

**Syntex Processors Vs. Collector of Central Excise**

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

**Decided On :** Feb-03-1994

**Reported in :** (1994)(71)ELT386TriDel

**Appellant :** Syntex Processors

**Respondent :** Collector of Central Excise

**Judgement :**

1. The above appeals arise out of the order of the Additional Collector of Central Excise, Chandigarh confiscating certain quantities of processed man-made fabrics seized in transit and from certain other premises, levying duty on the processed man-made fabrics alleged to have been removed clandestinely by M/s. Syntex Processors and imposing penalties on all the appellants herein.

2. The facts of the case are as follows : M/s. Syntex Processors is a Partnership firm engaged in the processing of man-made fabrics on job work basis in their Unit at Amristar. On 8-5-1987 officers of the Central Excise Department intercepted a Matador van found to be carrying 160 pieces of processed man-made fabrics and enquiry from the driver and other occupants who were the employees of Syntex Processors revealed that the Malador had left the factory premises of Syntex Processors the same morning after loading the fabrics which were seized in the absence of any accompanying gate passes. The Matador was also seized after recording the statements of the driver and the other occupants. The Department conducted physical verification of the entire balance stock of fabrics in the factory premises of Syntex Processors from 8-5-1987 to 11-5-1987 and found a shortage

of 12757 metres of fabrics. They also seized 216 pieces of man-made fabrics found in excess of the statutory balance. Statements of Partners of Syntex Processors were recorded. On the same date the Departmental officers visited the premises of one M/s. Rami Tex where they recorded the statement of its partner to the effect that M/s. Rami Tex had sent grey fabrics under the challan dated 25-4-1987 to Syntex Processors through M/s. Simplex Trading Company, a sister concern of Syntex Processors and that some processed man-made fabrics found in the premises of Rami Tex were out of the fabrics sent to Syntex Processors which had been returned after processing without cover of any gate passes. The Partner of Rami Tex also deposed that they had received further quantity of processed fabric without valid duty paying documents which had already been disposed of by them. The Departmental officers visited the business premises of another trading concern viz. M/s. Amrit Lal Subhash Chander and seized certain processed fabrics from there on the basis of the statement of the Partner of the trading concern of receipt after processing from Syntex Processors without gate passes. In the course of visit to the premises of Simplex Trading Company, processed man-made fabrics were seized therefrom on the ground that they had been cleared from Syntex Processors clandestinely without payment of duty.

3. Show cause notices dated 6-11-1987 and 19-1-1988 were issued regarding goods seized in transit and seized thereafter from various business premises and proposing confiscation of the same, levy of duty and imposition of penalty. The adjudicating authority passed the following order : (a) Confiscation of fabrics seized from the Matador on 8-5-1987 and from the factory of Syntex Processors on 11-5-1987 and released after appropriation of redemption fine in addition to duty demand thereon; (b) Fabrics seized from premises of Rami Tex and Amrit Lal Subhas Chander were confiscated with option to redeem; (c) Confiscation of fabrics seized from Simplex Trading Co. with option to redeem; (e) Levy of additional duty and cess of Rs. 16,641.90 in respect of 12757 metres of fabrics on the basis of shortage and Rs. 19281.76 on 8302.15 metres of fabrics clandestinely removed and supplied to trading concerns.

(f) Penalty of Rs. 25,000/- imposed on Syntex Processors, penalty of Rs. 7000/- on M/s. Rami Tex, penalty of 3,000/- on Amrit Lal Subhash Chander, Rs. 2000/-

on Simplex Trading Co. and penalties of Rs. 1000/- each on the driver of the Matador (Pawan Kumar) and 4 other employees. Hence these appeals by M/s. Syntex Processors and its sister concern, Simplex Trading Co. and Pawan Kumar, driver of the Matador.

4. We have heard Smt. Archana Wadhwa, learned Counsel and Shri V.C. Bhartiya, learned DR.5. Learned Counsel for the appellants submits that the goods seized in transit from the Matador van had been removed from the factory of Syntex Processors by some disgruntled employees and this was brought out in the statement of Pawan Mehra Partner of Syntex Processors and that the fabrics had been accounted for in the statutory grey fabrics receipt register and, therefore, were not liable to confiscation. She contends that the entire case of the Department is based upon statements of Partners of M/s. Rami Tex and M/s. Amrit Lal Subhash Chander which are not corroborated in material particulars by any other independent evidence. She submits that the shortage and excess was due to certain inadvertent mistakes and was not a real shortage and that the bulk of the fabrics seized as excess and unaccounted for were still in a semi-processed condition and had not reached the stage for entry in RG-I register. She further submits that the inability of M/s.

Simplex Trading Co. to prove the duty paid character of goods seized from its premises cannot be made the basis for a finding of clandestine removal as there is no requirement in law for a trading concern to maintain any accounts for correlation of gate passes to establish the duty paid character of the goods stored by it or dealt with by it.

Regarding Pawan Kumar, learned Counsel submits that no duty is cast in law upon the driver of the vehicle to ensure that the goods under SRP carried by him are covered by proper gate passes and other duty paying documents. She relies upon the judgment of the Hon'ble Delhi High Court in the case of M/s. Pioneer Silk Mills Pvt. Ltd. and Ors. v. Union of India reported in 1991 (4) Delhi Lawyer 75 to plead that in any event confiscation and penalty cannot be sustained as it has been held by the High Court that there is no mandate in the Additional Duties of Excise (Goods of Special Importance) Act, 1957 for levy of penalty. She, therefore,

prays for setting aside of the impugned order.

6. Shri Bhartiya, learned DR opposes the prayer, drawing our attention to the detailed findings in the impugned order submitting that the adjudicating authority has passed his findings upon the actual shortage, seizure from the van and from premises of various trading concerns including the sister concern of Syntex Processors and the statements of various persons such as the driver of the Matador and the other occupants thereof and the Partners of M/s. Syntex Processors and partners of the other trading concerns. He refutes the argument that in respect of lot No. 20 duty has been demanded in the hands of Syntex Processors and once again for the same lot when the goods were seized from Rami Tex on the basis of the details contained in that lot.

Finally he seeks to distinguish the judgment of the Hon'ble Delhi High Court on the ground that the show cause notice in this case alleges contravention of some of the Central Excise Rules such as clearance without gate pass, albeit gate passes indicating nil duty.

7. On hearing both sides and carefully considering their submissions we are of the view that duty has been rightly demanded from M/s. Syntex Processors. The allegation of clandestine removal without accountal in the statutory records and without payment of duty is based upon physical verification conducted from 8-5-1987 to 11-5-1987 following the interception of the Matador and the appellants have not been able to satisfactorily explain the shortage. As regards the shortages against lot No. 22B, the explanation of the Syntex Processors that their workers at the time of allotting lot No. to grey fabrics entering the factory forgot to add the initial B to No. 22 on all the thans does not seem to be convincing and appears to be an attempt to escape liability. The adjudicating authority has given reasons in paragraphs 7.7 and 7.8 for confirming the duty demand and we see no reason to interfere with the same. We also reject the contention that there has been a duplication of demand in respect of goods covered by lot No. 20 as not substantiated. We, therefore uphold the duty demand.

8. Regarding confiscation and penalty, we find that the Hon'ble Delhi High Court has held in the case of Pioneer Silk Mills (supra) that there is no mandate in the

Additional Duties Act for levy of penalty and the CESA and the Rules made thereunder cannot be imported in the Additional Duties Act for the purpose of levy of penalty. The petitioners before the High Court challenged the show cause notice issued by the Collector of Central Excise proposing confiscation of plant and machinery, etc., and proposing imposition of penalty alleging contravention of Rules and proposing levy of Additional Duties of Excise and Cess payable on processed man-made fabrics. The claim of the petitioners was that invoking of the penal provisions of the Central Excise Rules by the respondents under the show cause notices was illegal and void and unconstitutional as under Section 3 of the Additional Duties Act, the only provisions of the Central Excises Act and Rules made thereunder apply in relation to the levy and collection of additional duty of excise under the Additional Duties Act which pertains to levy and collection of duties of excise under its Act, and in the absence of penal provisions under the Additional Duties Act, mere liability to duty alone cannot carry with it a liability to penalty as any tax Statute has to provide for the charge, viz., the taxable event and the quantum of tax and in the absence thereof, there will be no liability for tax, and that if a penalty is levied for infraction of the tax laws, as a deterrent, to ensure against evasion of tax, the taxation statute should expressly provide for charge of penalty. The respondents contended that Section 3 of the Additional Duties Act makes all the provisions of the CESA and the Rules applicable, so far as may be, to the Act and that the wordings "apply in relation to the levy and collection of duties of excise on the goods specified" are expressive enough to make all provisions in the CESA and Rules applicable if they are in relation to levy and collection of excise duty and confiscation and penalty necessarily flow out of levy and collection of duty.

8.1 After considering the arguments of the both sides and several judgments of the Hon'ble Supreme Court including the decision of C.A.Abraham v. Income Tax Officer, Kottayam reported in AIR 1961 SC 609 and Ujagar Prints, the High Court held in paragraph 32 of its order that there is provision in the Additional Duties Act which creates a charge in the nature of penalty and that the term "levy and collection" in Section 3(3) of the Additional Duties Act has a restricted meaning in view of the use of the words "including those relating to refund and exemptions from duty". The contention of the respondents that there could be a penalty without

there being any sanction for charge of duty if Rules regarding maintenance of records, etc., had been contravened was negated by the High Court in para 33 as follows : "A distinction was sought to be created by the Revenue that though there was no charge for penalty for non-payment, late payment or short deposit of the additional duty, but there could be a penalty without there being any sanction for charge thereof if there was contravention of the rules regarding maintenance of records, etc.

This distinction, to our mind, does not appear to be based on any sound reasoning. The object of the maintenance of records and for doing other acts as per rules is only to collect proper amount of tax and within the prescribed period and the object for levying penalty for non-payment or late payment, etc. is also the same.

Confiscation or forfeiture of property is also a form of penalty. To appropriate the property of the assessee of the value equal to an amount of taxes due from him is one thing but to confiscate his property for contravening certain provision of the Rules is another and partakes the form of penalty. It is not that there are no teeth for levy and collection of additional duty of excise under the Additional Duties Act inasmuch as under Section 11 of the Central Excises Act the officer authorised to levy excise duty may "deduct the amount so payable from any money owing to the person from whom such sums may be recoverable or due which may be in his hands or under his disposal or control, or may recover the amount by attachment and sale of excisable goods belonging to such person; and if the amount payable is not so recovered he may prepare a certificate signed by him specifying the amount due from the person liable to pay the same and send it to the Collector of the district in which such person resides or conducts his business and the said Collector, on receipt of such certificate, shall proceed to recover from the said person the amount specified therein as if it were an arrears of land revenue." Provisions of Chapter X of Indian Penal Code, especially Sections 176 and 177 (Omission to give notice or information to public servant by person legally bound to give it and furnishing false information) falling therein, can also be made use of by the Revenue." 8.2 The Court dealt with the requirement of clear authority of law position of penalty as additional tax in paras 37 and 39 of its order, reproduced

below: "When penalty is additional tax, constitutional mandate requires a clear authority of law for imposition thereof. If long drawn arguments are needed to explain if the Act by referential legislation or legislation by incorporation levies penalty or not, it is better for the Court to lean in favour of the tax payer. There is no room for presumption in such a case. The mere fact that all these years the Additional Duty Act has not been challenged on this ground is of no consequence if authority of law as mandated by the Constitution is lacking. We may also note in the passing that it was submitted before us that penalty so realised earlier has never been distributed among the States as part of net proceeds of the collection of the additional duties of excise under the Additional Duties Act. This statement made at the Bar was not challenged.

Since, however, this point was not raised in the writ petition and the revenue had no opportunity to reply in its counter-affidavit, we leave the matter at that. Levy of penalty which is an additional tax has to be under the authority of law which should be clear, specific and explicit.

39. We have given our considerable thought to various arguments raised by the parties. We find there is no mandate in the Additional Duties Act for levy of penalty and the Central Excises Act and the Rules made thereunder cannot be imported in the Additional Duties Act for the purpose of levy of penalty. We have spent anxious moments as the interpretation we have put has grave consequences for the revenue as similar terminology as used in Sections 3(3) of the Additional Duties Act has been used in various Finance Acts and other enactments, but then Article 265 of the Constitution mandates that no tax shall be levied and collected except by authority of law. There being no such authority of law to levy penalty, we have to held so." 9. The above decision of the Hon'ble Delhi High Court is, in our view, applicable on all fours to the facts of the present appeal. From a reading of the show cause notice it is clear that contravention of the Rules is in respect of levy and collection of additional duties of excise under the Additional Duties of Excise (Goods of Special Importance) Act, 1957 as applicable by virtue of Section 3 thereof.

There is no allegation of contravention of the Rules regarding levy and collection of basic excise duty apparently because processed fabrics were admittedly wholly exempt from such levy during the relevant period. The show cause notices allege contravention of Rules 9.1, 52A, 53, 173B, 173C, 173F, 173G and Rule 226 and invokes Section 173Q for confiscation of goods seized from the van as well as business premises of M/s. Rami Tex, M/s. Simplex Trading Co. and M/s. Amritlal Subhash Chander. In the case of Pioneer Silk Mills (supra) contravention of Rules 9, 173B, 173D, 173F, 173G, 209 and 226 read with Rules 52A and 53 was alleged in the show cause notices and the High Court dealt with the aspect of contravention of various Rules while coming to its conclusion that the respondents had no jurisdiction to resort to penalty proceedings or forfeiture of goods provided under the Central Excise Rules for alleged default under the Central Excises Act or Rules insofar as these provisions are made applicable by virtue of Section 3 of Additional Duties Act. Further we, also see great force in the contention of the learned Counsel for the appellants that the same reasoning holds good in respect of levy of cess under Khadi & Other Industries Development (Additional Excise Duty on Cloth) Act, 1953.

Accordingly, following the order of the Delhi High Court (supra) we set aside the confiscation of the processed fabrics both in transit from the Matador and from the premises of trading concerns. We direct release of the seized fabrics on payment of appropriate duty. We also set aside the confiscation of the Matador. We also set aside the penalties imposed by the adjudicating authority upon the appellants herein.

(i) We confirm the demand of duty of Rs. 16,641.90 and Rs. 19,281.76.

12. While I agree with my Ld. Colleague Hon'ble Member (Judicial), I would like to focus one particular aspect which in my opinion is required to be highlighted. *Khemka & Co. v. State of Maharashtra* (AIR 1975, SC 1549) it was held that in the absence of any provision for penalty under Central Sale Tax itself it is not open to the Sale Tax Authorities to press into service the provision of the State Sale Tax Act. And according to the Hon'ble High Court the ratio of the majority judgment is that penalty is an imposition and penalty like imposition of tax

cannot be included within the procedural part. There has to be a substantive provision levying penalty and what is equally significant that it has been held that "Penalty is not merely sanction.

It is not merely adjunct to assessment. It is not merely consequential to assessment. It is not merely machinery. Penalty is in addition to tax and is a liability under the Act".

14. Referring to a decision of the Federal Court in *Chatturam v. Commissioner of Income Tax*, 15 ITR 302 : AIR 1947 FC 32, Ray, C.J. had observed that there must be a charging section to create liability, and that there must be first a liability created by the Act." 15. The important thing to be noted is that by majority opinion the Hon'ble Supreme Court has considered penalty as an imposition in addition to tax and Hon'ble Justice Beg has in fact observed that "provisions relating to penalty were special and specific provisions in each Act". Therefore, in my opinion it was required to be seen as to what was the position in the relevant Act(s).

[In Central Excises and Salt Act, 1944 (as also under the Customs Act, 1962), there are specific provisions for penalty; and these are not in the nature of additional tax or as an adjunct to tax for consequential to it but in the nature of distinct liability created under the Act]".

16. In the instant case however, as rightly observed by the Hon'ble Delhi High Court in the case of *Pioneer Silk Mills Pvt. Ltd. and Ors.*

(1991 (4) DELHI LAWYER 75 (DB) that there is no penal provision in the relevant Act that is Additional Duties Act itself.

In this context, it is interesting to note 'en-passant' that on the customs' side penal provisions have been incorporated in the allied laws which charge duties in the nature of Customs Duties and invoke various provisions of Customs Act for assessment and refund etc. for example in the Agriculture Produce Act, 1940 Section 5B provides for penalty; The Produce Act, 1966 Section 16 provides for offences and Section 18 for composition of offence. And in the Tea Act, 1953 Section 36 provides for illicit export by making provisions of Customs Act

applicable. Therefore, absence of any specific provision providing for penalty under the Additional Duties of Excise Act is rather striking and appears to be in the nature of omission which only legislature could make good.

17. Hence respectfully following the ratio of judgment of Hon'ble Supreme Court to the effect that in the absence of any specific provision regarding penalty in the relevant Act, no penalty can be imposed, I agree with the finding of Hon'ble Member (Judicial) as mentioned above.

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