

Gopal Industries Ltd. Vs. Cce

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Jun-29-2007

Reported in : (2007)(121)ECC173

Judge : R Abichandani, S T T.V., P Das

Appellant : Gopal Industries Ltd.

Respondent : Cce

Judgement :

1. The issue involved in this case is whether outgoing partners are liable to pay excise duty assessed against a registered partnership firm, which was dissolved. Having regard to the importance and wide repercussions of the question involved the appeal has been placed for disposal before this Larger Bench.

2. The Hon'ble High Court of Madhya Pradesh had earlier, by order made in Writ Petition No. 2239/2002 dated 20.2.2002, remanded the matter, after quashing the order passed by the Commissioner on 6.5.2002, with a direction to the petitioners to appear before the Commissioner and file their reply to the show cause notice dated 24.3.2003. Thereafter, fresh adjudication order was made by the Commissioner on 31.1.2004, confirming central excise duty demand of Rs. 46,053,866/- and ordering its recovery from the original notice No. (1), which is the present appellant No. (1). Penalty of like amount was imposed under Section 11AC of the Central Excise Act, 1944, on the said assessee and interest on the amount of duty was ordered to be paid in terms of Section 11 AB of the Act.

Penalty of Rs. 5 lacs was imposed on the noticee No. (2) who was the managing partner in the appellant firm.

2.1 Though the appeal memo was filed showing the name of the appellant as "M/s. Gopal Industries Ltd.", it was stated by the learned Counsel for the appellant that the appellant was not a company, but was only a partnership firm, which was dissolved on 31.3.2001. The four partners of the appellant partnership firm M/s. Gopal Industries including the noticee No. (2) Shri Yogesh Garg, were engaged in the manufacture of tin containers falling under subheading 7310 of the Schedule to the Central Excise Tariff Act, 1985. On 1.8.1998, the revenue officers of the Preventive Branch visited the factory premises of the firm and under a panchnama recovered certain records. On scrutiny, it was found that the note-book titled "Daily report tin factory" was being maintained in the factory of the appellants and it contained the information about the opening balance, production, issue, and closing balance of the tin containers manufactured by M/s. Gopal Industries and in its "new unit". The unit shown as 'new' was a non-power operated tin container unit, which was exempt from payment of duty by virtue of Notification No. 4/94-CE dated 1.3.1994, as amended from time to time.

The appellant M/s. Gopal Industries was a power operated unit and the "Daily report tin factory" note-book contained details of the appellants' production and issue of tin containers by the new tin factory as well as by M/s. Gopal Industries. There was another note-book recovered from the factory premises of the appellant M/s.

Gopal Industries, which was entitled as "Daily production report" and which contained details of the appellants' production and clearance of tin containers. On comparison of the figures shown in this book with the figures shown in the book entitled "Daily report tin factory" they were found to be tallying. It was noticed that the particulars of production and clearance of tin containers appearing in "Daily report tin factory" note book in respect of M/s. Gopal Industries were corroborated by the figures of production and clearances appearing in "Daily production report". On comparison of the figures of production and clearance appearing in the note-book "Daily report tin factory" with the figures of production and clearance shown

in the statutory record, i.e., RG.1 Register, abnormal variations in the production and clearance were noticed.

3. In his statement recorded on 29.1.1999, the partner Yogesh Garg gave particulars of the partnership firm and stated that the documents recovered under the panchnama dated 1.8.1998 were pertaining to production and clearances of tin containers by the appellant's factory and that these documents consisted of daily production reports written in the note-books, delivery challans, stock record of empty tins etc.

He stated that all the sale records pertained to the production and clearance of tin containers. The authorized signatory of partnership firm Shri Girijesh Kumar Rai in his statement recorded on 28.9.1998 confirmed that all the record shown to him was withdrawn from the factory of the appellant in his presence and that he had put his signatures on the documents at the time of their recovery on 1.8.1998.

Shri Awadesh Kumar Saxena, who was the Electronics Engineer engaged by the firm and its group concerns, stated on 28.9.1998 that, the said daily production report depicted the number of tin containers produced/manufactured on a specified day and that a copy of that report was submitted to the Managing Director also. Whenever, he prepared such daily production/challan, original copy of the same was submitted to the Managing Director. The daily production report/challans were prepared by him whenever he was directed to do so by the Managing Director. He also stated that the daily production reports/challans, which had been recovered from the factory and which were seen and signed by him on the day of recording his statement, pertained to the production of tin containers manufactured by M/s. Gopal Industries.

3.1 The Commissioner concluded from the facts revealed by the said persons that the private documents recovered from the factory of the appellant on 1.8.1998 were maintained by the appellant and that the record was pertaining to the suppressed production and removal of tin containers without payment of duty.

4. Initially the Commissioner had passed an order on 6.5.2002, which was challenged before the Hon'ble High Court of Madhya Pradesh on the ground that

Girijesh Rai who was served with the notices issued to the firm and its partners had no locus standi to file any reply and attend the hearing on behalf of the appellants. The Hon'ble High Court set-aside the order dated 6.5.2002 with a direction that the petitioners will appear and file their reply to the show cause notice dated 24.3.2003 before the Commissioner and that the Commissioner after considering their reply shall afford an opportunity of hearing to the petitioners and pass the final order.

5. Thereafter, common defence reply was filed on behalf of the noticee Nos. (1), (2), (4) and (5) on 24.3.2003. It was contended that the show cause notice dated 10.8.2001 was issued to M/s. Gopal Industries and four other partners, original noticee Nos. (2) to (5) and that, since the partnership firm was dissolved with effect from 31.3.2001 and the factory was sold away and its registration surrendered on 30.3.2001 and an affidavit was executed by the erstwhile partner Shri Yogesh Garg to the effect that he accepted the past liabilities of the partner of the resolved firm, the demand was not sustainable.

6. On the basis of the material on record, the Commissioner came to a finding that Shri Girijesh Rai had submitted a letter dated 19.9.2001 to the excise department to the effect that although M/s. Gopal Industries had surrendered registration, his authorization was still valid. It was also noted that the appellant firm and its partners were all-along approaching Shri Girijesh Rai as the person competent to participate in the proceedings. However, after the first adjudication was passed, the partners suddenly took an altogether a different stand that Shri Girijesh Rai was not authorized to represent them. In their written submissions filed on 24.3.2003, it was stated by the noticees that they had approached the department for service of the show cause notice. It was, however, held that besides tendering notices through Shri Girijesh Rai, copies of show cause notices were also affixed on 13.8.2001, on the conspicuous parts of the residential address indicated by Shri Yogesh Garg in his affidavit and further copy of show cause notice was also affixed on the headquarter's notice board on 14.8.2001. It was held that the notices were duly served on the noticees. It may be made clear that no contention has been raised before us during arguments as regards the service of the notices, and rightly so, because the Hon'ble High Court had directed them to file their reply

to the show cause notice, which they filed on 24.3.2003 pursuant to the directions.

7. The Commissioner found that there was a clear cut admission of clandestine production and clearance of the said goods by the appellant. The authenticity of the recovered documents had been admitted by the noticee Nos. (2) and (6) who had stated that these records pertained to the unaccounted production and clearance of tin containers by the appellant. The adjudicating authority took note of the statement of the managing partner Shri Yogesh Garg that besides others, Shri Awadesh Kumar Saxena was also looking after the production and clearance work of appellant. It was held that charge of the production and removal of tin containers by the appellant-noticee No.(1) was established beyond doubt. The impugned order was therefore made, confirming the duty demand, imposing penalty on the appellant firm and also imposing penalty on the noticee No. (2) (the partner Shri Yogesh Garg) under Section 209A. No penalty was imposed on noticee Nos.

(4), (5), (6) and (7).

8. The learned Counsel appearing for the appellant submitted that service of the notice on the partners of the Gopal Industries cannot amount to service on the firm M/s. Gopal Industries [see paragraph 2.2 of his written submissions]. It was also submitted that there was no corroborative evidence such as illicit receipt of raw material, excessive consumption of electricity etc. to corroborate the alleged private records recovered from the factory premises of the appellant-noticee No. (1). It was submitted that clandestine removal could not be held to have been conclusively established merely on the basis of the two note-books, which were recovered from the factory premises. He placed reliance on the following decisions in support of his contentions: *Sharma Chemicals v. CCE* 8.1 In his "overview of submissions" filed on 22.6.2007, it was contended that the provisions of the Indian Partnership Act were not relevant and the issue had to be decided in the light of the provisions of the taxing statute. He argued that the Central Excise Act contained no provision permitting post-dissolution assessment of a dissolved firm, for its pre-dissolution clearances and there was nothing in the said Act, which permitted existence of such power by necessary implication. He submitted that the

position in law, which followed from a conjoint reading of the decision in *State of Punjab v. Jullundur Vegetables Syhdicate*(SC) and *Morarilal Mahabir Prasad v. B.R. Vad* reported in, was that even under the Central Excise Act, firms are deemed to be specified as distinct legal entities and, in the absence of any provision expressly or impliedly sanctioning the same, their post-dissolution assessment for clearances effected prior to dissolution, was not permissible. It was submitted that the principle laid down in *Jullundur Vegetables Syndicate* (supra) has been held to have been reiterated in *Murarilal Mahabir Prasad* (supra). Reliance was also placed in support of his submissions on the decisions in *Janaki Devi v. STO* reported in 1977 (39) STC 268 (Del), *Chief Commissioner of Sales Tax v. Raj Kishan Goyal* reported in AIR 1982 Del 110(FB) and *Assistant Commercial Taxes Officer v. National Bricks and Lime Industries* reported in 1980 (85) STC 295 (Raj.). It was also contended that the Central Excise Act does not contain any provision akin to Section 19(3) of the Bombay Sales Tax Act and, therefore, the observations made against the assessee in *Murarilal Mahabir Prasad* (supra) cannot justify the assessment of a dissolved firm, to tax it under the Central Excise Act for clearances effected prior to dissolution.

8.2. The learned Counsel for the appellant submitted that where the Statute talks of "person", firms are deemed to have been specified as distinct legal entities. He placed reliance on the decision in *Murarilal Mahabir Prasad* (supra) in support of his submission.

9. The learned authorized representative for the department, on the other hand, argued that the decision of Hon'ble the Supreme Court in *Jullundur Vegetables Syndicate* (supra) was not applicable to the present case, as it was rendered in the context of the provisions of the East Punjab Sales Tax Act and not the Central Excise Act. He submitted that the judgments relating to the provisions of the Income Tax Act or other taxing statutes have no relevance while considering a provision in the excise statute. For this proposition, he placed reliance on the decision of Hon'ble the Supreme Court in *Collector of Central Excise v. Dai Ichi Karkaria Ltd.* in which it was observed that, there can be no doubt about the correctness of the proposition that judgments relating to the Income Tax Act or other statutes had no relevance while considering a provision in the excise statute.

He also placed reliance on the decisions of the Supreme Court in *CCE v. Alnoori Tobacco Products* and *Ispat Industries* contentions. He further argued that there was a marked difference between the provisions of the Income Tax and Sales Tax legislations, and the provisions of the Excise law. He submitted with reference to the relevant provisions of the Income Tax Act that, legal personality was ascribed to a firm as distinct from its partner for making firm as an assessable entity. He also referred to the provisions of the Sales Tax Act for pointing out that sales tax law recognized the process of the assessment of partnership firms dealing with sale of goods. He submitted that since the provisions of the Central Excise Act are not *pari materia* to the provisions of Income Tax and Sales Tax laws, they are required to be viewed separately. It was argued that, whereas the taxable event in case of income tax is accrual of income to a person, in sales tax, the taxable event is the turnover of sales, while the taxable event in the Central Excise is manufacture of excisable goods.

Under the Central Excise Act levy was on excisable goods and not on a person natural or juristic. He further argued that the liability arises at the time of manufacture under the Excise Act and the payment of duty is to be ordinarily made by the 5th of the month following the month of clearance and the return is to be ordinarily filed by 10th day of the month following the month of clearance. Since the goods are cleared on the basis of self-assessment, all that remains to be done is, to verify the correctness of the self-assessment. In the Central Excise liability, assessment and payment are at the points of time specified in the law and not over a period of time, unlike under the Income Tax and Sales Tax laws. Therefore, changes over a period of time may be relevant in the context of the Income Tax and Sales Tax laws, but not in the Central Excise law where one has to examine the position under the Act and the Rules at the point of time when the liability/self-assessment/payment was done. For this, he referred to the provisions of Section 11A of the Act and Rule 12 of the rules framed thereunder, which provided for filing of monthly returns. He further contended that levy of duty was a legislative function, self-assessment and payment an individual act on the part of the assessee, passing of assessment orders, a quasi judicial one, while collection was an administrative or executive action. He submitted that, liability arises as soon as there is manufacture; the duty and quantification is initially self-determined by the

assessee, the correctness or otherwise of which is decided by way of a quasi judicial order. He argued that if a firm has got dissolved after incurring the duty liability but before the correctness of the payment of duty is verified or quantified, such dissolution cannot have the effect of wiping out the duty liability itself. He queried that if the boot was on the other foot, and the issue involved was of a refund, can it be said that no refund is due because the firm has since been dissolved? He submitted that duty liability of the partners of a partnership firm incurred before its dissolution, does not get wiped out by the dissolution of the firm. He argued that, in this context there was no distinction between a continuing partner and an erstwhile partner. He placed reliance on the decisions of the Supreme Court in *Malabar Fisheries v. CIT Kerala* , *S.V. Chandra Salem v. Arunagiri Chettiar* reported in 1996 (SC2) GJX 0991 (SC), *TWT v. Raipur Manufacturing Company* , in support of his submissions. He also argued that while construing a taxing statute, one must examine if the transaction is a device to avoid tax. He further contended that the impugned order of adjudication made on 30.12.2003 was in compliance with the directions of the Hon'ble High Court by which the appellants' partners were ordered to file their reply and the adjudicating authority was directed to afford an opportunity of hearing to them and pass the final order. In view of these directions, it was submitted that, it is not open to the appellants to agitate the points relating to issuance of the notice, receipt of notice and assessment of the dissolved firm. If there was any infirmity in the notice or in its receipt, the Hon'ble High Court would not have asked the appellants to file a reply, nor would it have asked the Commissioner to pass an order pursuant to such reply and hearing, which was required to be given to them as per the directions.

It was finally submitted that Section 11A of the Central Excise Act, by its very wordings, maintained the continuity in the assessment of the assessee. He also placed reliance on paragraphs 21 to 30 of the decision *Murarilal Mahabir Prasad* (supra). He relied on the decision of the Supreme Court in *Maya Mahal Industries v. CCE, Meerut* , for proposition that summoning of a co-noticee for cross-examination was not proper.

10. The contentions of the learned Counsel for the appellants have proceeded on the footing that under the Central Excise Act, a partnership firm should be treated as a distinct legal entity from its partners. He submitted that the liability of the partnership firm and that of its partners was distinct and the partners cannot be assessed for the manufacturing activity of the partnership firm. He submitted that since recoveries may be possible against the partners, the partner (Yogesh Garg) has challenged the impugned order made against the firm and himself by filing the appeal in the name of the firm.

11. There is no dispute about the fact that there is no reference express or implied in the Central Excise Act or the Rules made thereunder for assessment of a partnership firm, unlike in the provisions of the Income Tax Act in which Section 2(31) provides an inclusive definition of "person", which includes a "firm". The assessment of partnership firm under the Income Tax Act is separate from the assessment of individual partners as regards their own income.

Section 189(1) of the Income Tax Act provides that when a firm is dissolved, the assessing officer shall make an assessment of total income of the firm as if no dissolution had taken place. Section 189(3) of that Act makes every person who was at the time of dissolution a partner of the firm, and the legal representative of any such person who is deceased, jointly and severally liable for the amount of tax, penalty or other sum payable by the firm. Even in the East Punjab General Sales Act, 1948 Section 2(d) defining "dealer" considered a "firm" or "Hindu undivided family" engaged in the business of selling or supplying goods within the meaning of "dealer", besides, "any person". Obviously, therefore, where a firm could be a dealer under the Sales Tax law and was required to file returns, the liability of such separate assessable entity would stand on its own. There is no such provision under the Excise Act and the Rules treating a partnership firm as a separate assessable entity. Excise registration is done of any "prescribed person" as provided by Section 6 of the Act, and the word "assessee" in Section 2(d) of the Central Excise Rules means any person who is liable for payment of duty assessed or a producer or a manufacturer of excisable goods or a registered person of a private warehouse including his authorized agent. Assessment of duty under Rule 6 is to be done by the assessee himself except in case of cigarettes.

The scheme of the Act and the Rules provides that a living person or a juristic person like company may be registered in connection with production or manufacture of any specified goods included in the first Schedule to the Tariff Act. It is obvious that when an individual can carry on manufacturing activity and get registration for excise purposes, a body of such individuals may collectively get themselves registered in relation to manufacture of excisable goods. As held by this Tribunal in *Vashist Ispat Products & M/s Lakshmi Steel Rolling Mills v. CCE, Ludhiana* decided on 30.03.2007, a registered partnership firm would be a group of persons who are its partners and will collectively be manufacturers and assessees, though doing a business in the name of their partnership firm. In this context, we may approvingly refer the following from paragraph 9 of the said judgment: 9. The word "manufacturer", under Section 2(f) of the Central Excise Act, 1944 shall include not only person who employs hired labour in the production or manufacture of the excisable goods, but also any person who engages in their production or manufacture on his own account. Thus, a manufacturer has to be a person, living or juristic. A sole-proprietory concern is not a juristic person and cannot, of its own, be a manufacturer or producer. For the purpose of Section 4, "assessee" is defined in Sub-section (3)(a) thereof, to mean the person who is liable to pay the duty of excise under the Act and includes his agents. Any prescribed person who is engaged in the production or manufacture or any process of production or manufacture of specified goods is required to get himself registered with proper officer, as required by Section 6 of the said Act.

Therefore, registration can be done only of such prescribed person, and not of a sole-proprietory concern, which by itself is not a person. The practice of giving registration in the name of a proprietary concern and not the person, who is the proprietor, is contrary to the provisions of the said Act and is capable of perpetuating frauds due to the real name of the person concerned being camouflaged by the assumed proprietary name. The word "assessee", as defined in Rule 2(c) of the Central Excise Rules, 2002, means any person who is liable for payment of duty or a registered person of a private warehouse. Under Rule 4, duty is payable on removal of excisable goods by every person who produces or manufactures or stores in a warehouse. Thus, none of the provisions of the Act or the Rules warrants recognition of mere sole proprietary name as manufacturer or

assessee, who would be liable to pay the duty. Only a person living or juristic can be registered for the purposes of the Act and will be liable to assessment and payment of duty irrespective of any name/names that he may adopt for doing the proprietary business. All the excise registrations and assessments under the Act and the Rules are required to be done in the name(s) of the persons concerned even when they run their proprietary business in different names. In fact, the practice of registering manufactures in the name of proprietary concerns, appears to have been unwittingly recognized by a seemingly innocuous but a most damaging instruction in note 5 which has crept in the prescribed Form A1, which was substituted w.e.f. 1.10.2002. The said form is prescribed for application for central excise registration, in the context of Rule 9 of the Central Excise Rules, 2002.

Surprisingly, though Section 6 of the Act clearly contemplated registration of a person who is engaged in the production or manufacture of excisable goods, the newly introduced instruction No. 5 of the proforma application A1 requires that, name of the registrant should be the name and style in which the registrant is likely to carry out the business. This shady instruction 5 was wholly uncalled for and is contrary to the scheme of the Act and the Rules, and is capable of perpetrating mischief and fraud by shielding the names of the real persons who are engaged in the manufacture of excisable goods and are required to be registered under Section 6 of the Act read with Rule 9 of the Central Excise Rules, 2002, which refer to the registration of the person who produces or manufactures the excisable goods. It will be noticed that, no such instruction ever existed in the earlier proforma application for registration. This is evident from the earlier proforma A1 issued under Rule 9 of the Rules of 2001, which required a request being made to the Superintendent of Central Excise to issue a Registration Certificate under Rule 9 for the purposes indicated in the Schedule to that proforma. In that Schedule, name and address of the person applying for the registration was required to be mentioned. There was absolutely no scope for registering the name of any "non-person"; and the details of the properties, persons, directors as the case may be, were also required to be given. In the same way, even in the still earlier proforma in Form R1 under the Central Excise Rules of 1944, the application for registration was required to be made by the person in whose name the registration certificate

was required to be issued. The application was to be made in the name of the person (living or juristic) applying and not in any other name. Thus, there never was any possibility of giving excise registration in the names of sole-proprietory concerns. In view of the substantive provisions of Section 6 of the said Act and Rule 9 of the said Rules, instruction No. 5 in the proforma application Form A1 is ultra vires the scope of the said statutory provisions.

12. The word "person" would also include a body of persons. The self-assessment in cases where there is one individual registered for excise purposes is to be done by such individual. However, where two or more persons constituting a partnership firm get registered for excise purposes, such body of persons will be treated as an "assessee", that is required to make self-assessment and file the returns. In both these cases, the individual person and the body of persons incur liability, when the goods manufactured in their factory are removed, for paying the excise duty and filing the returns. The definition of the word "person" including its plurality of body of persons, as defined in General Clauses Act, does not create a separate juristic entity of partnership firms. Since no provision has been made in the Excise Act or Rules made thereunder, treating a partnership firm as a distinct assessable entity, every partner would be liable jointly with all other partners and also severally, for all acts of the firm, done while he is a partner, as provided by Section 25 of the Indian Partnership Act, 1932. As held by the Supreme Court in *Arunagiri Chettiar (supra)*], Section 25 of the Partnership Act does not make a distinction between a continuing partner and an erstwhile partner.

Every partner is liable for all the acts of the firm done while he is a partner jointly along with other partners and also severally. The Supreme Court observed that if a continuing partner is liable to pay the tax due from the firm relating to the period when he was a partner of the firm, there was no reason, in principle, to hold that the said liability ceases merely because a partner has ceased to be a partner subsequent to the said period. The Supreme Court reiterated the ratio of the decision in *Malabar Fisheries Company v. CIT* , in which it was held: "....A partnership firm under the Indian Partnership Act, 1932 is not a distinct legal entity apart from the partners constituting it and equally in law the firm as such has no separate right of its own in the partnership assets and when one talks of the firm's

property or firm's assets all that is meant is property or assets in which all partners have a joint or common interest".

13. As provided by Section 24 of the Partnership Act, notice to a partner who habitually acts in the business of the firm of any matter relating to the affairs of the firm operates as notice to the firm, except in cases of fraud. The Hon'ble the Supreme Court has held in *Ashutosh v. State Rajasthan and Ors.*

that the liability of the partners is joint and several under Section 25 of the Partnership Act, and that it is open to the creditor of the firm to recover the debt from any one or more of the partners and each partner shall be liable as if the debt of the firm has been incurred on his personal liability. The Hon'ble Supreme Court, has held in *Dena Bank v. Bhikhabhai Prabhudas Parekh & Co.* reported in 2000 (5) SCC 594, that, while the firm is incurring a liability, it can be assumed that all the partners were incurring that liability and so the partners remained liable jointly and severally for all the acts of the firm.

Therefore, it cannot be said that such liability ceased merely because a partner has ceased to be a partner subsequent to the period in which the liabilities were incurred. In *ITO Salem v. Arunagiri Chettiar*, the Hon'ble Supreme Court while considering the question as to whether an erstwhile partner was liable to pay the tax arrears due from the partnership firm pertaining to the period when he was a partner held as under: Section 25 of the Partnership Act does not make a distinction between a continuing partner and erstwhile partner. Its principle is clear and specific viz. that every partner is liable for all the acts of the firm done, while he is a partner jointly along with other partners and also severally. Therefore, it cannot be held that the said liability ceased merely because a partner has ceased to be a partner subsequent to the said period.

14. However, when the provisions of the Sales Tax Act gave the firm a legal status by treating it as a dealer and hence a 'person' for the limited purpose of assessing it under the Sales Tax Act, the principle underlying Section 25 of the Partnership Act cannot be stretched and extended to such situations where the firm is deemed to be a person and hence legal entity for a certain purpose. In other words, the principle underlying Section 25 of the Partnership Act will have no applicability only

if there be a statutory provision to the contrary. This position clearly emerges from paragraphs 18 and 19 of the judgment of Hon'ble the Supreme Court in Dena Bank v. Bhikhabhai Prabhudas Parekh & Co.

(supra), reported in 2005 (5) SCC 694.

15. An individual person has a legal personality and status recognized by virtue of natural persons' rights and liabilities. A body of natural persons will retain their individual legal status and personality. They can collectively embark upon tasks they choose to undertake. By mere joining hands they do not bring about a different and distinct legal entity or legal personality. For their individual and collective actions they would themselves be liable jointly and severally in their partnership pursuits. When they constitute a partnership firm and adopt a firm name for their business, such firm name is not a name of any different and distinct juristic personality but only a convenient collective description of such body of individuals. It is the law alone that can create or recognize a juristic personality distinct from the constituent individuals as in the case of companies. Therefore, merely because definition of 'person' would include more than one person as a body of individuals, there is no automatic birth of a juristic person unless specifically so recognized by law.

16. For the purpose of income tax and sales tax assessments, 'firms' are specifically recognized as distinct assessable entities. Not so, under the central excise law. Therefore, the assessment of a partnership firm under the excise law is, in fact and reality, an assessment of persons who constitute that firm and not an assessment of the firm as distinct from the assessment of its partners in respect of the excisable goods manufactured by them and removed from the factory in the firm name. Under the provisions of excise law, a person (including persons together entering into a partnership agreement, who all are natural persons), or a juristic person like a company are contemplated as "assessee" and a partnership firm is not contemplated to be a distinct assessable entity because, no juristic personality for the purpose of assessment distinct from its partners is attributed to it, unlike under the income tax and sales tax laws. Therefore, the decisions rendered in the context of the provisions of the income tax laws that

attribute status of a legally assessable distinct entity to a firm, can be of no avail to the partners manufacturing excisable goods in their firm name. As held by the Hon'ble the Supreme Court in para 16 of its decision in Murarilal Mahabir Prasad v. B.R. Vad since the Bombay Sales Tax Act of 1953 considered a partnership firm to be a legal entity, on the dissolution of the firm its legal personality would cease to exist. However, in cases under the Central Excise Act under which a partnership firm is not recognized as a distinct assessable entity, there can arise no question of any assessable legal entity ceasing to exist on dissolution so as to necessitate a statutory provision like Sections 18 and 19(3) of the Sales Tax Act to make the partners jointly and severally liable even after its dissolution [See paragraphs 32 to 35 of the judgment in Murarilal's case (supra)]. In respect of partners manufacturing excisable goods in their firm name they all would themselves be assessed under their firm name, since their partnership firm is not recognized as an assessable entity separate from the persons who are its partners. A fortiori, every one of the partners will be liable jointly with all the other partners and also severally, for all acts of the firm done while he or she is a partner, under Section 25 of the Partnership Act. Therefore, in view of the decisions of the Apex Court in ITO Salem v. Arunagiri Chettiar, Dena Bank v. Bhikhabhai Prabhudas Parekh and Co.

(supra), the ratio of the decision in Jullundur Vegetables Syndicate's case (supra) in the context of the provisions of the Sales Tax Act which recognized firm as a "dealer" to be a separate assessable entity, under the Sales Tax Act, and other decisions following it cannot assist, the appellant. The resourcefulness and ingenuity which go into well-timed dissolution of firms ought not be allowed to be used as convenient instruments of tax evasion. The object underlying the provisions of the Central Excise Act and the rules made thereunder will be secured by holding that the partners continued to be liable for the excise duty liability incurred before the dissolution of their firm, and that the assessment proceedings do not frustrate by its dissolution. The assessment under the Central Excise law in the name of partnership firm will virtually, for all purposes, be assessment of the partners of such firm who will be jointly and severally liable for the duty liability that was incurred during the currency of their partnership venture of manufacturing excisable goods. The decisions of this Tribunal taking a contrary view are no

longer good law and will stand overruled.

17. It is not in dispute that the show cause notice dated 10.8.2001 was sent not only in the name of the partnership firm, but to all the partners of the firm. The learned Commissioner has for valid reasons, recorded in paragraph 25 of the impugned order, held that the show cause notice was to be treated as properly served. It is evident from the record that when the service of the show cause notice was questioned before the Hon'ble High Court of Madhya Pradesh, the Hon'ble High Court, while disposing of the writ petition of the partners ordered the noticees to file their reply on 24.3.2003 and participate in the proceedings. Accordingly, the partners have participated in the proceedings and, in fact, the present appeal has been filed in the firm name by one of the partners for challenging the impugned order.

18. It is not in dispute that two note books being private record, namely, "daily report tin factory" and "Daily production report" were seized from the factory premises of the appellant on 1.8.1998 under a panchnama in the presence of the authorized signatory of the appellant and two panch witnesses. The authenticity of these two note-books is not disputed, but a contention is canvassed that reliance cannot be placed on such private record in the absence of corroborative evidence to show clandestine removal of the excisable goods.

18.1 The "Daily report tin factory" note-book contained details of production and issue of tin containers by the appellant, which did not reflect in the statutory record. The details of production and clearance of tin containers were also shown in the note-book 'Daily production report' separately in respect of the appellant firm which tallied with the figures shown in the 'Daily report tin factory' which contained figures both for the 'new' tin factory as well in the name of the appellant. In this context, it will be noticed that the managing partner Shri Yogesh Garg confirmed in his statement recorded on 29.9.1998 that the documents recovered under the panchnama on 1.9.1998 were pertaining to production and clearance of tin containers by their factory. He stated that these documents consisted of daily production reports written in note-books, delivery challans, stock record of tins etc. The documents recovered pertained to production and clearance of tin containers.

He also stated that amongst other supervisors, even Awadesh Kumar Saxena, Electronics Engineer looked after the production and clearance of the goods of the factory. The authorized signatory of the appellant Girijesh Kumar Rai, confirmed in his statement recorded on 28.9.1998 that the records shown to him were withdrawn from the factory of the appellant in his presence and that he had put his signatures on the said documents at the time of withdrawal on 1.9.1998.

The Electronics Engineer, Shri Awadesh Kumar Saxena in his statement dated 28.9.1998 admitted that the portion of daily production reports note-book pertaining to the appellants was prepared by him and that challans and daily production reports which bear his signatures, were prepared by him and they were of the appellant firm. According to him, the daily production report depicted the number of tin containers produced/manufactured on a specific day. Whenever, he prepared the daily production report/challan he submitted the original copy to the Managing Director. The facts revealed by the Managing Director, Shri Yogesh Garg, the authorized signatory, Shri Girijesh Rai and Shri Awadesh Kumar Saxena make it clear that the said private documents recovered from the appellant premises on 1.9.1998 were maintained by the appellant and that the record, namely, the daily production reports, challans etc. were pertaining to the clandestine production and removal of tin containers without payment of duty. We have perused copies of these two notebooks containing the private record and we find that there were signatures of Awadesh Kumar Saxena, Electronics Engineer at various places. The daily report showed particulars of the opening stock, production and the closing stock of the said excisable goods. Admittedly, the production of the tin containers, which was recorded in these daily record books and which were removed, did not appear in the statutory record i.e. RG.1 register of the appellant.

This not a case where mere private record without anything more is relied upon. The private record was recovered from the factory of the appellant, and it is established beyond doubt and not even disputed that it was so recovered and that it belonged to the appellant. The nature of particulars contained in this private record clearly go to show their intrinsic authenticity about the clandestine production and removal of the excisable goods by the appellants who had

obtained the excise registration for the manufacture of such goods in the firm name.

There cannot be more authentic evidence than recovery of the said private record from the appellant's factory which admittedly was prepared and bears the signatures of the supervisors of the appellant, and which is proved to have been maintained in the factory, from the statements of the partner Shri Yogesh Garg, the Electronics Engineer, Shri Awadesh Kumar Saxena who has made several daily reports in the said book, and the authorized signatory, Shri Girijesh Rai in whose presence the note-books were recovered under a panchnama. In answer to question No. 18, Shri Awadesh Kumar Saxena who was shown the Daily production reports, stated in his statement dated 29.9.1998 that all these pertained to the appellants who manufactured the tin containers and that these contained information regarding production and clearance. He also stated in reply to question No. 19 that all challans were prepared by Shri Rajeev Agarwal and others whose signatures he recognized. The authenticity of the recovered documents was admitted by the partner Yogesh Garg [noticee No. (2)] and noticee No. (6) (Girijesh Rai) who also admitted that the record pertained to unaccounted for production and clearance of the tin containers by the appellant. Any subsequent retraction by Shri Awadesh Kumar Saxena has been rightly held to be an afterthought to protect the noticees. This is not a case where any defence was taken up about less consumption of electricity that would have impelled the Revenue Officers to examine consumption of electricity. When production and removal of excisable goods in a clandestine manner is established by such positive documentary evidence and the oral evidence of the managing partner and the supervisor, it cannot be said that the Commissioner committed any error in holding that the appellant had manufactured and cleared tin containers in a clandestine manner. The quantum of liability which is worked out, has not been disputed before us. We find ourselves in complete agreement with the reasoning and findings of the learned Commissioner in holding that the charge of clandestine removal of tin containers by the appellants was established beyond doubt. No further corroboration was required in view of the clinching nature of the oral and documentary evidence establishing clandestine production and removal of tin containers by the appellant. It is evident that Shri Yogesh Garg, noticee No. (2),

partner of the appellant, was in charge of the unit and was having overall control of the affairs of the unit. It was, therefore, rightly held that he was aware that the goods clandestinely manufactured and removed in the name of his partnership firm were liable to be confiscated.

19. For the foregoing reasons, we hold that the demand of Rs. 46,(SIC)53,866/- has been rightly confirmed against the appellant-assessee and the penalty of the like amount was justified under Section 11AC of the said Act alongwith payment of interest, as provided under Section 11 AB. The penalty of Rs. 5 lacs imposed on Shri Yogesh Garg, the noticee No. (2) which is distinctly imposed for the involvement of the said noticee, under Rule 209A of the Central Excise Rules of 1944, also calls for no interference. The appeal is, therefore, dismissed.

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