he also explained that as he was not asked by the officer the reason for the difference in both the figures, he did not say anything at that time that tapes and cassettes were taken from said storage place was taken for being booked by railway. Finally, the learned Advocate mentioned that the appellants had submitted the detailed account of the raw materials brought into the factory and used in the manufacture of tapes and cassettes; that the quantity of tapes that could be manufactured from the said raw material was nearly same as had been accounted for in RG-1; that similarly the quantity of cassettes that could be manufactured from captively used tapes was nearly the same as was accounted for in RG-1 and as such there was neither any suppression of production nor any clandestine removal of the excisable goods. Reliance was also placed on the decision in the case of CCE, Patna v. Universal Polyethylene Indus., 2001 (130) E.L.T.228 (Tribunal), wherein it was held that charge of clandestine removal and clearance is a serious charge against the manufacturer which are required to be discharged by the Revenue by production of sufficient and tangible evidence.

5. Countering the submissions Shri R.C. Sankhla, learned D.R., submitted that the factory premises were visited by the officers on the basis of intelligence about the

manufacture and removal of excisable goods by the appellants without payment of duty from their factory; that the scrutiny of the documents withdrawn from the factory revealed that most of the consignments were transported by railway; that the officers obtained from railway authorities railway receipts and forwarding applications; that the officers also collected documents from the appellants banks regarding discounting facility; that during the search of the factory premises some documents were torn by factory persons and thrown; that these were found to be issued note of video tapes issued for packing without mentioning in the statutory record; that similarly the production slips recovered from the factory premises did not find mention in the statutory record namely RG-1; that documents resumed also revealed the manufacture of Video Cassettes of category E-185 which was confirmed by Shri R.N. Sharma, in-charge production, in his statement recorded under Section 14 of the Central Excise Act; that however, there was no entry of cassette of category E-185 in RG-1 register; that double sets of invoices were maintained.

In fact, the learned D.R., reiterated the findings as contained in the impugned order and emphasized that Shri S.M. Rajadhayax, clerk at appellants sales office at Bombay had deposed in his statement dated 11-9-1993 that after booking the consignment by rail at Bhopal the railway receipts were brought to Bombay and rubber seals of the consignees whose names were mentioned on railway receipts were available with him which he used for taking delivery of the goods from railway; that he also used to take help of one babu to avoid payment of Octroi duty; that Shri Sanjeev Agarwal, Executive Director, had clearly accepted in his statement that cassettes of different timings were manufactured as per requirements of the customers; that even after ample opportunity given to the appellants they failed to produce any evidence in support of their claim of returned goods; that the department's case is not based on presumption and conjunctures and it is based on evidence. He placed reliance on the decision in the case of J.S. Khalsa Steel Ltd. v. CCE, Chandigarh, 2001 (129) E.L.T. 451, wherein the charge of clandestine removal was sustained on the basis of recovery of private documents and corroboration provided through statements of the Directors and others. The learned D.R. also submitted that as observed by the Supreme Court in the case of CCE v. Camphar Drugs and Liniments, 1989 (40) E.L.T. 276 (S.C.),

whether in a particular set of facts and circumstances there was any fraud or collusion or suppression is a question of fact depending upon the facts and circumstances of a particular case; that the facts and the evidence as discussed in the show cause notice and Adjudication Order clearly bring out the clandestine manufacture and removal of excisable goods by the appellants; that the decision in the case of Gian Castings is not applicable as the facts are totally different inasmuch as the Commissioner has passed a speaking and well reasoned order; that the Adjudicating Authority has given a clear and specific finding of cross-examination; that the cross-examination of their employees is not to be allowed, and if the appellants really wanted to produce their defence, nothing prevented them from producing those employees before the Adjudicating Authority. In reply the learned Advocate relied upon the decision in the case of Shalimar Agencies v. Commissioner of Customs, 2000 (120) E.L.T. 166 (Tribunal) wherein it was held that if a person is summoned for cross-examination does not appear, the documents on which he has to be cross-examined is not admissible as evidence without such cross-examination.

6. We have considered the submissions of both the sides. Regarding difference in the figures of clearances made from the factory as per gate passes and figures of clearance as per Railway Receipts, we observe that the Adjudicating Authority has given his findings that the dispatch of goods had not been disputed by the appellants. The appellants had not disputed the same before us also. Their defence is that the unsold tapes /cassettes which were returned to Bhopal were re-dispatched by rail together with those cleared on the day under GP-Is from the factory. The Adjudicating Authority had given his findings to the effect that they were specifically asked to produced documents and details in support of the said contention and that "even after ample and repeated opportunity given to them they failed to produce any evidence in support of their claim of returned goods." Even now the appellants have not brought on record any documentary evidence to show that the duty paid goods received at Bhopal from different diagnostic center were despatched by rail. As the appellants had not disputed the dispatch of goods and had not brought any evidence on record in support of their contention, non-cross-examination of the persons concerned does not affect the case of the Revenue. The appellants have now placed heavy reliance on the deposition of A.K.Godbole

before the Adjudicating Authority. But we observe that the same Godbole in his statement dated 17-2-1994 clearly deposed that the tapes mentioned in Railway Receipts were removed from factory without Gatepass/duty paying document. There is nothing on record to show that he ever retracted his statement. We also observe that this statement was recorded in February, 1994 that is much after the search of the factory of the appellants on 19-9-1993. There is no substance in his answer that since the officer did not ask him about the absence of gate pass, he did not inform them about clearance of goods from Bhopal. When the question was put to him about the goods mentioned in Railway Receipts, he clearly answered that ^bly, esjk ;g ekuuk gS fd mijksDr R.R. esa fudkyh xbZ video Tapes If the goods were cleared from Bhopal and about which he was aware he should have mentioned the same instead of deposing that the video tapes were cleared without gate pass/duty paying documents. In view of this his version made after more than 4 years of making initial statement is not tenable. We, therefore, find no infirmity in the findings recorded by the Adjudicating Authority.

7. Regarding E-185 cassettes, it was mentioned in Internal Office Memo that 3800 E185 cassettes were to be carried out by the E.D. Loding was to be continued in the night shift also. The Revenue has come to the conclusion, we think rightly, that the appellants had manufactured the said cassettes. Their conclusion was strengthened from the telegram sent to one Nar-simha Rao of Vijaywada intimating him that his ordered goods 3800 of E185 were ready for despatch. The appellants have not explained anything about the said Inter Office Memo and the telegram sent by them to said Narsimha Rao. They have on the other hand emphasized that R.N. Sharma, Dy. Manager (Production), was not produced for cross-examination and Shri Agra-hari, Account Clerk had mentioned that he had no knowledge that E-185 cassettes were ever manufactured.

In a case when a unit is involved in clandestine manufacture and removal of goods, it is possible that all the hands working in unit may not be taken into confidence. Shri Sharma, on the other hand, was Deputy Manager Production of the appellants and obviously would know about the goods manufactured in the factory. There is nothing on record also to suggest that Shri Sharma retracted his statement anytime.

Taking into consideration all the facts coupled with Inter Office Memo and said Telegram we agree with the findings reached in the impugned Order by the Adjudicating Authority that the appellants were manufacturing and clearing goods without recording in the statutory records and without payment of duty. This finding is strengthened from the fact that some documents were torn and found during the search of the factory premises. These torn papers were issue notes of video tapes which were issued for packing. There is no substance in the appellants' contention that the scribe of the torn papers was never located nor interrogated. The finding of the said torn papers from the factory had not been denied nor it had been claimed that they did not pertain to them. In respect of double sets of invoices the appellants have only contended that no evidence had been brought on record by Revenue to show that the goods had actually been removed and dispatched. In a case of clandestine removal, the Revenue cannot be burdened to prove in respect of each and every document that goods were actually removed and dispatched. It is for the appellants to explain the existence of double sets of invoice which, in our opinion, they have not done. Further their explanation that bills raised for discounting purpose were for commercial reasons besides being averred first time, has not been substantiated with any document/affidavit. We also do not find any substance in their submissions that from the account of the raw material brought into the factory it was not possible to manufacture any quantity of tapes and cassettes in excess of the quantity mentioned in RG-1 register. In a case of clandestine manufacture and removal of goods, the Revenue cannot prove the case with mathematical precision.

It was observed by the Supreme Court in Collector of Customs v. D.Bhoormul - 1983 (13) E.L.T. 1546 (S.C.) that "in order to appreciate the scope and nature of the onus cast by it, due regard must be paid to other kindred principles, no less fundamental of universal application.

One of them being that the prosecution or Department is not required to prove its case with mathematical precision, but what is required is the establishment of such a degree of probability that a prudent man may on its basis believe in the existence of the facts in issue." In our opinion, the Revenue has established their case about the manufacture and clearance of goods by the appellants without

entering them into statutory records and without payment of duty. Accordingly, we uphold the demand of duty as confirmed in the impugned Order. The penalty imposed, however, is on higher side. We reduce the same to Rs. 30 lakhs. But for this modification, the appeal is rejected.

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