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IN THE HIGH COURT OF DELHI AT NEW DELHI

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W.P.(C) 3070/2017 & CM No. 13393/2017

DIGIPRO IMPORT & EXPORT PVT. LTD. Petitioner
Through: Mr. Priyadarshi Manish with Ms. Anjali
Jha Manish, Mr. Sagar Rohtagi and Mr. Ashutosh
Mishra, Advocates.

versus

UNION OF INDIA & ORS. Respondents
Through: Mr. Harpreet Singh, Senior Standing
Counsel with Ms. Namrata Bhati, Advocate for
Respondent Nos. 2,3, 4 and 5.
SI Adarsh Shrivastava, Superintendent, Central
Excise.

**CORAM: JUSTICE S. MURALIDHAR
JUSTICE CHANDER SHEKHAR**

ORDER

15.05.2017

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Dr. S. Muralidhar, J.:

1. This writ petition has brought to light certain disturbing facts concerning the functioning of the office of Chief Commissioner of Central Excise (Anti Evasion).

2. The Court has perused the original files brought to the Court by Shri Adarsh Shrivastava, Superintendent in the Anti Evasion Wing. The note states that on the basis of intelligence developed in respect of the Petitioner herein i.e. Digipro Import & Export Pvt. Ltd. ('Digipro') it was learnt that it was engaged *inter alia* in the manufacturing of mobile phone batteries,

mobile phone charger and LED bulbs. The unit was registered with the Central Excise Department since 4th January, 2016. The intelligence gathered was that the unit imported more than 20 kinds of components/raw materials under nil rate of duty for the manufacturing of mobile phone battery, mobile phone battery charger and LED bulb. More than 70% of the clearances of finished goods of the unit are stated to be of mobile phone battery. It is further stated that the unit is selling all their finished goods to one single buyer named Nancy Impex Private Limited (NIPL). It is alleged that the unit was paying duty @ 2% ad valorem on mobile phone battery and mobile phone charger, and 6% on LED bulbs. According to the Respondents, the tariff rate of duties on these products is 12.5% ad valorem.

3. The issue concerns the availing of exemption by the Petitioner under Notification No. 12/2012-CE dated 17th March, 2012. The note on the file further states that while scrutinising the Petitioner's ER-3 Returns filed for the period of April to December, 2016 it had been observed that the unit had cleared mobile phone batteries valued at Rs.13,76,75,874 on payment of duty of central excise at 2% ad valorem whereas it was liable to pay a differential duty of 10.5% ad valorem. Likewise, it cleared the LED bulbs by paying a differential duty at 6% while it was required to pay differential duty at 6.5%. A note was prepared by the Superintendent (Shri Adarsh Kumar Shrivastava) on 6th March, 2017 for permission to visit the premises of the Petitioner "to safeguard the revenue." It appears that permission was granted by the Additional Commissioner ('ADC') on 10th March, 2017.

4. There is a note dated 14th March, 2017 in the file titled 'Visit to M/s.

Digipro Import and Export Pvt. Ltd.’ *Inter alia* it records that during the course of the visit a statement was made by the Director of Digipro, Mr. Rohit Jain, which has also been placed on file. What is of immediate relevance is that it is recorded in the note that there was a purported admission by Mr. Jain “that above notification exemption was not applicable in their case.” The note states that “Shri Rohit Jain was ready to deposit the differential duty of 10.5% as they had short-paid the duty on all the clearances of mobile phone battery. Accepting his offence, he voluntarily tendered five undated cheques towards their duty liability amounting to Rs.1,25,00,000/- as detailed below:

Sl.No.	Cheque No.	Amount (in Rs.)
1.	691099	20,00,000/-
2.	691100	25,00,000/-
3.	691101	25,00,000/-
4.	691102	25,00,000/-
5.	691103	30,00,000/-
	Total	1,25,00,000/-

5. There is then a paragraph devoted to search at NIPL and the statement of Mr. Mudit Jain, Director of NIPL. The Court has been shown a separate file containing the statements as well as the *panchnamas* prepared at the time of search. A *panchnama* dated 10th March, 2017 drawn by Mr. Amritesh Ranjan, Inspector of Central Excise Delhi-II (Anti Evasion) *inter alia* notes as under:

“Sh. Rohit Jain, Director of the firm, after going through the relevant provisions of Central Excise Act and the relevant

notifications showed to him by the officers, admitted their lapse regarding short-payment of duty resulting in evasion of Central Excise duty and voluntarily tendered **five post-dated cheques** of Rs.20 Lacs, Rs.25 Lacs, Rs.25 Lacs, Rs.25 Lacs and Rs.30 Lacs respectively (total amounting Rs.1.25 Crore only) on account of liability of Central Excise duty as applicable upon them. The preventive check proceedings started at 13:00 hrs on 10.03.2017 and concluded at 23:00 hours on the same day. Nothing untoward happened during the course of preventive check proceedings and it was conducted in a peaceful and orderly manner in our presence. No harm was caused to any person, property and religious sentiments. Before leaving the premises the officers again offered their personal search which was politely declined by Shri Rohit Jain in our presence.”

(emphasis supplied)

6. It requires to be noted that while the note dated 14th March, 2017 prepared by the Superintendent, a portion of which has been extracted hereinbefore, talks of ‘undated cheques’ having been collected, the *panchnama* talks of the Petitioner having voluntarily tendered five 'post-dated' cheques.

7. The Petitioner’s version of what happened on 10th March, 2017 is of course different. Its version is that all of a sudden on 10th March, 2017, a team of the Anti Evasion, Central Excise, Delhi visited the office; conducted search; seized some of the documents and thereafter collected five cheques “all dated nil” bearing the aforementioned numbers and for the same amount i.e. Rs.1.25 crores. The copies of the *panchnama* dated 10th March, 2017 and the copies of the cheques have been enclosed with the petition as Annexures P-6 and P-7. The *panchnama* enclosed with the petition tallies with what is there in the file.

8. The Petitioner states that its representative went along with its counsel to

meet the Commissioner of Central Excise, Delhi-II on 27th March, 2017. They handed over to him a representation dated 21st March, 2017 explaining why the Petitioner was entitled to Exemption Notification No. 1/2011-CE dated 1st March, 2011. They also handed over to the Commissioner a copy of the Circular/Instruction of the Central Board of Excise and Customs (CBEC) bearing No. F.No.528/2/2008-Cus (TU) dated 6th February, 2009 which purportedly stated that the battery pack being part of cellular/mobile phone are eligible for exemption.” When the note dated 14th March, 2017 was put up before the ADC, he issued three instructions: (i) Please realise the cheques early. (ii) Please quantify duty liability (iii) Please put up file as soon as cheque is realised.

9. A summons was issued to the Petitioner on 29th March, 2017. On 30th March, 2017 the Petitioner’s counsel requested the Department not to encash the cheques claiming to have rightly availed of the benefit of exemption notification in question. The Petitioner thereafter filed the present petition on 30th March, 2017 alleging illegalities committed by the Department. The Petitioner prayed *inter alia* for a declaration that the Petitioner is entitled to the benefit of exemption and for a mandamus to the Respondent No.3 i.e. the Commissioner of Central Excise, Delhi-II not to encash the five cheques dated ‘nil’.

10. When this writ petition was listed first for hearing on 12th April, 2017 the following order was passed:

“1. Notice. Mr. Harpreet Singh, Advocate accepts notice for the Respondents.

2. The Court has been shown, by counsel for the Respondent, photocopies of three undated cheques drawn in favour of the Department for sums of Rs.20.00 lakhs, Rs.25.00 lakhs and Rs.25.00 lakhs collected from the Petitioner. In fact, according to the Petitioner, there were five undated cheques totalling to Rs.1.25 crores collected from the Petitioner by the officers of the Anti Evasion Wing, Commissioner of Central Excise, Delhi-I.

3. The officer of the Respondent (Mr Adarsh Shrivastava, Superintendent) present in Court instructs Mr Harpreet Singh to state that the originals of the five cheques are available with the Department and have not yet been encashed. It is directed that the said five cheques shall be brought to the Court by a responsible officer of the Department on the next date of hearing.

4. The Court would like to know on what instructions, orders and circulars the practice of collecting undated cheques from parties is being undertaken by the officers of the Anti Evasion Wing of the Central Excise Department, The Court directs the Additional Commissioner of Central Excise, In-charge of the Anti-Evasion Wing of the Commissionerate of Central Excise, Delhi-II to himself personally file an affidavit in this Court not later than 1st May, 2017 on this aspect.

5. The attention of Mr Harpreet Singh has been drawn to the judgment of this Court in *Capri Bathaid Private Limited v. Commissioner of Trade & Taxes 2016 (155) DRJ 526* where a similar practice followed in the Department of Trade and Taxes of the Government of the NCT of Delhi was directed to be stopped forthwith.

6. The Additional Commissioner, while filing the affidavit as directed above, will after reading the aforementioned decision, place/state the stand of the Anti Evasion Wing of the Central Excise Department.

7. Liston 8th May, 2017.

8. Till the next date, no coercive action will be taken against the Petitioner.

9. *Dasti*, under the signature of the Court Master.”

11. At the hearing on 8th May, 2017, the five cheques were brought to the Court. They were asked to be brought on the next date and the interim order was continued.

12. Pursuant to the above orders, an affidavit dated 1st May, 2017 has been filed by the ADC seeking to explain the collection by the officers of the Department of the undated cheques as under:

“7. That, it is further respectfully submitted, at the time of tendering the cheques, the petitioner requested for some time for making good the payment and stated that since he is not having sufficient balance/funds with him at that point of time, therefore, he requested that the cheques may not be presented immediately and assured that within a very short period of time he would clear his statutory duty liability. The petitioner, therefore, requested that no date may be put on the cheques and as and when the petitioner would have sufficient balance, he would inform the deponent and accordingly the deponent may encash these cheques. On getting the assurance from the petitioner, the officer who visited the premises of the petitioner, agreed not to put any date on the cheques.”

13. Today the Court has been shown the five undated cheques for sum of Rs.1.25 crores which were collected from the Petitioner during the visit to the premises of the Petitioner on 10th March, 2017. The Court specifically asked Mr. Harpreet Singh, learned counsel appearing for the Respondents, to show any provision in Central Excise Act 1944 (CE Act) or the Rules made

thereunder or any circular or notification that permitted the officers of the Department to collect 'undated cheques' constituting the differential duty liability and in particular authorising officers to collect such differential duty liability during the process of a visit/search or survey. Mr. Harpreet Singh could point out to no such provision or notification or circular. What was repeated before the Court was what is stated in the affidavit viz., that since the Petitioner expressed its difficulty in making the payment of the entire duty liability, it was at the Petitioner's insistence that the officers agreed that no date would be put on the cheques.

14. The above affidavit makes it appear that officers of the Department who go on a visit/survey etc to detect evasion of CE duty, have the discretion to decide on the spot what the evaded duty amount is; to collect such duty by way of cheques; to decide again on the spot the terms on which such duty should be paid; to decide again on the spot whether to grant such duty evader the facility of postponement/late payment by 'agreeing' not to put any date on such cheques. It is indeed extraordinary that officers at the level of a Superintendent would have such vast powers of collecting duty on the spot without even a quantification of the duty amount preceded by a show cause notice (SCN). No attempt has been made to demonstrate that the above is a procedure known to law. It actually points to the opposite. And that is what makes it inexcusable.

15. At this stage, at the risk of some digression, it requires to be noticed that the Court has come across instances where a similar practice of 'collecting' purported differential duty/tax from dealers/assesseees alleged to have evaded

payment of statutory duties/taxes has come to the notice of the Court in the context of the proceedings under the Delhi Value Added Tax Act, 2004 ('DVAT Act') as well as the Finance Act, 1994. The Court has in a detailed judgment in ***Capri Bathaid Private Limited v. Commissioner of Trade & Taxes 2016 (155) DRJ 526*** held that

"by no means does Section 87 (6) of the DVAT Act enable the officers who undertake a search and seizure operation under Section 60 of DVAT Act to collect tax dues on the spot from the dealers whose premises are searched. This is wholly impermissible in law and will lead to unhealthy practice of arm-twisting a dealer into parting with alleged tax dues without there even being an order of assessment. The tax demand crystallises only upon an assessment. In any event, even if a dealer volunteers to deposit the disputed tax amount, he should be asked to deposit the said amount in the counter designated for that purpose. There is no question of the members of the search team collecting such payment. The CVAT should issue clear instructions in this regard. It should also be made clear that if any of the officers of the DT&T are found violating the instruction, they would be subject to disciplinary proceedings."

16. In that case again while directing the return of such cheques to the dealer from whom they were collected, the Court observed that "the VAT Authorities have in these cases proceeded on a basic misconception of the scope of their powers and authority." In para 52, the Court observed as under:

"52. The Court would like to impress upon the CVAT that given the frequency with which the Court has been constrained in the recent past to interfere with the illegal exercise of powers and jurisdiction by the VAT Authorities, it has become imperative for the CVAT to issue clear instructions/directions to the VAT Officers to follow regarding the scope of their powers and jurisdiction. The delegation of powers and the jurisdiction of the VAT Authorities must be specific and leave

no room for ambiguity. It must be ensured that there is no possible overlapping of the exercise of powers and jurisdiction by different VAT Authorities. The CVAT should issue clear instructions that no VAT Authority will collect in cash or by cheque any alleged tax demand on the spot/field while undertaking a survey, or a search or seizure operation. In this regard, it should also be made clear that if any of the officers of the DT&T are found violating any of the instructions, they would be subject to disciplinary proceedings.”

17. In its order dated 12th April, 2017 in the present case, the Court had specifically drawn the attention of the learned counsel for the Respondent to the above judgment. Further, this Court required the ADC while filing his affidavit to read the decision and place the stand of the Anti Evasion Wing on record. In the affidavit filed by the ADC, he deals with these aspects in paras 3 and 17 as under:

“3. That, I have gone through the order dated 12.04.2017 passed by this Hon'ble Court and I have also gone through the Judgment passed by this Hon'ble Court passed in the case of 2016 (155) DRJ 526 and have understood the same. The present affidavit is being filed after going through the said Judgment.

17. That, the deponent further respectfully submits, the judgment passed by this Hon'ble Court in the case of *Capri Bathaid Vs. Commr. Of Trade & Taxes* is, with respect, not applicable to the facts of the present case. It is respectfully submitted in this regard that the case of *Capri Bathaid* is distinguishable on facts since in the said case, the officials of the Delhi VAT Department had carried on a search/seizure exercise on the assessee without any proper authorization by the Competent Authority and had further proceeded to reverse the ITC availed by the assessee. The issues which had arisen in the said case may not be relevant in the facts of the present case. In the facts of the present case, the team of the Anti Evasion department were duly authorized by the deponent being the

Additional Commissioner and empowered in this regard and the cheques handed over by the petitioner have still not been encashed as the petitioner had time and again requested for some time to arrange for the duty amount. Further the said cheques were handed over voluntarily in the wake of circumstances which have been explained supra. Thus, there was no action on part of the department which can be said to be lacking of any authorization by the Competent Authority.”

18. The Court rejects the attempts of the ADC to distinguish the above judgment on the ground that the search and seizure operation in the above case under the DVAT Act was without authorisation whereas in the present case it was duly authorised. The ADC is obviously missing the point. The ADC has been unable to point out any provision of law or any notification or any circular that permitted the officers who visited the Petitioner’s business premises to collect undated cheques which purportedly constitute the differential duty. He is further unable to explain how these undated cheques were kept with the Department and why indulgence was shown by the Department to the Petitioner when the Petitioner requested for some time to arrange for the duty amount.

19. This illegal practice adopted by the Anti-Evasion Department of Central Excise requires a deeper investigation. The Court has every reason to believe that this has come to light only because the Petitioner has approached this Court. This practice is perhaps being adopted in a number of instances which are yet to come to the notice of the Court. There will be serious ramifications if this practice is allowed to continue unchecked. In the first place, it must be realised that the officers of the Anti Evasion Wing of the Central Excise Department have to function within the four corners of

the law. They are bound by not only the CE Act and the Rules made thereunder but all the notifications/circulars/instructions issued from time to time including those issued by the CBEC. There is no scope at all to collect duty and that too without even quantifying the extent of duty evasion.

20. The most glaring feature here is that when the note dated 14th March, 2017 was put up before the ADC, his three instructions were to "1. Release the cheques early" (which is a tacit acceptance of the practice of collection of undated cheques); "2. To quantify the statutory liability" (which is a clear admission that till then the duty was not quantified) and "3. To again put up the file as soon as the cheques are realised" (which is a clear admission of the fact that it is not known when that is going to happen). It is telltale that even after the Court issued notice to the Department in the present petition, the above instructions of the ADC have not been complied with. The undated cheques remained with the Department. What loss this entailed to the Government Exchequer is a different issue altogether. Then there is the loss of interest on the said amount. At least two scenarios are possible when such unbridled power of 'collection' of duty, on the spot, is allowed to go unchecked. One is that since there is nothing written down anywhere, the unscrupulous officers who constitute the survey/search team can 'negotiate' an amount of evaded duty and also agree to waiver of interest and penalty. This is without quantification and without a SCN. The duty evader gets away with a lighter amount and this is prejudicial to the interest of the Revenue. The second scenario is where an Assessee refuses to comply with an illegal demand and under threat and coercion is compelled to issue cheques or pay cash which is supposed to constitute the differential duty.

This is undoubtedly prejudicial to the Assessee and is harmful to public interest. It is not rule of law but anarchy unleashed by holders of public office. Neither is it an acceptable scenario in a system governed by the rule of law. It metamorphoses into a system of rule by law and, worse still, by abuse of law. It has to be stopped.

21. The Court would like the matter to be carried out to its logical conclusion. The cheques brought to the Court are directed to be kept in a sealed cover with the Registrar General of this Court. The Court would like the Commissioner of Central Excise, Delhi-II to personally file an affidavit in this Court in light of the present order to explain to the Court what steps he proposes to take to immediately stop this illegal practice adopted by his officers of collecting undated cheques. This affidavit should be filed on or before 29th May, 2017. The Commissioner is also requested to remain personally present in Court on the next date to assist the Court with the queries that the Court may have.

22. The Commissioner of Central Excise, Delhi-II is directed to immediately institute an enquiry to ascertain which of the officers were involved in this illegal exercise. He will seek a proper explanation from them as to how they proceeded to collect undated cheques in the manner indicated above and that too without any authorisation to do so under the CE Act, the rules made thereunder or under any circular/notification etc. In his affidavit to be filed in pursuance to the present order, the Commissioner of Central Excise, Delhi-II will detail all the consequential steps that he has taken in this regard including fixing responsibility on such of those officials who have crossed

the line.

23. The Court would also like a copy of this order to be sent forthwith to the Central Vigilance Commissioner (CVC) in view of the seriousness of the issue. The CVC will also be sent a copy of the judgment of this Court in ***Capri Bathaid Private Limited v. Commissioner of Trade & Taxes*** (*supra*). The CVC is probably aware that there is a pattern in several Departments of the Government which are entrusted with powers of collection of duties and taxes, and vested with search and seizure powers, resorting to such illegal practice of collecting cheques some time undated and some time even cash from persons and entities who may have evaded payment of taxes and duties. The extent of harm this can cause to the government exchequer and the harassment it can cause to innocent persons is immense. It symbolises what economists term as 'rent seeking behaviour' of public servants. It also raises serious issues about accountability and transparency of the functioning of these Departments. It is imperative for the CVC to issue clear guidelines.

24. Reverting to the case in hand, Mr. Harpreet Singh says that a SCN will be issued to the Petitioner in all probability within a week from today. Mr. Priyadarshi Manish, learned counsel appearing for the Petitioner, requests that when the Petitioner is summoned to appear in person pursuant to the SCN, it should be permitted the presence of counsel who will be within visible but beyond audible distance. In the peculiar facts and circumstances of this case, the Petitioner is permitted the above facility. It is expected that the SCN would be carried to its logical end and decided in accordance with

law without unnecessary delay, uninfluenced by anything that may have been said in this order touching on the merits of the case. On this aspect of the matter, no further directions are called for. However, the writ petition is kept pending to ensure compliance of the above directions.

25. List on 30th May, 2017.

26. A copy of this order be given *dasti* to learned counsel for the parties under the signature of Court Master. A Special Messenger of the Registry will deliver forthwith for compliance a certified copy of the present order to (i) the Commissioner of Central Excise Delhi - II, and (ii) the CVC.

S. MURALIDHAR, J

CHANDER SHEKHAR, J

MAY 15, 2017
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