

S.D. Enterprises Vs. Commissioner of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Jun-14-2006

Judge : T Anjaneyulu

Appellant : S.D. Enterprises

Respondent : Commissioner of Central Excise

Judgement :

1. This is an unusual appeal filed by against order dated 28.10.2005 passed by the Commissioner of Central Excise, Thane-II, in pursuant to the directions contained in the order dated 01.09.2005 passed by the Hon'ble Bombay High Court in Writ Petition No. 5767/2005. The facts in a nutshell that culminated into the present proceedings may be summoned up as follows: 2. The appellant, M/s.S.D. Enterprises situated at Unit No. 3, Gala No.8, Vasai (East), Mumbai, is engaged in the manufacture of Stainless Steel Utensils. The appellant's aforesaid factory premises were searched on 17.01.2004 by the Officers of Central Excise. A Panchnama was drawn and physical stock of raw material lying in the premises was taken, weight as well as, sizes shown in the packing, was verified and found to be tallying. No discrepancy was noticed. A second visit of the Central Excise Officers, at the appellant's premises took place on 20.01.2004, and a panchnama was drawn up on the said occasion.

Strangely, this second Panchnama records that the Panchas "were given to understand" that "the raiding officer" had drawn a Panchnama dated 17.01.2004, in the said premises for discrepancies noticed, wherein correlating the available

stock of raw materials with the input documents" whereas a bare reading of the Panchnama dated 17.01.2004, clearly shows that no such discrepancies existed. Inventories of the Cold Rolled Stainless Steel Sheets/Pattas/Pattis, and Coils (raw materials) were taken on the ground that the said inputs/raw materials could not correlate with duty paying documents, they were detained.

Representative samples thereof were also drawn. The premises at Gala No. 8 were thereafter, sealed by the Central Excise Officers. The Panchnama further states that the officers, "on peeping through", one of the windows, the other galas, noticed packages bearing the name/markings of the appellants, which were probably contained utensils/inputs. These galas, too, were therefore sealed and all other galas were also seized.

3. On the same day, the officers also visited the premises of the appellant at 68/A-02 Shah & Nahar Industrial Estate, Dhanraj Mills Compound, Lower Parel, Mumbai. Nothing incriminating was found therein.

However, several records were resumed, comprising practically all the working records of the appellant.

4. A third visit of the above premises, by the Central Excise authorities took place on 22.02.2004 and a Panchnama was drawn up on the said location. Contrary to the recordings made under Panchnama dated 20.01.2004, after opening the sealed galas, all the galas were found to be empty.

5. As per the search made on 20.01.2004, and the Panchnama conducted and as per the records taken over the raw materials/inputs were 36.894 MT. There was no discrepancy in the stock found in the factory premises and the input register contained entries of the inputs receipt.

6. That on 22.06.2004, statement of the Managing Partner was recorded.

A table comprising of 28 invoices was prepared by the officers and the Managing Partner of the appellant was asked to correlate the inputs available in the factory with those invoices. Three invoices pertaining to Pattas/Pattis were deliberately not mentioned in the Table though available on record and their entry being

existed in the seized records thereby requiring the appellant to compare the incomparables. The request of the appellant made in the statement recorded under Section 14 of the Central Excise Act, 1944 to provide complete records seized from the premises for giving correct position in regard to seized stocks, detailing the complete of the receipt and usage, exports and for the true comparison and correlation, was not acceptable.

7. On 23.05.2004, the Managing Partner of the appellant wrote to the Superintendent (Preventive) submitting that he could confirm additional details only after the complete records were verified by a Chartered Accountant and Excise Consultants. He also submitted that otherwise, the findings would be incorrect and erroneous, arrived on the basis of incomplete/insufficient verification of complete facts/records.

8. On 24.06.2004, the appellant again wrote to the Superintendent (Preventive) with regard to the request, of the letter, for providing the correlation and maintenance of the product wise, size wise, grade wise and quality wise records of the material used in the finished goods exported by the appellant. The appellant pointed out that its internal control records would completely satisfy this requirement, and that numerous records, in this regard, had already been drawn by the Central Excise authorities under Panchnama from the factory and from its office. In the absence of such records, the appellant submitted that it was not in a position to explain any accounts or answer any of the queries of the Department. The Department was therefore requested to examine the records of the appellant, which they had seized.

9. On 19.7.2004, a Show Cause Notice No. V/PI/Th-II/30-06/2004/2634 was issued to the appellant by the Commissioner of Central Excise, Thane-II. The Show Cause Notice alleged that the raw materials found in the appellant's premises for intended to be used in the manufacture of export product and rebate was claimed against invoices available had been, never entered in the appellant's factory premises, but had been diverted. The appellant was, therefore, alleged to have contravened Notification No. 41/2001-CE(NT) as well as Rule 18 of the Rules. The seized raw material was procured without any duty paying documents.

On the basis of these allegations, the appellant was directed to show cause as to why the seized goods (raw materials) should not be confiscated and penalty not imposed on it for keeping and purchasing the said goods without any duty paying documents.

10. On receiving the above mentioned Show Cause Notice, the appellant wrote on 26.07.2004 to the Superintendent requesting following amongst other records and documents resuming from its premises under Panchnama, which were relied upon in the Show Cause Notice be given to them: a) File No. 20 Sales Tax Working for Scrap Sale, and Rule 18 statements etc from pages 1-159; b) File No. 21 Bank Statement File (State Bank of India 2002-03), from Pages 1-311.

c) File No. 22 - Rule 18 - Job Worker Reconciliation and production file reconciliation, excise correspondence etc. (Bank statement- HDFC) etc Pages 1-429.

d) File No. 23 - Rule 18 Production Reconciliation monthly statements and correspondence, page 1-59.

11. The appellant, vide its letter dated 31.7.2004 requested the Commissioner to provide to it, copies of the report of the Central Excise Division, Jodhpur, which were relied upon in the Notice. The reminder for being supplied copies of the documents drawn under the Panchnama dated 20.1.2004, was sent by the appellants to the Central Excise Officers vide a plethora of representations.

12. Vide, letter dated 9.11.2004, the Joint Commissioner informed the appellant that photocopies of some of the documents requisitioned by it were available and could be collected. However, copies of Files at Sr No. 20 to 23, of Annexure A to Panchnama dated 20.1.2004 drawn at the office premises were stated to be made available shortly, and were not supplied on the pre-text that the same would be relevant for the further Show cause Notice also.

13. Vide further letter dated 24.11.2004 addressed to Chief Commissioner the appellant has highlighted the importance, relevance, significance underlying of the documents of which copies are sought for as well as the importance of File Nos.

20 to 23. Thereafter reminders were also issued in this regard.

14. Another Show Cause notice No. VI/Pt/Th-II/30-06/2004/7753 dated 31.01.2005 was issued to the appellant to show cause as to why rebate claim by it which was, erroneously paid to it been demanded and recovered from it under Section 11A of the Central Excise Act, 1944, penalty should not be imposed on it, and interest on the said amount be recovered from it and rebate claim of Rs. 2,03,81,566/- claimed by it should not be rejected.

15. In the context of the abovementioned Show Cause Notices issued to the appellant, it again addressed a letter dated 15.02.2005 to the Deputy Commissioner requesting for supply of the details regarding the procedure of drawing samples of the exported goods, prior to the sealing of the export container, the identity of the officer conducting drawl of the samples, place of sealing, mode of transport and evidence thereof, identification marks, the manner of receipt and delivery of the sample parcels, parcels, place of storage of samples drawn and record if any maintained in respect thereof, and whether the balance samples had been kept intact for verification, as requested by the appellant.

16. That on 15.12.2005 itself, a Show Cause Notice No. V(73) Rebate/ARE-2/1746/04/331 was issued to the appellant by the Assistant Commissioner of Central Excise, again alleging wrongful claim of rebate by it, against a different ARE-2, and directing it to show cause as to why the said amount of rebate claimed should not be rejected and penalty should not be imposed on it.

17. That vide various letters dated 03.02.2005, 10.02.2005, 14.02.2005, 23.02.2005, 01.03.2005, 02.03.2005, 09.03.2005 and 20.03.2005, the appellant inter alia sought to return the entire records taken over specifically and file No. 20-23 which contain vital and crucial information as well as appellant's correspondence, production lots, verification reports with Excise and various Miscellaneous reports. It is putforth that these documents would answer the allegations against the appellant.

18. That after 15 months of seizure and after 14 months of the first request for these files, on 10.03.2005, it was informed that records marked as File Nos. 20 to

23 were lost and that an FIR had been lodged in respect thereof.

19. The above communications by the appellants finally invited the response, from the Learned Assistant Commissioner, vide letter dated 17.05.2005, wherein it was stated that but for File Nos. 20 - 23 which were missing and in respect of which an FIR had been lodged, copies of complete records had been furnished to the appellant. Further, it is stated that the missing files are not relied upon.

20. Vide letter dated 27.06.2005, the appellants intimated the Learned Deputy Commissioner that some documents, requisitioned by it in connection with the Show Cause Notice dated 31.1.2005, still remained to be furnished and requested that they may be furnished forthwith.

21. The appellant wrote a letter dated 20.07.2005 to the Learned Chief Commissioner of Central Excise stating that adjudication of Show Cause Notice being inordinately delayed owing to the non supply of the records sought for and that file No. 20 - 23 were crucial to the appellant's defence. Further, the appellant also addressed another letter dated 19.08.2005 requested for several other documents, records and information explaining their relevance relating to defence point of view. The appellant also sought inspection of originals of the exporters representative sample memo and also sought return of the non relevant original records seized from its premises.

22. As there was no fruitful response from the department's side, the appellant moved the Hon'ble Bombay High court vide Writ Petition No.5767/2005 setting out the facts of the case in detail. The Show Cause Notices were challenged on the ground of apparent and gross mala fide, deliberate denial of natural justice, vindictive action, suppression of evidences, concoctions of false evidences and the intervention of the High Court was therefore sought to avoid palpable injustice to the appellant.

23. Vide its order dated 01.09.2005, the Hon'ble Bombay High Court disposed of Writ Petition No. 5767/2005 with direction, to the Learned Commissioner to first adjudicate all applications pending before him and thereafter to adjudicate the Show Cause Notices. The Minutes styled as "Pursis" prepared by the department

was part of the said order dated 01.09.2005.

24. Consequent to the above said decision of the Bombay High Court, the appellant requested for expeditious decision by the Learned Commissioner by addressing letter dated 21.09.2005 and 02.10.2005 by the Learned Commissioner by addressing letter dated 21.09.2005 and 02.10.2005 for which the Deputy Commissioner responded vide letter dated 6.10.2005 in which no personal hearing was accorded. The Learned Commissioner thereafter has on 28.10.2005 passed the impugned order, wherein it is held as under: (a) Each letter of the appellant had been replied to by the Department.

(b) Though the appellant cited 137 letters written by them to various authorities, of which they sought adjudication, the Learned Commissioner inferred to his convenience, based on an opinion sought from the Ministry of Law, that the directions of the Hon'ble High Court were confined to the 39 representations/applications. As such, the learned Commissioner was confining himself to the said 39 representations, only.

(c) Regarding the letters concerning with manner of withdrawal, sealing, transportation, storage of samples, etc. the Learned Commissioner only informed that samples were drawn as per the Standing Orders issued by the Customs authorities, (d) The Learned Commissioner held that all documents relied on by the Revenue, and sought for by the appellant, had been provided to him except for Files Nos. 20 to 23, which were missing. Of these, the appellant was directed to procure copies of the Sales Tax Working File from the Sales Tax authorities and Bank Statement files from the respective Banks. The Monthly Production file could be reconciled from copies of the Production Slips and RG 1 register, (e) Copy of FIR lodged on 24.03.05 and report dated 30.09.2005 was provided to the appellant along with the impugned order, (f) The Learned Commissioner held that the other issues raised by the Appellant, and the requests made in letter dated 19.08.2005 could be considered at the time of adjudication of the Show Cause Notices themselves. The Learned Commissioner held that any reply, by him, to the allegations leveled by the petitioner in his communications, could prejudice the adjudication proceedings and result in subversion of the due process of the quasi-

judicial proceedings, (g) documents enlisted in the annexure to a Panchanama could not be treated as relied upon documents merely because the Panchanama itself is a relied upon document, (h) the subjects of the Files 20 to 22 showed that they did not appear to have any connection whatsoever with the Show Cause Notices issued to the appellant, (i) as the Show Cause Notice was based on non-receipt of raw material in the petitioner's premises, and was based on records of purchase, transportation, etc., the Monthly Production Statement File (No. 23) could not be said to be of relevance in answering the charges against the appellant.

25. Aggrieved by the aforesaid impugned order passed by the learned Commissioner, the appellant contends that the above referred findings are manifestly perverse and untenable in law. The observation of the Commissioner that in reply to the allegations leveled by the appellant would cause prejudice to the adjudication proceedings will tantamount to utter disobedience to the directions issued by the Hon'ble High Court.

26. It is contended that non supply of the File Nos. 20 to 23 and other documents, statements, information and correspondence connected with the case is against the basic principles of natural justice and that without providing the same, the learned Commissioner cannot insist upon final reply to the Show Cause Notices. The observation of the Learned Commissioner that the Files 20 to 23 were not relied upon by the revenue was entirely perverse. If these files were not relied upon, the same were required to be returned in original. In any case, since the appellant wanted to rely upon these Files and have consistently contended regarding the importance to them in establishing correlation of the inputs with the exported goods, under no circumstances the Show Cause Notices can sustain if they are allegedly lost. These files were integral part of the Panchnama which were relied upon in the Show Cause Notices and therefore there was no plausible reason for non-supply of these Files along with first Show Cause Notice dated 19.07.2004 itself, when the same were admittedly in possession of the department as evident from the letter dated 19.11.2004 issued by the Learned Deputy Commissioner.

27. The findings of the Learned Commissioner that the subject Files No.20 to 22 appears to have no connection whatsoever in the notices is not tenable.

28. The Learned Commissioner erred in directing the appellant to reconstruct the file Nos. 20 to 22 from the available records. These files contained primary information which could not be retrieved from other records and details in computer. The responsibility to reconstruct the files, if any, was entirely on the department itself, which lost them, if it did, in the first place. The file bearing No. 23 is contained scrolls of production log for 2002-03 and 2003-04 which disclosed the inputs going into manufacture of the final products whereon rebate was claimed. Reconstruction of the said file from RG1 register and production slips, as advised by the Learned Commissioner was not possible as all details under the scroll of production log was not possible to be gleaned from these documents.

29. The claim of officers regarding loss of files was not credible and that no action whatsoever was taken against the officers responsible for the alleged loss of the files.

30. As against the contentions raised by the appellants, the Learned D.R. raised the following points for preliminary consideration about the maintainability of the appeal itself. According to him, this case is related to exports under claim of rebate and as such this tribunal has no jurisdiction to entertain the same. On this score, he relied upon the following Tribunal's decisions: (a) CCE, Chennai III v. Kiwi TTK Ltd. 2002 (149) ELT 340 (T). It is observed that in this decision that the Tribunal has no jurisdiction to deal with even the limited question of limitation relating to rebate of duty on export as per proviso to Section 35B of the Central Excise Act, 1944, when the Tribunal cannot take up the main substantive issue of rebate claim on export, it can not take up the procedural issue relating to time bar for limitation is only species of the generic issue pertaining to rebate claim. Punjab Chemicals & Pharmaceuticals Ltd., v. CCE, Chandigarh In the above case, excise duty paid on goods which were ultimately exported in modification of plan to divert the goods for home consumption.

The nature of claim is of rebate of duty consequent on export of goods and not of refund, which is covered by the proviso to Section 35B(I) of the Central Excise Act,

1944. Hence the appeal in that case is held as outside the jurisdiction of the Tribunal.

(c) Lastly he relied upon the decision in the case of Madura Coats Ltd. v. CCE 1990 (49) ELT G 237 (Tri.), wherein it is held that the Tribunal is not empowered to decide the matters relating to rebate of excise duty on goods exported to any territory outside India.

Interest on such rebate having arisen out of rebate, jurisdiction of the Tribunal is barred.

31. On a careful reading of the above referred decisions, it is found that none of them are applicable to the present proceedings before me.

In the instant appeal, neither there is any determination of the point having relation to the rate of duty of excise or the rebate of duty or the value of goods for the purpose of assessment or any issue relating to the fine or penalty is involved. There is also no prayer by the appellant for setting aside or quashing the Show Cause Notices, which relates to the question of export of goods and rebate duty claimed therein. In this appeal, what is required to be examined is whether the impugned order passed by the Learned Commissioner is in compliance with the decisions issued by the Hon'ble High Court of Bombay in pursuance of a Writ Petition filed by the appellant. In short, whether the Learned Commissioner has complied with such directions, in substantive manner, in the letter and spirit, as seen from the facts and circumstances, the subject matter of the appeal, did not fall within the scope of the first proviso to Sub-section (1) of Section 35B of the Central Excise Act, 1944. Therefore, the aforesaid decisions of this Tribunal do not stand for consideration. The preliminary objection is answered accordingly.

33. There was nothing unusual implied in the Hon'ble High Court's order.

The prayer of the appellant was to invalidate the Show Cause Notice itself on the basis of superficial after thoughts. The documents in question at the time of Writ Petition (relied upon documents) were already in possession of the appellants, which could be disclosed from the order dated 28.10.2005 of the Commissioner.

The adjudication of the applications implied only the course of natural justice, and the fact is that these applications implied only the course of natural justice, and the fact is that these applications mainly deal with illegible copies of relied upon documents, its repeated requests to supply and demand for the missing files, informing the department of the vital point of defence lying in the said four unrelieved upon documents to the Show Cause Notice in spite of reminders by the department.

34. The appellant is trying to misinterpret the directions of the Bombay High Court, the observation of the Commissioner is only aimed at the preservation of equity to the adjudication proceedings, which is in consonance with the directions of the High Court.

35. The department has made certain charges against the appellant based on records. The department has exclusive right to rely upon one or other documents. If the files at Serial No. 20 to 23 are not relied upon, it means they are not holding any evidence in support of the charges raised in the Show Cause Notice. The bank files and sales tax documents can be obtained from the concerned department and as far as the payment records to transporters are concerned, it can be procured from the particular transporter. None of these is destructible unilaterally by the loss of one set of copies. This kind of exaggeration is exposing unholy intention of the appellant to defend their case. There is no doubt that the files in serial No. 20 to 23 shown in the Annexure to the Panchnama dated 21.1.2004, are integral part of the Panchnama but the same are not integral part of the Show Cause Notice. In the course of initial search, lot of documents are withdrawn under the suspicion that the same could be used for investigation, but subsequent to investigation some may prove to be not relevant and hence not relied upon. There can not be any primary information in the production log, bank file and sales tax file, bank cheques and ledger are primary information, not the statements, not sales tax; the sale and purchase invoices are primary documents which are still in the custody of the department, copies of the same are also supplied to the appellant. Depending wholly on the so-called production log can not be an absolute defence, which can disprove other records of production such as RG1, input invoices, ARE-I details etc. When the raw material invoices indicate

non receipt as per transportation record, how such production log are going to prove otherwise.

36. The Hon'ble High Court did not say simply to dispose of the applications by furnishing necessary documents to the appellants. The word 'adjudication' can not arrive at the truth by giving specific findings as facts alleged and denied after due consideration of the evidence available on record or let in the proceedings and hearing of the parties.

37. As seen from the Records, there were consistent efforts of the Appellants in seeking copies of relevant Documents, statements and information apart from, raising the following issues for adjudication.

That vital and crucial information claimed by the appellants as available on the fillies have been made known to the department since the beginning 12.02.2004 covering for the period 2002-03, 2203-04.

(i) The allegation of the appellants regarding Malice and making of False Panchanama.

(ii) The deliberate drawing of Incorrect List of 28 Unutilised Invoices excluding the 3 Invoices of SS Patta - Patti, though available on Input Register to penalize the appellants.

(iii) Allegation of the Appellants of Fabrication of Samples by the Officers for testing and creation of False Test Reports and the department claims of No Exporters Representative Memo in the face of the of available Memo's annexed to the Appeal.

(iv) The supervision of the Appellants factory by the officers on Regular Basis for verification and Exports and consequent fallacy in the allegations in the Show Cause Notice.

(v) The departments claim on non-receipt of inputs or Sales Tax report in the face of the information by way of documentary evidences claimed by the appellants under File Nos. 20 - 23 which include available Inputs of SS Coils under

Panchnama; verification reports of the Range Officers' available transport records under Files 20-23; and unique linkage of Purchased Inputs used to the Export products under the Production Log-23 for period 2002-03, 2003-04, seized by the department.

(vi) The departments allegation of substituting the costly Inputs on which proportional Excise Duty has been admittedly been paid, with Cheaper Inputs without any Duty Paying Documents etc.; in the face of the department valuing the Inputs at Rs. 70/- instead of the Purchase Input Invoice rate of Rs. 33.50 per kg.

(vii) Incapacitation caused to the Appellants - in establishing co-relation of Inputs - Exported Goods; Rebuttal of Vehicle owner statements, due to non-supply of various records, documents and information and regarding crucial and vital documents drawn under Panchnama under Riles 20-23.

38. The department representative has failed to rebut any of the issues argued by the appellants in respect of the malice, denials of records, and other contentions under the petition. The allegations under the Notice is seen severely prejudiced with contradictory recordings under panchnama's of 20.01.2004 and 10.03.2004; denial of records as a means to subject the appellants to rigours of adjudication; The allegations of non-transportation of inputs/handling etc. in the face of available coils sheets under panchnama; the statement of the jobbers; the laboratory test reports of the department; the payment records to the transporters against receipted challans; verification reports of the department officers; The same as claimed by the appellants, is negated by the proof of transporter details of payment etc. under file 20-22 and appear illogical therefore. There are many imponderables in business and there is force in the Appellants grievance of grave prejudice in filing the defense reply, specifically when the department's allegation of improper vehicle nos. or mere owner statements are not even supported by the Transporters statements/Records to conclusively prove non transportation of the Inputs. The two prime means of co-relations of inputs with exported goods- the "Scrolls of Production Log and the Original Exporters samples have been compromised as claimed by the Appellants; in conclusion, it may be said that such allegations are raised by denial of factual primary seized records. Therefore, in

view of the facts and circumstances of this case, the said Critical and Vital records of the Appellants cannot be washed away as not relied or irrelevant or inconsequential for its defense and is directly violative of the principles of natural justice and fair play. Considering the infirmities brought forward by the appellants, the Panchnama's, statements evidences, allegations under the Notice therefore cannot be said to be free from elements of malice; incorrect portrayal of facts.

39. The contradiction has to be addressed, followed principles of Natural Justice. The defense reply against the Show Cause Notices, has to be answered in the realms of the appellants seized records and not on partial, isolated and truncated information. The Learned Commissioner cannot expect the appellants to provide effective defense reply of the period for which the appellants records are deprived.

40. The Hon'ble High Court required the Learned Commissioner to adjudicate all such issues completely under the pending applications, apart from the adjudication and consideration of the requirement of documents, statements, records, and information specified in letter dated 19.8.2005, which was a specific prayer in the Writ Petition.

Instead of following the directions of the Hon'ble High Court, I find that the Learned Commissioner sought to keep the above issues pending for being adjudicated at the time of adjudication of the Show Cause Notices. As seen from the impugned order, the Learned Commissioner gave his finding without considering the above issues and the relevant facts and circumstances, that the file purported to be missing were not relied upon in the Show Cause Notices and that therefore, no prejudice was being caused to the appellant on this score. The said observation of the Learned Commissioner is devoid of any merits. Moreover, there is considerable force in the submissions made by Learned Counsel for the appellant and that the documents forming Annexure to the Panchnama are integral part of the Panchnama and once the Panchnama is relied upon, it is not open to the department to contend that they are not relied upon documents taken over under the Panchnama. In *Sanghi Textile Processors Pvt. Ltd., v. CCE* 1993 (65) ELT 357 (SC), the apex court makes it mandatory for the department to supply to the assessee copies of all the documents relied upon in the Show Cause Notice.

Further, it has been held that the documents on which the department does not seek to rely shall be returned to the assessee. In *Tribhuvandas Bhimji Zaveri v. CCE* The Hon'ble Supreme Court held: We fail to appreciate why the authorities could not furnish the required information to the appellants. To say that the documents are not ready available with the Officer, is no ground to deny vital information to a person who is to be visited with a penalty under the Act. We are of the view that the failure to supply this important piece of information to the appellants has prejudice the appellants and to that extent, we agree with Mr. Diwan that the principles of natural justice would stand violated.

The learned commissioner cannot create precedents amounting to denial of Natural Justice and prejudging the contents of the appellants records; reportedly lost by the department and later seek shelter in a hopelessly delayed Police complaint. The allegations of Sample Test Reports obtained by the department from Samples drawn under Panchnama dated 10.02.2004, without Exporters samples memo's suffer from infirmities and a Show Cause Notice does not permit the profiling of improper and vitiated facts in order to put on assessee to charge. The Learned Commissioner can not shrug off such a vital aspect of misindulgence by claiming that- "the department reply to the letter of 15.02.2005 and the appellants seems adequate", shows a prejudiced application of mind.

41. In the light of the aforesaid position, the judgment of the Karnataka High Court in the matter of *M/s. Reletronics Pvt. Ltd. and the order of the Tribunal in the case of Vikas Industries and Ors v.CCE, Thane II* (Order No. A-74 to 77/WZB/05-C-II dated 31.12.2004) relied upon by the Ld. D.R. can be said to have been misplaced in the facts and circumstances of this case.

42. The Learned Commissioner erred in maintaining that "even if evidences have been fabricated, false statements have been obtained under duress, investigation has not been done in proper manner etc., this should be considered at the time of adjudication of the Show Cause Notice" I am in complete disagreement of this score, when the Hon'ble High Court has directed to adjudicate all issues consciously, such blatant and apparent mis-indulgence even though being recognized by the Learned Commissioner, cannot be postponed at any cost and

allowing such laxity will jeopardize the very essence of justice. Failure to provide the records and information sought for will clearly vitiate and prejudice the effective defense of the appellants and amounts to denial of natural justice. It is a settled proposition in law that any document essential to the unfolding of the narrative and supply of the same referred and drawn under Panchnama is necessary, whether in the result the effect of it is for or against the Revenue or the assessee.

No adjudicating authority can, therefore, refuse production of such a document simply because that document which is to be used against the subject is not relevant in its prescription. This would certainly amount to refusal of original opportunity to defend. The appellant has also alleged change in the stand of the department, from time to time in respect of availability of the files serial No. 20 to 23. In the initial stage the department has undertaken to produce and supply these files to the appellant. After a gap of period, and after the pronouncement of the order in M/s. Vikas Industries, the department has informed that these four lines were not relied upon in the Show Cause Notices and were missing. Therefore, the appellants doubt of the genuineness of the claim made by the department in respect of missing of the documents are reasonable and obvious.

43. The appellant has rightly put forth its case that it is impossible to reconstruct the matrix or primary information, inputs and the usage for the exported products without the production log, transport records etc. Therefore, incapacitation in the defence cannot be ruled out.

44. Thus what is observed is that the Learned Commissioner failed to adhere to the basic requirements of the adjudication on the pending applications of the appellant and the impugned order suffers from clear bias, which prejudices the interest of the appellant. The Learned Commissioner failed to recognize that the delay caused in supply of vital documents, information and records was resulting in great loss to the appellants. When direct allegations were made and on due consideration, the Hon'ble High Court gave directions to adjudicate the pending applications, of malice, mis-indulgence and it is the duty and responsibility of the Learned Commissioner to comply with the same.

45. In the light of the aforesaid discussion, the impugned order passed by the Commissioner is not sustainable and as such the same is set aside.

46. In the result, the appeal is allowed as prayed for. Stay application is also disposed off accordingly.

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