

Patel Products Vs. Commissioner of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Sep-11-2002

Reported in : (2002)(84)ECC359

Judge : S T G.R., P Bajaj

Appellant : Patel Products

Respondent : Commissioner of Central Excise

Judgement :

1. The above captioned appeals have been preferred by the appellants against the common order-in-original dated 29-8-01 vide which the Commissioner had confirmed duty demand of Rs. 1,72,36,732/- with penalty of Rs. 1.50 crores on the firm appellant No. 1 besides ordering confiscation of the unaccounted goods and also imposed penalty of Rs. 1,00,000/- on the proprietor of the firm (appellant No. 2) and of Rs. 5,00,000/- on appellant No. 3.

2. The appellant No. 1 is a firm (hereinafter referred as firm) engaged in the manufacture of 'Har Singar' brand pan masala (sada & Gutkha) falling under Chapter heading 21 of the CETA. On 17-2-97, the officers of the central excise conducted search of the various premises of the firm bearing numbers E-3555-57 and 3637, located at Rajaji Puram, Lucknow. They also conducted search of the trading premises of the appellant No. 3 bearing No. E-3727, Rajaji Puram, Lucknow. During the search of the premises of the firm registered with the central excise, 55 bags of pan masala gutkha in loose condition weighing 1282 Kgs. were

found but out of that 507 Kgs. was not shown in RG-1 register, wherein the balance pan masala gutkha in loose condition record was 775 Kgs.

The excess pan masala gutkha was seized as proprietor of the firm K.N.Singh (appellant No. 2) could not offer any plausible explanation for non-accountal of the same in the statutory record. As per form IV register, there were various quantities of different raw material, but no stock of raw material of pan masala was physically available in the registered premises. Regarding shortage of raw material, Shri K.N.Singh disclosed that due to paucity of space, the premises No. E-3637 and E-3727 were being used by him for storage of raw materials. The raw material kept in these premises were found to be of the value of Rs. 7,18,300/-. Similarly, from the trading premises of appellant No. 3, 1600 Kgs. supari valued at Rs. 88,320/- was found. The manager of that trading firm informed the central excise officers that the supari belonged to the firm appellant No. 1 and the same was seized. After completion of the investigation, show cause notice was served on all the appellants for confiscation of the raw material found in the factory premises of the firm and other stock/raw material found lying in the unregistered premises. The duty demand for clandestine removal of the goods was also raised in the show cause notice. The penalty was also proposed in that notice on all the appellants.

3. After getting the replies from the appellants, the adjudicating authority confirmed the duty demand with penalty on the firm appellant No. 1 and imposed penalty on the other appellants vide order dated 23-8-98. That order was, however, challenged by the appellants before the Tribunal. The Tribunal vide order dated 14-9-2000 remanded the matter to the adjudicating authority for de novo decision by keeping in view the decisions of the Tribunal relied upon by the counsel for the appellants (detailed in para 11 of the said order of the Tribunal).

4. After remand, the adjudicating authority had passed the impugned order.

5. The learned Counsel has challenged the impugned order before us on these grounds, (i) no personal hearing was afforded by the adjudicating authority before passing the order, (ii) the duty demand had been based only on the shortage of essence without bringing any evidence on record proving the shortage of other

raw materials such as supari, katha, lime etc, which are used in the manufacture of pan masala. On mere shortage of one of the raw material, i.e. 'essence' the clandestine manufacture and removal of the final product i.e. pan masala could not be inferred.

The counsel has referred to the definition of 'pan masala' as given in note 3 of Chapter 21 of the CETA, (iii) seizure of 1882 Kgs. of pan masala in loose form kept in gunny bags could not be made as the same had not reached the RG-1 stage, (iv) no penalty under rule 209A could be imposed against the appellant No. 2 as proprietor when the firm had been separately penalised and (v) no penalty under rule 209A could be imposed on the trading firm appellant No. 3 for Storing 1600 Kgs. of supari which was not excisable at the time of seizure.

6. On the other hand, the learned JDR has reiterated the correctness of the impugned order.

8. We find that the firm did not dispute the detection of shortage of raw material (essence) in the factory premises. The proprietor of the firm, appellant No. 2 namely K.N. Singh at the spot, when this detection was made on 17-2-97 while conducting search, could not offer any explanation thereto. It had also not been contested that 'essence' is one of the raw materials used in the manufacture of pan masala. What is pan masala has been defined in Chapter 21 of the CETA. As per note 3 of the said Chapter, pan masala means any preparation containing betel nuts and any one or more of the ingredients, namely lime, katha and tobacco whether or not containing any ingredients such as cardamom, copra and menthol. Note 4 of this Chapter further defines 'betel nut' powder which is also known as 'supari' as any preparation containing betel nuts but not lime, katha, tobacco. The argument of the learned counsel that since betel nuts or other ingredients such as lime, katha had not been found short or excess in the stock of the firm, no inference regarding the clandestine production and removal of pan masala could be drawn on the basis of shortage of one of the raw materials i.e. essence, cannot be accepted, keeping in view the facts and circumstances of the case. It is quite evident from the record that in all 4300 Kgs. of supari known as betel nuts powder, in terms of chapter Note 4 of Chapter 21, referred to above, was found lying in the

two unregistered premises which were being used by the firm for storing the raw material and that supari was capable of manufacturing 6143 Kgs.

of pan masala after mixing other ingredients. It is also evident from impugned order that other ingredients too were found lying in the unregistered premises of the firm. Even pan masala in loose form (55 bags) were found lying in the factory premises unaccounted valued at Rs. 3,83,625/- weighing 1375 Kgs.. The raw material found in the premises No. E-3677, was supari 2700 Kgs. Katha 100 Kgs, tobacco 75 kgs., cardamom 650 kgs., zarda 500 Kgs., essence 240 Kgs., lime 75 Kgs., menthol 250 kgs., while in premises No. 3727 supari weighing 1600 Kgs. was found stored. All these were sufficient for the manufacture of pan masala. These materials were stored in unregistered premises by the firm for no other purpose except for clandestine manufacture and removal of the pan masala, without payment of duty. The quantity of pan masala manufactured and cleared without payment of duty, had been calculated as is evident from the show cause notice and the impugned order, on the basis of the statement of K.N. Singh, appellant No. 2 proprietor of the firm, who disclosed in his statement dated 17-2-97 that for manufacture of 300 kgs. of pan masala, raw material required was 210 Kgs. supari, 42 kgs. katha, 6 Kgs. lime, 1.5 Kgs. perfume, 7.5 Kgs. cardamom, 3 Kgs. menthol and 30 kgs. zarda. According to this ratio, disclosed by him, from the raw material found short in the registered premises of the firm, as shown in form IV register, the firm must have manufactured 154451 Kgs. pan masala valued at Rs. 4,30,91,829/- and the duty payable thereon at the rate of 40% was Rs. 1,72,36,731.60. Therefore, apparently the duty demand has been rightly calculated and confirmed on the firm appellant No. 1.

9. It was not essential for the department to prove the actual clearance of the final product, in a clandestine manner, without payment of duty by the appellant firm in the light of above referred evidence. Even otherwise, such an evidence could not be legally available because clandestine removal is always made by the assessee in a clandestine and secret manner. The Tribunal in *Siemens Ltd. v. CC & CE, Calcutta-I* - 1994 (70) E.L.T. 305, has even observed that in case of clandestine removal/ the department will not be able to produce direct evidence. Such removal can be gathered from the circumstances.

The Apex Court has also in CC, Madras and Ors. v. D. Bhoormull -1983 (13) E.L.T. 1546 (S.C.), made observations that on the principle underlying section 106 of the Evidence Act the burden to establish those facts which are within the knowledge of the party, is always on the party concerned and if that party fails to establish or explain those facts, an adverse inference can be raised against him. In the instant case, the firm as well as its proprietor appellant No. 2, had failed to offer any explanation for the shortage of the raw material and the raw material found stored in the unregistered premises. From the recovery of the raw materials from the unregistered premises, detailed above and shortage of raw material, referred to above, it can be safely inferred that the firm was indulging in clandestine manufacture and removal of the goods, without payment of duty. The Commissioner has recorded the definite findings in this regard and we do not find any illegality in those findings.

10. The appellant firm has no doubt taken the plea regarding seizure of 507 Kgs. of pan masala (loose), that out of this quantity, 332 kgs. was found lying on the floor of the manufacturing section waiting packing while the remaining 175 kgs. contained in pouches, was damaged during the process of packing and as such, were not entered in the statutory record. But this plea has been rightly rejected by the Commissioner.

The firm was making entries in register RG-1 (column 15) regarding the quantity of closing balance of the pan masala lying in the finishing room in packed condition and in loose condition. The proprietor of the firm K.N. Singh could not explain as to why the pan masala found lying in loose as well as in packed condition was not entered in that register [column 15(1)]. No explanation infact was offered at the spot, by him regarding the non-accountal of excess quantity of 507 Kgs. pan masala found in the factory premises. Therefore, the confiscation of the excess goods had been rightly ordered.

11. Similarly, seizure of 1375 kgs. of pan masala (loose) had been also correctly ordered as the plea of the appellant firm that it had not reached the stage of marketability stood exposed from the test report of the chemical examiner. That report revealed that pan masala contained all essential ingredients and was not

unfinished and non-marketable. Similarly, the plea of the firm that supari found lying in the trading premises of the appellant No. 3, could not be confiscated, being non-excisable, had been also, in our view, correctly rejected. Supari, as observed above, is one of the ingredients/raw materials, for the manufacture of pan masala. The supari found in the premises of the appellant No. 3 belonged to the appellant firm and it was obviously kept in that premises with intent to use the same in the manufacture of pan masala in a clandestine manner and for no other purpose. Being one of the raw material of the main final product, the firm are required to enter the same in the statutory record and could not conceal it, in unregistered premises or premises of the trading firm, without giving an intimation to the department.

12. The counsel has no doubt relied upon the ratio of law laid down in certain cases to contend that shortage of one of the raw materials could not lead to an inference of manufacture and removal of goods in a clandestine manner. Those are J.N.J. Industries and Ors. v. CCE - 1999 (83) E.C.R. 251 (T), V.K. Thampy v. Collector - 1994 (69) E.L.T. 300 (T), Premier Packing (P) Ltd v. Collector - 1986 (26) E.L.T. 333 (T) and Rishi Packers Ltd. v. CCE - 1999 (33) RLT 445 (CEGAT). But the ratio of law laid down in all those cases is not attracted to the facts of the present case, in the light of the discussions made above. In the first case, the clandestine removal was based on the total procurement of raw material by all the units, but the finished goods lying with the assessee were not taken into consideration. No proper deduction was worked out and for that reason, demand was set aside by the Tribunal.

In other cases, the charge of clandestine removal of the goods from the material brought on record, was not proved and the demands were set aside. No corroborative evidence was also collected in those cases by the department. But in the instant case, as discussed above, there is over-whelming evidence to infer clandestine production and removal of the goods by the appellant firm and its proprietor K.N. Singh, appellant No. 2. In fact, each case has to be decided for the confirmation of duty on the charge of clandestine production and removal of goods by an assessee, on the basis of its own facts and material brought on record. The observations made by the Tribunal/Court in a particular case holding that

clandestine removal in that given case was not proved, for want of material evidence, cannot be made applicable to each and every case. The facts and material brought on record, always differ from case to case. In the instant case, as observed above, sufficient material has been brought on record to establish the charge of clandestine removal of the goods by the appellants. We do not find any illegality or legal infirmity, in the impugned order of the Commissioner holding the appellants guilty of clandestine manufacture and removal of goods without payment of duty.

13. However, only legal defect which we find in the impugned order is regarding imposition of penalty on the appellant No. 2 K.N. Singh. In the earlier adjudication order dated 25-8-98, the penalty imposed on him was only Rs. 25,000/-, while in the present impugned order, it had been enhanced to Rs. 1,00,000/-. Such an enhancement could not be legally made. Moreover, even otherwise, the penalty on the proprietor could not be imposed when his firm had been burdened with the penalty under Rule 173-Q of the Rules. Therefore, the penalty on appellant No.2 being not legally maintainable, is set aside.

14. The argument of the counsel that no penalty at all could be imposed on the appellant No. 3 as the goods found stored by him were non-excisable being supari, cannot be accepted. Supari, as observed above, is one of the material ingredients for the manufacture of pan masala. The appellant No. 3 helped the appellant firm in storing supari, in their premises with a full knowledge that it was one of the ingredients for the manufacture of pan masala. The penalty, in our view, had been rightly imposed on appellant No. 3. However, the penalty amount could not be enhanced to Rs. 5,00,000/- when in the earlier adjudication order which was set aside by the Tribunal (referred to above), was only Rs. 50,000/-. Therefore, we reduce the penalty to Rs. 50,000/- on the appellant No. 3.

15. In view of the discussions made above, the impugned order of the Commissioner except for modification in the penalty on appellants 2 & 3, is upheld. The appeals of the appellants accordingly stand disposed of in the above terms.