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IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CWP No.12747 of 2016
DATE OF DECISION :- June 22,2016

M/s G-Tech Industries **...Petitioner**

Versus

Union of India and another **...Respondents**

CORAM: HON'BLE MR.JUSTICE M.JEYAPAUL

HON'BLE MR. JUSTICE HARINDER SINGH SIDHU

Present:- Mr. Sujay Kantawala, Advocate for the petitioner.

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1. Whether Reporters of local papers may be allowed to see the judgment? Yes/No
2. To be referred to the Reporters or not? Yes/No
3. Whether the judgment should be reported in the digest? Yes/No

M.JEYAPAUL, J.

1. Heard.

2. On asking of the Court Mr. V.K. Kaushal, Advocate took notice for the respondents.

3. The petitioner seeks, by means of the present Writ Petition, to challenge Order-in-Original No. V(29) 15/ce/Commr.Adj/Chd-II/44/2015, dated 4.4.2016 issued by respondent no.2 whereby respondent no. 2 has confirmed differential Central Excise Duty (hereinafter referred to "as duty") demand of ₹7,08,38,008/- with interest and equivalent penalty. It is contended that the impugned order in original has been passed in flagrant violation of Section 9D of the Central Excise Act, 1944 (hereinafter referred to as "the Act") by relying upon the statements recorded under

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Section 14 of the Act without first admitting them in evidence in accordance with the procedure prescribed in this regard by Section 9D (1) b of the Act.

4. In view of the fact that the case of the petitioner is essentially premised on Section 9D of The Central Excise Act, 1944, it would be appropriate to reproduce the said provision, in extenso, thus :

> "9D. Relevancy of statements under certain circumstances.-
>
> (1) A statement made and signed by a person before any Central Excise Officer of a gazetted rank during the course of any inquiry or proceeding under this Act shall be relevant, for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which it contains,-
>
> (a) when the person who made the statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable; or
>
> (b) when the person who made the statement is examined as a witness in the case before the Court and the Court is of opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interests of justice.
>
> (2) The provision of sub-section (1) shall, so far as may be, apply in relation to any proceeding under this Act, other than a proceeding before a Court, as they apply in relation to a proceeding before a Court."

5. A plain reading of sub-section (1) of Section 9D of the Act makes it clear that clauses (a) and (b) of the said sub-section set out the

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circumstances in which a statement, made and signed by a person before the Central Excise Officer of a gazetted rank, during the course of inquiry or proceeding under the Act, shall be relevant,for the purpose of proving the truth of the facts contained therein.

6. Section 9D of the Act came in from detailed consideration and examination, by the Delhi High Court, in **J.K. Cigarettes Ltd. vs. CCE, 2009 (242) ELT 189 (Del).** Para 12 of the said decision clearly holds that by virtue of sub-section (2) of Section 9D, the provisions of sub-section (1) thereof would extend to adjudication proceedings as well.

7. There can, therefore, be no doubt about the legal position that the procedure prescribed in sub-section (1) of Section 9D is required to be scrupulously followed, as much in adjudication proceedings as in criminal proceedings relating to prosecution.

8. As already noticed herein above, sub-section (1) of Section 9D sets out the circumstances in which a statement, made and signed before a gazetted Central Excise Officer, shall be relevant for the purpose of proving the truth of the facts contained therein. If these circumstances are absent, the statement, which has been made during inquiry/investigation, before a gazetted Central Excise Officer, cannot be treated as relevant for the purpose of proving the facts contained therein. In other words, in the absence of the circumstances specified in Section 9D(1), the truth of the facts contained in any statement, recorded before a gazetted Central Excise Officer, has to be proved by evidence other than the statement itself. The evidentiary value of the statement, insofar as proving the truth of the contents thereof is concerned, is, therefore, completely lost, unless and until the case falls within the parameters of Section 9D(1).

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9. The consequence would be that, in the absence of the circumstances specified in Section 9D(1), if the adjudicating authority relies on the statement, recorded during investigation in Central Excise, as evidence of the truth of the facts contained in the said statement, it has to be held that the adjudicating authority has relied on irrelevant material. Such reliance would, therefore, be vitiated in law and on facts.

10. Once the ambit of Section 9D (1) is thus recognized and understood, one has to turn to the circumstances referred to in the said sub-section, which are contained in clauses (a) and (b) thereof.

11. Clause (a) of Section 9D (1) refers to the following circumstances :

i) when the person who made the statement is dead,
ii) when the person who made the statement cannot be found,
iii) when the person who made the statement is incapable of giving evidence,
iv) when the person who made the statement is kept out of the way by the adverse party, and
v) when the presence of the person who made the statement cannot be obtained without unreasonable delay or expense.

12. Once discretion, to be judicially exercised is, thus conferred, by Section 9D, on the adjudicating authority, it is self-evident inference that the decision flowing from the exercise of such discretion, i.e. the order which would be passed, by the adjudicating authority under Section 9D, if he chooses to invoke clause (a) of sub-section (1) thereof, would be pregnable to challenge. While the judgment of the Delhi High Court in J&K Cigarettes Ltd. (supra) holds that the said challenge could be ventilated in

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appeal, the petitioner has also invited attention to an unreported short order of the Supreme Court in **UOI and another vs. GTC India and others in SLP (C) No. 2183/1994** dated 03/01/1995 wherein it was held that the order passed by the adjudicating authority under Section 9D of the Act could be challenged in writ proceedings as well. Therefore, it is clear that the adjudicating authority cannot invoke Section 9D(1)(a) of the Act without passing a reasoned and speaking order in that regard, which is amenable to challenge by the assessee, if aggrieved thereby.

13. If none of the circumstances contemplated by clause (a) of Section 9D (1) exists, clause (b) of Section 9D (1) comes into operation. The said clause prescribes a specific procedure to be followed before the statement can be admitted in evidence. Under this procedure, two steps are required to be followed by the adjudicating authority, under clause (b) of Section 9D (1), viz.

i) the person who made the statement has to first be examined as a witness in the case before the adjudicating authority, and

ii) the adjudicating authority has, thereafter, to form the opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interests of justice.

14. There is no justification for jettisoning this procedure, statutorily prescribed by plenary parliamentary legislation for admitting, into evidence, a statement recorded before the gazetted Central Excise officer, which does not suffer from the handicaps contemplated by clause (a) of Section 9D(1) of the Act. The use of the word “shall” in Section 9D (1), makes it clear that, the provisions contemplated in the sub-Section are

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mandatory. Indeed, as they pertain to conferment of admissibility to oral evidence they would, even otherwise, have to be recorded as mandatory.

15. The rationale behind the above precaution contained in clause (b) of Section 9D(1) is obvious. The statement, recorded during inquiry/investigation, by the gazetted Central Excise officer, has every chance of having been recorded under coercion or compulsion. It is a matter of common knowledge that, on many occasions, the DRI/DGCEI resorts to compulsion in order to extract confessional statements. It is obviously in order to neutralize this possibility that, before admitting such a statement in evidence, clause (b) of Section 9D(1) mandates that the evidence of the witness has to be recorded before the adjudicating authority, as, in such an atmosphere, there would be no occasion for any trepidation on the part of the witness concerned.

16. Clearly, therefore, the stage of relevance, in adjudication proceedings, of the statement, recorded before a gazetted Central Excise officer during inquiry or investigation, would arise only after the statement is admitted in evidence in accordance with the procedure prescribed in clause (b) of Section 9D(1). The rigour of this procedure is exempted only in a case in which one or more of the handicaps referred to in clause (a) of Section 9D(1) of the Act would apply. In view of this express stipulation in the Act, it is not open to any adjudicating authority to straightaway rely on the statement recorded during investigation/inquiry before the gazetted Central Excise officer, unless and until he can legitimately invoke clause (a) of Section 9D(1). In all other cases, if he wants to rely on the said statement as relevant, for proving the truth of the contents thereof, he has to first admit the statement in evidence in accordance with clause (b) of Section 9D(1).

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For this, he has to summon the person who had made the statement, examine him as witness before him in the adjudicating proceeding, and arrive at an opinion that, having regard to the circumstances of the case, the statement should be admitted in the interests of justice.

17. In fact, Section 138 of the Indian Evidence Act, 1872, clearly sets out the sequence of evidence, in which evidence-in-chief has to precede cross-examination, and cross-examination has to precede re-examination.

18. It is only, therefore,

(i) after the person whose statement has already been recorded before a gazetted Central Excise officer is examined as a witness before the adjudicating authority, and

(ii) the adjudicating authority arrives at a conclusion, for reasons to be recorded in writing, that the statement deserves to be admitted in evidence,

that the question of offering the witness to the assessee, for cross-examination, can arise.

19. Clearly, if this procedure, which is statutorily prescribed by plenary Parliamentary legislation, is not followed, it has to be regarded, that the Revenue has given up the said witnesses, so that the reliance by the CCE, on the said statements, has to be regarded as misguided, and the said statements have to be eschewed from consideration, as they would not be relevant for proving the truth of the contents thereof.

20. Reliance may also usefully be placed on para 16 of the judgment of the Allahabad High Court in ***C.C.E. V Parmarth Iron Pvt Ltd, 2010 (250) ELT 514 (All),*** which, too, unequivocally expound the law thus:

> "If the Revenue choose (sic chose?) not to examine any witnesses in adjudication, their statements cannot be considered

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as evidence."

21. That adjudicating authorities are bound by the general principles of evidence, stands affirmed in the judgement of the Supreme Court in ***C.C. V Bussa Overseas Properties Ltd, 2007(216) ELT 659 (SC),*** which upheld the decision of the Tribunal in ***Bussa Overseas Properties Ltd v C.C., 2001 (137) ELT 637 (T).***

22. It is clear, from a reading of the Order-in-original dated 4.4.2016 supra, that Respondents No.2 has, in the said Orders-in-Original, placed extensive reliance on the statements, recorded during investigation under Section 14 of the Act. He has not invoked clause (a) of sub-section (1) of Section 9D of the Act, by holding that attendance of the makers of the said statements could not be obtained for any of the reasons contemplated by the said clause. That being so, it was not open to Respondent No.2 to rely on the said statements, without following the mandatory procedure contemplated by clause (b) of the said sub-section. The Orders-in-Original, dated 4.4.2016, having been passed in blatant violation of the mandatory procedure prescribed by Section 9D of the Act, it has to be held that said Orders-in-Original stand vitiated thereby.

23. The said order-in-Original, dated 4.4.2016, passed by Respondent No.2 is, therefore, clearly liable to be set aside.

24. In view of the above facts and circumstances, the impugned Order-in-Original dated 4.4.2016 passed by respondent no.2 stands set aside. Resultantly, the Show Cause Notice issued to the petitioner is remanded to respondent no.2 for adjudication de-novo by following the procedure contemplated by Section 9D of the Act and the law laid down by various judicial Authorities in this regard including the principles of natural

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justice in the following manner :-

(i) In the event that the Revenue intends to rely on any of the statements, recorded under Section 14 of the Act and referred to in the Show Cause Notices issued to Ambika and Jay Ambey, it would be incumbent on the Revenue to apply to Respondent No 2 to summon the makers of the said statements, so that the Revenue would examine them in chief before the adjudicating authority, i.e. before Respondent No 2.

(ii) A copy of the said record of examination-in-chief, by the Revenue, of the makers of any of the statements on which the Revenue chooses to rely, would have to be made available to the assessee, i.e. to Ambika and Jay Ambey in this case.

(iii) Statements recorded during investigation, under Section 14 of the Act, whose makers are not examined in chief before the adjudicating authority, i.e. before Respondent No 2, would have to be eschewed from evidence, and it would not be permissible for Respondent No 2 to rely on the said evidence while adjudicating the matter. Neither, needless to say, would be open to the Revenue to rely on the said statements to support the case sought to be made out in the Show Cause Notice.

(iv) Once examination-in-chief, of the makers of the statements, on whom the Revenue seeks to rely in adjudication proceedings, takes place, and a copy thereof is made available to the assessee, it would be open to the assessee to seek permission to cross-examine the persons who have made the said statements, should it choose to do so. In case any such request is made by the assessee, it would be incumbent on the adjudicating authority, i.e.

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on Respondent No2 to allow the said request, as it is trite and well-settled position in law that statements recorded behind the back of an assessee cannot be relied upon, in adjudication proceedings, without allowing the assessee an opportunity to test the said evidence by cross-examining the makers of the said statements. If at all authority is required for this proposition, reference may be made to the decisions of the Hon'ble Supreme Court in **Arya Abhushan Bhandar v U.O.I., 2002(143)ELT 25 (SC), Swadeshi Polytex v Vollector, 2000 (122) ELT 641 (SC).**

25. The Writ Petition is allowed in the aforesaid terms.

(M. JEYAPAUL)
JUDGE

(HARINDER SINGH SIDHU)
JUDGE

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