

Commissioner of C. Ex. Vs. Modison Ltd.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Jul-12-2006

Judge : J Balasundaram, Vice-, S T Chittaranjan, T Anjaneyulu

Appellant : Commissioner of C. Ex.

Respondent : Modison Ltd.

Judgement :

1. The issue referred to the Larger Bench is whether there is any need for mens rea for warranting confiscation and penalty under the provisions of Rule 173Q(1)(a), (b) & (c) of the Central Excise Rules, 1944.

The brief facts in this case are that on 22-2-2001, officers of Central Excise division, Vapi, visited the premises of the assessee engaged in the manufacture of copper chromium billets, copper rods/flats/bars, cast copper wire bar etc. falling for classification under Chapter 74, and found 299 bundles of extruded and drawn copper bars/rods which were fully tested, packed on 13th, 16th and 21st February, 2001 and in ready to despatch condition, but not entered in the daily stock account which showed nil stock of finished goods. Duty amount involved thereon was Rs. 1,90,338.80. It was also noticed that the assessee had removed duty paid raw materials viz. 17,482 kgs. of copper waste and scrap on which credit was taken, to their sister unit, i.e. Modisun Ltd., without preparing central excise invoice, without reversing Cenvat credit involved and without obtaining specific permission to store duty paid material in some other factory premises. Show case notice dated 17-8-2001 was, therefore, issued to the assessees, proposing to confiscate the seized

finished goods and raw materials under Rule 173Q(1), to recover Central Excise Duty/Cenvat credit of Rs. 2,06,987/- leviable on raw materials cleared illicitly without payment of duty/without reversing Cenvat credit proposing levy of interest under the provisions of Section 11AB read with Rule 57AH and imposition of penalty under Section 11AC of the Central Excise Act read with Rule 173Q of the Rules. The Additional Commissioner of Central Excise adjudicated the notice by ordering confiscation of seized finished goods with option to redeem the same on payment of a fine of Rs. 2,00,000/-, ordered confiscation of seized raw materials with option to redeem the same on payment of a fine of Rs. 2,50,000/-, confirmed the duty demand raised in the notice together with interest imposed penalty of amount equal to duty involved on the seized finished goods and seized raw materials and penalty of Rs. 20,000/- on the senior engineer-cum-authorised signatory of the assessee, under Rule 209A. The Commissioner (Appeals) set aside the order of confiscation, holding that there was no evidence on record to establish intention on the part of the assessee to clear finished goods clandestinely and that since raw material found short was subsequently recovered at an adjoining plot of the assessee which prior to 1996 was registered with the central excise authorities as unit No. 2 of the same assessee and the assessee had surrendered its registration in 1996 and in February 2001, the assessee submitted a revised ground plan for addition of premises of the plot where the raw materials were found, the bona fide intention of the assessee was established and, therefore, the short found quantity of raw material was not removed by the assessee from their control. He reduced the penalties to Rs. 2,000/- under Rule 173Q and set aside the penalty imposed on the authorised signatory of the assessee company. The Revenue has come up in appeal against the setting aside the confiscation and the reduction of penalty.

The brief facts are that on 19-5-2000, Central Excise Officers visited the premises of the manufacturing unit of the assessee and seized excess/unaccounted stock of finished goods, viz. air-conditioners, electric motors and fan blowers/impellers. Show cause notice dated 13-11-2000 issued to the assessee for recovery of duty, confiscation and penalty on the manufacturing unit and its director, was adjudicated by the Deputy Commissioner who confirmed a demand of Rs. 28,882/- , imposed penalty of equal amount on the company and on its director and

confiscated the seized goods. The Commissioner (Appeals) held that there was nothing on record to bring out that the assessee made any attempt to remove goods in question clandestinely with intent to evade payment of duty. He, therefore, set aside the confiscation. He reduced the penalty imposed upon the company to Rs. 2,000/- and set aside the penalty on the director. The Revenue is in appeal against setting aside of confiscation and reduction of penalty.

(a) removes any excisable goods in contravention of any of the provisions of these rules; or (b) does not account for any excisable goods manufactured, produced or stored by him; or (d) contravenes any of the provisions of these rules with intent to evade payment of duty, then, all such goods shall be liable to confiscation and the manufacturer, producer, registered person of a warehouse or a registered dealer as the case may be, shall be liable for penalty not exceeding three times the value of the excisable goods in respect of which any contravention of the nature referred to in Clause (a) or Clause (b) or Clause (bb) or Clause (bbb) or Clause (c) or Clause (d) has been committed, or five thousand rupees, whichever is greater.

Sub-clause (a) deals with the liability of a manufacturer if he removes any excisable goods in contravention of any of the provisions of the Rules. A manufacturer must always be in the knowledge of goods produced and if removal thereof is not in accordance with the Rules, liability to confiscation and penalty is attracted. Sub-clause (b) refers to accounting. Here too, a manufacturer is aware of the goods manufactured by him and is to necessarily account for the same in the prescribed manner.

Sub-clause (c) refers to engaging in the manufacture of excisable goods without a licence when one is required. In all these cases, knowledge is inherent in the commission or omission simpliciter. The language of these three clauses is in contrast to the language of Clause (d) which refers to contravention of any of the provisions of the Rules with intent to evade payment of duty. The absence of reference to intent in Clauses (a), (b) and (c) would show that intention is not material in the case of violation or contravention of the kinds referred to therein. In this context, the judgment of the Hon'ble Bombay High Court in *Kirloskar Brothers Ltd. v. UOI* is very relevant. The Court held that "Firstly, the question whether one

had an intention to evade excise duty is a question of fact. Secondly, Clauses (a), (b) and (c) of Sub-rule (1) of Rule 173Q do not admittedly use the expression "with intent to evade payment of duty", which is found in Clause (d) thereof. It can, therefore, be prima facie, assumed that the liability in terms of Rule 173Q Sub-clauses (a), (b) and (c) does not depend upon *metus rea*. *Nizam Sugar Factory Ltd. v. CCE*, the Hon'ble Andhra Pradesh High Court has held that *mens rea* is not relevant ingredient of the liability under Rule 173Q(1)(a) of the Central Excise Rules. The relevant extracts from the judgment are reproduced below: 15. In the above view, it would not strictly be necessary for us to examine the question how far the theory of *mens rea* is applicable to the acts of the manufacturers that disregarded the excise statute and the rules. However, in view of the fact that the learned Counsel has argued this point at great length, we propose to express our view on this aspect of the matter. Excise Revenue is one of the most important sources of the central income. Excise Act is an important instrument enacted to safeguard the Central Excise Revenue. It requires the manufactured goods to be entered into the statutory registers and provides for the storing of the manufactured goods in statutory godowns and prohibits the removal of those goods from the godown except on payment of the excise duty. However, in the case of those manufacturers who come under the scheme of self-removal, the excise goods are permitted to be removed by merely posting the necessary credit entries in the statutory books showing the excise duty payable to the Government. This is a scheme which depends for its operation on the honesty of the manufacturers. The Excise Rules, which provide for this scheme, must be interpreted in such a way as to ensure their usefulness and enforcement. If the presence of manufacturer's guilty mind is made by judicial process an essential ingredient of an act of violation of these rules, then the enforcement of these rules will largely become impossible. There is no textual warrant for such judicial interpretation. Rule 173Q says that if any manufacturer, purchaser or licensee of a warehouse removes any excisable goods in contravention of any of the provisions of the rules, such goods shall be liable to confiscation and also imposition of penalties. It appears to us in the context of statutory purpose the Legislature has used peremptory language creating an absolute liability that does not require the presence of any *metus rea* against those that remove goods without posting the

relevant entries in the statute books. When we contrast the language used in Rule 173Q(1)(d) with the language used in 173Q(1)(a), this position becomes clearer. In 173Q(1)(d) the language connects the violation of the statutory provision with an intendment to evade the excise duty. But in 173Q(1)(a) the rules use no such formula. The difference in language between the two parts of the same Rule 173Q must be taken to be deliberate. The rule seeking the protection of the public revenue proceeds on the basis that the removal of excise goods from the godowns could not be intentional and could only be with knowledge of the manufacturer. It is a sort of conclusive presumption which the legislature is competent to enact. It, therefore, dispenses with the proof [of] any mental state of the manufacturer which sometimes the devil may know not. Speaking in practical terms it would not be conceivable that the excise goods from godowns would be regularly transported without the knowledge and intention of the manufacturer. It is open for the legislature to act upon such common knowledge and hold the manufacturer absolutely liable. What is forbidden under the excise law in this case is such a transportation which is not preceded by the necessary posting of the entries in the account books.

16. The decision in *State of M.P. v. Azad Bharat Fin. Co.*

supra is a case where Their Lordships were concerned with the possibility of an innocent third party being convicted. It is possible for his lorry to be used in the commission of an offence without his knowledge. It was in that context the words "shall be " in that case were interpreted by Third Lordships as being "not mandatory". Their Lordships have assigned three distinct reasons for so holding. The first reason is that it would be unjust to confiscate the truck of a person if he has no knowledge whatsoever of his truck being used for transporting opium. Secondly, that it is a penal statute. Thirdly, that any other meaning would render the statute unconstitutional. We notice that there is vast contextual difference between the facts in the above opium case and our present Excise Act case. In our case it is not possible to conceive, though it may not be impossible to conjecture, that the removal of sugar would be without the knowledge or intent of the manufacturer. Secondly, we are here concerned with the enforcement of self-removal scheme, which operates on the basis of the honesty of the manufacturer

of the excise goods. For these reasons, we do not think it appropriate to apply the rule of interpretation which Their Lordships of the Supreme Court had adopted in *State of M.P. v. Azad Bharat Finance Co.* supra in altogether a different context. In our opinion, the excise rules have created an absolute liability.

17. There is respectful authority for this view of ours. It is stated in *Crawford Statutory Construction* (Paragraph 275) that where a statute denounces as crimes acts *mala prohibita* (as distinct from criminal acts *mala in se*) such laws are either in the nature of police regulation or intended to protect the public or to promote the general welfare and that their enforcement does not call for the proof of a criminal intent unless the legislature so declares in apt words. The same author says: Although *prima facie* and as a general rule there must be a mind at fault before there can be a crime, it is not an inflexible rule, and a statute may relate to such subject matter and may be so framed as to make an act criminal whether there has been any intention to break the law or otherwise to do wrong or not. There is a large body of municipal law in the present day, which is so conceived. Bye-laws are constantly made regulating the width of thoroughfares, the height of buildings, the thickness of walls, and a variety of other matters necessary for the general welfare, health or convenience, and such bye-laws are enforced by the sanction of penalties, and the breach of them constitutes an offence and is a criminal matter. In such cases, it would, generally speaking, be no answer to proceedings for infringement of the bye-law that the person committing it had *bona fide* made an accidental miscalculation or an erroneous measurement. The acts are properly construed as imposing the penalty when the act is done, no matter how innocently, and in such a case the substance of the enactment is that a man shall take care that the statutory direction is obeyed, and that if he fails to do so he does it at his peril.

Courts held that in discarding the guilty mind theory, the subject matter of the relevant enactment will be of vital significance.

18. Lord Russell of Kilowen, in the case of *Coppen v. Morre* No. 2 (1898) 2 QB 306 pointed out that it was the intention of the legislature that would make the presence or absence of *mens rea* important. But it is urged that the Courts in

ascertainment of the intent of the legislature must have regard to the subject matter of the relevant statute. In *The King v. Erson* 17 CLR 506, 508, Griffith, C.J., absented that the rule that mens rea is not a necessary ingredient of an offence applies to revenue statutes only.

In *Hobbs v. Winchester Corporation* (1910) 2 KB 471, a butcher who sold unsound meat was guilty of an offence without proof of any mens rea.

Following the above, we hold that mens rea is not a relevant ingredient of the liability under Rule 173Q(1)(a) of the Excise Rules.

7. The decision of the Apex Court in *Gujarat Travancore Agency v. CIT*, cited by the learned SDR, in the context of Sections 271(1)(a) of the Income Tax Act, 1961, is also very relevant. The Apex Court has held in paragraph 4 that in the case of proceedings under Section 271(1)(a) which provides that a penalty may be imposed if the Income Tax Officer is satisfied that any person has without reasonable cause, failed to furnish the return of total income, the intention of the legislature is to emphasise the fact of loss to Revenue and to provide for a remedy for such loss, although no doubt an element of coercion is present in the penalty. The Court held that unless there is something in the language of the statute indicating the need to establish the element of mens rea it is generally sufficient to prove that a default in complying with the statute has occurred. The Apex Court held that there is nothing in Section 271(1)(a) requiring that mens rea must be proved before penalty can be levied under that provision contrasted with the provisions of Section 276C wherein the element of mens rea was required to be established before imposition of any sentence under that provision. Paragraph 4 of the judgment is reproduced below: Learned Counsel for the assessee has addressed an exhaustive argument before us on the question whether a penalty imposed under Section 271(1)(a) of the Act involves the element of mens rea and in support of his submission that it does he has placed before us several cases decided by this Court and the High Courts in order to demonstrate that the proceedings by way of penalty under Section 271(1)(a) of the Act are quasi criminal in nature and that therefore the element of mens rea is a mandatory requirement before a penalty can be imposed under Section 271(1)(a). We are

relieved of the necessity of referring to all those decisions. Indeed, many of them were considered by the High Court and are referred to in the judgment under appeal. It is sufficient for us to refer to Section 271(1)(a), which provides that a penalty may be imposed if the Income Tax Officer is satisfied that any person has without reasonable cause failed to furnish the return of total income, and to Section 276C which provides that if a person wilfully fails to furnish in due time the return of income required under Section 139(1), he shall be punishable with rigorous imprisonment for a term which may extend to one year or with fine. It is clear that in the former case what it intended is a civil obligation while in the latter what is imposed is a criminal sentence. There can be no dispute that having regard to the provisions of Section 276C, which speaks of wilful failure on the part of the defaulter and taking into consideration the nature of the penalty, which is punitive, no sentence can be imposed under that provision unless the element of mens rea is established. In most cases of criminal liability, the intention of the Legislature is that the penalty should serve as a deterrent. The creation of an offence by Statute proceeds on the assumption that society suffers injury by and the act or omission of the defaulter and that a deterrent must be imposed to discourage the repetition of the offence. In the case of a proceeding under Section 271(1)(a), however, it seems that the intention of the legislature is to emphasise the fact of loss of Revenue and to provide a remedy for such loss, although no doubt an element of coercion is present in the penalty. In this connection the terms in which the penalty falls to be measured is significant. Unless there is something in the language of the statute indicating the need to establish the element of mens rea it is generally sufficient to prove that a default in complying with the statute has occurred. In our opinion, there is nothing in Section 271(1)(a) which requires that mens rea must be proved before penalty can be levied under that provision. We are supported by the statement in *Corpus Juris Secundum*, Volume 85, page 580, paragraph 1023: A penalty imposed for a tax delinquency is a civil obligation, remedial and coercive in its nature, and is far different from the penalty for a crime or a fine or forfeiture provided as punishment for the violation of criminal or penal laws.

8. Another judgment relevant in the context of necessity of the ingredient of mens rea is the Supreme Court's decision in the case of *Indo-China Steam Navigation*

Co. Ltd. v. Jasjit Singh, ACC, Calcutta and Ors. holding that guilty mind is not an essential constituent of Section 52A which absolutely prohibits entry of vessels in which there is any construction, adaptation, alteration or fitting made for the purpose of concealing goods. The relevant extracts are reproduced below: 19. That takes us to the principal question as to the construction of Section 52A of the Act which has been elaborately argued before us by Mr. Sachin Choudhary. Section 52A provides that no vessel constructed, adapted, altered, or fitted for the purpose of concealing goods shall enter, or be within the limits of any port in India, or the Indian customs waters. This section is the only section included in Chapter VIA and it was inserted by Act 10 of 1957. The plain construction of this section appears to be that whenever a ship answering the description contained in its first part enters or is within the limits of any port in India, or the Indian customs waters, if contravenes the prohibition prescribed by it. The prohibition is against the construction, adaptation, alteration or fitting for the purpose of concealing goods. What has to be proved against a vessel which is charged with having contravened Section 52A is that there has been a construction, adaptation, alteration or fitting, and that the said construction, adaptation, alteration or fitting has been made for the purpose of concealing goods. Therefore, if an alteration in a vessel made for the purpose of concealing goods is proved, the contravention of Section 52A must be inferred. In other words, the section prohibits absolutely the entry of vessels which show that there has been any construction, adaptation, alteration or fitting made in them for the purpose of concealing goods.

22. On the other hand, the scheme of Section 167 supports the contention of the Additional Solicitor-General that if we read Section 52A along with Section 167(12A), it would be clear that the legislature intends, by necessary implication, the exclusion of mens rea in dealing with the contravention of Section 52A. Section 167(12A) provides that if a vessel constructed, adapted, altered or fitted for the purpose of concealing goods under Section 52A, enters or is within the limits of any port in India or within the Indian Customs waters such vessel shall be liable to confiscation and the master of such vessel shall be liable to a penalty not exceeding Rs. 1,000/-. It would be noticed that in Column 1, Section 167(12A) reproduces the material words of Section 52A and does not add the words "knowingly or wilfully". It is significant that the words "knowingly or wilfully" are

used in several other provisions contained in Section 167. Section 167(14) and Section 167(61) use the word "wilfully" in respect of the commission of the offences there specified. Similarly Section 167(3) and Section 167(81) use the word "knowingly" and Section 167(78) uses the word "intentionally". Similarly in Section 167(8), though the words "knowingly or wilfully" are not used, we have the expression "concerned in", and that may introduce considerations of mens rea.

Thus, where the legislature wanted to introduce the knowledge or intention actuating the commission of the offence as an essential element of the offence, it has used appropriate words to indicate that intention. The failure to use a similar word in Section 167(12A) cannot, therefore, be regarded as accidental, but must be held to be deliberate. In our opinion, there is some force in this argument as well.

23. Besides, there can be no doubt that in construing a section, it would be relevant for the Court to consider whether the construction for which Mr. Choudhary contends would not make the provisions of Section 52A read with Section 167(12A) substantially nugatory. If it appears that the adoption of the said construction would substantially defeat the very purpose and intention of the legislature in enacting the said section, that would be a legitimate reason for rejecting the said construction. If the words used in Section 52A are capable of only one construction and no other, and the construction is the one suggested by Mr. Choudhary, the fact that by adopting the said construction the section would be rendered nugatory, would not be of any material significance. If on the other hand, two constructions are reasonably possible one of which leads to the anomaly just indicated, while the other does not and helps the effectuation of the intention of the legislature, it would be the duty of the Court to accept the latter construction.

24. The intention of the legislature in providing for the prohibition prescribed by Section 52A is, inter alia, to put an end to illegal smuggling which has the effect of disturbing very rudely the national economy of the country. It is well known, for example, that smuggling of gold has become a serious problem in the country and operations of smuggling are conducted by operators who work on an international

basis. The persons who actually carry-out the physical part of smuggling gold by one means or another are generally no more than agents and presumably, behind them stands a well-knit organisation which, for motives of profit making, undertakes this activity. That is why Section 52A makes an absolute prohibition against the entry of a vessel which contains, inter alia, any alteration made for the purpose of concealing goods. Entry of contraband gold with the help of ships has thus become a serious problem and is intended to be checked by this absolute prohibition.

If it was held that the knowledge of the owners of the offending vessel or of its master should be proved before Section 52A is held to be contravened, in a majority of cases, the offending vessels will escape punishment. It is not difficult to imagine that mens rea or guilty mind could rarely be established against the owners of vessels which are travelling on the High-seas and it may not be always easy to prove the guilty knowledge even of the master of the ship. If the guilty mind is made an essential constituent of the section, it would be very easy both for the owners and the master of the ship to plead that the alleged alteration, adaptation or fitting was made without their knowledge and even contrary to their instructions. It is not difficult to realise in this connection that it would be almost impossible for the customs authorities to establish mens rea in the manner suggested by the appellant. Section 52A refers to the construction for the purpose of concealing goods, but it is obvious that no vessel would ordinarily be constructed initially for the purpose of concealing goods. Like the adaptation, alteration or fitting, the construction also would be made in such a manner as would not be easily detected or discovered. Therefore, it seems to us plain that if we are to accept the construction suggested by Mr. Choudhary, mens rea would rarely be proved against the owners of the vessel, or even its master and the section, in substance, would remain a dead letter on the statute book.

9. Following the ratio of the above decisions, we answer the issue referred, by holding that mens rea is not an essential ingredient to warrant confiscation and penalty under the provisions of Rule 173Q(1)(a),(b) & (c) of the Central Excise Rules, 1944.

10. The papers are now returned to the referral Bench for disposal of the appeals in the light of the above.

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