Customs, Excise & Service Tax Appellate Tribunal,
West Zonal Bench : Ahmedabad

REGIONAL BENCH - COURT NO. 3

Excise Appeal No. 861 of 2009

[Arising out of Order-in-Appeal No OIO-47/VDR-II/JOLLY/MAK/COMMR/08-09 passed by Commissioner of Central Excise, Customs and Service Tax-VADODARA-II]

M/s Jolly Electrical Industries **.... Appellant**
S-09, Aries Complex, 87, Sampatrao Colony,
Bpc Road, Vadodara, Gujarat-390007

VERSUS

C.C.E. & S.T. Vadodara-ii **.... Respondent**
1st Floor... Room No.101,
New Central Excise Building,
Vadodara,Gujarat-390023

AND

Excise Appeal No. 862 of 2009

[Arising out of Order-in-Appeal No OIO-47/VDR-II/JOLLY/MAK/COMMR/08-09 passed by Commissioner of Central Excise, Customs and Service Tax-VADODARA-II]

Nilesh V Shah **.... Appellant**
Jolly Electrical Industries,
S-09, Aries Complex, 87, Sampatrao Colony,
Bpc Road, Vadodara, Gujarat-390007

VERSUS

C.C.E. & S.T. Vadodara-ii **.... Respondent**
1st Floor... Room No.101,
New Central Excise Building,
Vadodara,Gujarat-390023

APPEARANCE :
Sh. P.M. Dave, Advocate for the Appellant
Sh. L. Patra., Assistant Commr. (AR) for the Respondent

CORAM: HON'BLE MR. RAMESH NAIR, MEMBER (JUDICIAL)
HON'BLE MR. RAJU, MEMBER (TECHNICAL)

FINAL ORDER NO. A/ 11889-11890 /2019

DATE OF HEARING : 17.06.2019
DATE OF DECISION:01.10.2019

RAMESH NAIR

The brief facts of the case are that the appellant M/s Jolly Electrical Industries were engaged in the manufacture of plain paper copier and transmitting apparatus classifiable and chargeable to duties of excise, heading/ sub-heading 9009.00 and 8425.00 respectively of the Central Excise Tariff Act, 1985. There are other two units, namely M/s

Jolly Enterprises located at K-1, 16-15/GIDC-Dabhoi District-Vadodara (hereinafter referred to as 'Jolly' for the sake of brevity) having Central Excise Registration for manufacture of electrical switches transmitting apparatus, micro film, reader printer and computer classifiable and chargeable to duties of excise under heading/ sub-heading no. 8536.90, 9525.00 and 8471.00 respectively of Central Excise Tariff Act, 1985 and M/s Kinitronics located at Shed No. 21-22, GIDC Waghodia Distt. Vadodara (hereinafter referred to as 'Kini' for the sake of brevity) having Central Excise Registration for manufacture of TV sets, Modular Systems, Plain Paper Copier, paper shedding machine and data display monitors classifiable and chargeable to duty under chapter heading no. 8528.00, 8517.00, 9009.00, 8472.00 and 8471.00 respectively of the Central Excise Tariff Act, 1985. The Central Excise departmental officers carried out massive investigation of all the three units and found that in fact the other two units i.e. Kini and Jolly were not manufacturing the goods whereas the goods manufactured by Jolly Electricals Industries were being cleared under exemption in the name of Kini and Jolly. During investigation various statements of the employees of the appellant and other persons were recorded. The status of the units were also verified and from all these evidences it was revealed that all the clearance shown to have made by Kiny and Jolly are in fact manufactured and cleared from Jolly Electrical Industries. Accordingly, the demand of excise duty was raised against the appellant M.s Jolly Electrical Industries. A SCN dated 02.03.1994 was issued wherein demand of duty, penalty, and confiscation of land and building plant and machinery was proposed against M/s Jolly Electrical Industries. M/s Kini and Jolly were proposed for recovery of modvat credit wrongly availed and utilized and also corresponding penalty was proposed to be imposed. Personal penalties under Rule 209A of Central Excise Rules, 1944 was also proposed to be imposed against various persons including partners of all the three partnership firms. The said SCN was adjudicated by the Collector of Central Excise Vadodara vide Order-in-Original No. 117/BRC/MP/95 and held that goods of all the three firms were different for which separate excise license were given and recorded various findings and dropped the SCN against all the noticees. Being aggrieved by the said order in original dated 06.10.1995 the Revenue filed an appeal before the Appellate Tribunal Mumbai praying for setting aside the order in original dated 06.10.1995. The Tribunal remanded the matter vide order dated

08.07.2004. The appellant filed application before the Tribunal for restoration of appeal which was dismissed. Another application was filed by the present appellant for restoration of the Revenue's appeal and for recalling the order dated 08.07.2004 however the Appellate Tribunal rejected the said application vide order dated 09.07.2007. In the meanwhile, the Tribunal's Order of remand was complied with and Collector passed de novo order confirming the duty demand against the present appellants with interest and penalties. Aggrieved by the de novo order in original dated 31.01.2007, the appellants filed appeal along with stay petition before this Appellate Tribunal. The Tribunal remanded the matter to the original authority. The Commissioner of Central Excise-Vadodara in the second round of remand has passed the impugned order whereby the duty demand against M/s Jolly Electrical Industries was confirmed and a penalty of Rs. 80 Lakhs was imposed under Rule 173Q(1D) of Central Excise Rules, 1944. It was also ordered for confiscation of land, plant, building, machinery etc. of M/s Jolly Electrical Industries under Rule 173Q(2) and an optionwas given to redeem the said asset on payment of redemption fine of Rs. 10 Lakhs. A penalty of Rs. 10 Lakhs was also imposed on Sh. Nilesh V Shah, partner of M/s Jolly Electrical Industries under Rule 209A of Central Excise Rules, 1944. Being aggrieved by the impugned order in original dated 06.02.2009, the present appellants filed these appeals.

2. Sh. P.M. Dave, Ld. Counsel appearing on behalf of the appellant submits that in the first round of adjudication the Collector of Central Excise, Vadodara vide Order dated 06.10.1995 dropped the proceedings against all the noticees holding that all the three firms i.e. M/s Jolly Electrical Industries, M/s Kinitronics and M/s Jolly Enterprises are separate units and both cannot be clubbed. Against the said order dated 06.10.1995, the Revenue filed only one appeal i.e. against M/s Jolly Electrical Industries, therefore, finding with regard to the clubbing of two units i.e. M/s Kinitronics and M/s Jolly Enterprises were held to be independent. The clearance of those units cannot be clubbed with the clearances of the appellant M/s Jolly Electrical Industries, therefore, the demand is not sustainable. He submits that in the impugned order demand of modvat credit against M/s Kinitronics and M/s Jolly Enterprises was dropped though it was proposed in the SCN. He submits that if these two units are treated as dummy units for facade created by M/s Jolly Electrical Industries then modvat credit taken and utilized by

these alleged dummies had to be denied and recovered but no adverse order for recovery of modvat credit has been made against these two manufacturers. The Commissioner has indirectly recognized them as real and genuine manufacturer. This is fatal legal infirmity in the impugned order and therefore, clubbing of clearances of these two manufacturers with the appellant M/s Jolly Electrical Industries is liable to be set aside on this ground itself. Without prejudice to the above submission, he further submits that in the first round of adjudication, adjudicating authority dropped the proceedings against two of alleged dummies which was not challenged by the Revenue, therefore, in the adjudication against other two units i.e. M/s Kinitronics and M/s Jolly Enterprises, the adjudication order became final and conclusive and therefore, the value of other clearances cannot be clubbed with the clearances of the appellant herein. He placed reliance on the following judgments:

- Elemec Industries 2003 (158) ELT 595 (Tri. Del.)
- CCE vs Tightwell Fastners 2008 (230) ELT 163 (Tri. Ahmd.)
- CCE vs Supreme Electrical Appliances 2001 (113) ELT 271 (Tri. Del.)
- CCE vs Meco Tronics Pvt. Ltd. 2003 (159) ELT 628 (Tri. Chen.)
- CCE vs Campco 2006 (199) ELT 630 (Tr. Bang.)

2.1 He submits that there was only one appeal filed by the Revenue against order in original dated 06.10.1995 namely, Appeal No. E/2474/1996-Bombay and the name of the Respondent against serial No. 2 of EA-5 form was of M/s Jolly Electrical Industries. The notice for hearing of this appeal was also served only on M/s Jolly Electrical Industries. In the order dated 08.07.2004 made by Appellate Tribunal – Bombay also only M/s Jolly Electrical Industries was shown as the Respondent. If appeals were filed against other two firms also then there will be two more appeals where the ground about demand of modvat credit would have been taken and prayer against these two firms would also have been made and hence notices would have been issued to these two firms also by the Registry of the Appellate Tribunal. Only because it was written in the caption of memo of revenue's appeal – M/s Jolly Electrical Industries & Ors., the Commissioner could not have now held that appeals were filed against other firms also. He placed reliance on the following judgments:

- Krishna Clearing Agency vs UOI 2016 (334) ELT 427 (Guj.)
- M/s Vyas Shantilal Jethala Sons Co. Order No. A/10721/2018 dated 03.04.2018 passed by CESTAT, Ahd.

2.2 He further submits that if appeals filed by the Revenue against the alleged dummies were dismissed as time barred (and not on merits) then also clubbing of clearances is not admissible because the situation is that the order dropping the proposal of clubbing for such units has become final. The case of clubbing alleged dummies has become final, the case of clubbing of other clearances with main unit also does not survive. In this support, he placed reliance on the following judgment:

- CCE vs Supreme Electrical Appliances 2001 (113) ELT 271 (Tri. Del.)
- CCE Trichirapalli v/s Devi Silicates (P) Ltd. 2004 (178) ELT 1018 (Tri. Chennai)

2.3 He further submits that in remand proceedings also the Commissioner has not called M/s Kinitronics and M/s Jolly Enterprises for hearing, because the case against them was dropped by virtue of order in original dated 06.10.1995 and that order was not challenged by the filing the appeals against these two firms. In case of clubbing of clearances, no order can be passed without joining alleged dummies as parties are co-noticees in adjudication proceedings. In this regard he placed reliance on the following judgments:

- K.R. Balachandran 2003 (151) ELT 68 (Tri. Chennai)
- CGST vs Unitech Containers Pvt. Ltd. 2017 (358) ELT 99 (Del.)
- CCE vs Diamond Scaffolding Co. 2011 (274) ELT 10 (Cal.)
- Premier Heavy Engineering Corpn. 2016 (337) ELT 332 (Guj.)

2.4 As regard Commissioner's observation that as per letter dated 11.11.1996 forwarding the memorandum of appeal and appeal paper book to the Assistant Registrar – CESTAT, Bombay, a copy of memorandum was also forwarded to all 8 noticees to whom the SCN was issued, he submits that this objection seems to be incorrect as this matter is not on record and it is not established that a copy of appeal memorandum was actually forwarded to all 8 noticees. He submits that but assuming without admitting that appeal memorandum was forwarded to M/s Kinitronics and M/s Jolly Enterprises also as held by Hon'ble Gujarat High Court in the case of M/s Premier Heavy Engineering Corporation 2016 (337) ELT 332 Guj., certifying a copy of the notice on the alleged dummy units is immaterial because the question whether the unit was dummy or not had to be decided with full participation of such alleged dummy.

2.5 As regard the facts on the issue of clubbing, he further submits that the findings of the facts recorded by the predecessor Commissioner while passing order in original dated 06.10.95 have not been considered by the predecessor Commissioner for recording the findings of the facts while passing OIO dated 06.10.95 has also not been considered by the Respondent Commissioner in the remand proceeding, therefore, the findings in the impugned order is contrary to the findings already recorded by the predecessor Commissioner as regard facts of the case and thus impugned order passed on incorrect and non-existent fact deserves to be set aside. He submits that in the OIO dated 06.10.95 it was recorded that all the three units had manufactured and cleared excisable goods independently on their own and their function was not on paper but they were actually in existence and working. The predecessor Commissioner has considered statutory records while recording this finding. As against the said finding the respondent Commissioner has now recorded in the impugned order that the three units were functioning as one unit and all the manufacturing activities were maintained at premises of Jolly Electrical Industries only. He submits that all the staff were looking after activities of all the three units, therefore, all the three units were working independently. The predecessor Commissioner has recorded in the order dated 06.10.95 that electricity in the factories of M/s Kinitronics and M/s Jolly Enterprises was less because the manufacturing activity over there was only of assembling of imported and otherwise procured parts and components so as to produce goods like electrical switches, fax machines, micro film reader and printer as well as telephone sets, plain paper copier and paper shredders. In view of screw driver technology adopted by these two manufacture electricity consumption in their factory was less. In the impugned order now passed by the Respondent Commissioner, it is held that electricity consumption being of less units in the factories of M/s Kinitronics and M/s Jolly Enterprises and electricity consumption of Jolly Electrical Industries being at higher the manufacturing activities were undertaken only in the factory of Jolly Electrical Industries. He submits that only because electricity consumption in one of the three factories was higher it could not be held that other two factories actually did not undertake any process of manufacture. He submits that all the findings given by the Respondent Commissioner is contrary to the findings given by the predecessor Commissioner therefore the impugned order is not sustainable.

2.6 He further submits that as regard clubbing of clearances a trade notice No. 59/1992 was issued by the Vadodara Collectorate as far back as 14.07.1992 based on an order No. 6/1992 issued by CBEC under Section 37B of the Act from file No. 213/15/92-C-Ex.-06 and it was clarified thereunder that clubbing of manufacturers and factories was not permissible if (i) all the manufacturers were independent in the sense that they were having their own factories, sheds, machineries and other infrastructural facilities like power (ii) the source of raw material and source of funding was also separate and independent for all the manufacturers (iii) the manufacturers and other factories were registered and recognized as separate entities under various Central and State Legislatures applicable to manufacture and sale activities (iv) the manufacturers were independent in the matters of management and administration of their affairs and one manufacture was not controlling the management of the others and (v) the manufacturers were independent entities and also juristic persons and in such case even if one or two partners, directors were common, said commonness was absolutely irrelevant. He placed reliance on the following judgments:

- Prabhat Dyes and Chemicals 1992 (62) ELT 469 (Tri.)
- Swastik Engg. Works 1992 (62) ELT 313 (Tri.)
- Diamond Engineering & Trading Corpn. 1989 (44) ELT 92
- Bhagwandas Kanodia & Ors. 1987 (32) ELT 204 (Tri.)
- Alpha Toys Ltd. 1993 (66) ELT 375 (Raj.)
- Rang Udyog 1996 (83) ELT 648
- Prima Control (P) Ltd. 1994 (71) ELT 689 (Tri.)

2.7 He submits that in view of above judgments the principles were laid down that in each case clubbing of clearances is permissible, taking support of above of the above judgment. He submits that as per the facts of the present case, all the three units cannot be clubbed together.

2.8 As regard time bar, he submits that all the three manufacturers were licensed by the Central Excise Department separately. All the three manufacturers have availed benefit of Modvat Credit by maintaining Modvat Register and filing Modvat declaration. All the three manufacturers have paid duty after exceeding SSI limits. All the units were maintaining RG-1 and filing RT-12 returns, therefore, all the activities of three units were well within knowledge of Revenue Officers. The predecessor Commissioner has recorded in the order dated 06.10.95 that the Central Excise Authorities were aware about these manufacturing activities, therefore, the demand for the extended period of limitation is time barred.

2.9 He further submits that the demand, if any arise, the same needs to be recomputed by extending the benefit of cum duty price as held by the Larger Bench of CEGAT in the case of Shri Chakra Tyres 1999 (108) ELT 361 and in the case of Dugar Tetenal (India) Ltd. 2008 (224) ELT 180 (SC). Accordingly, the demand of Rs. 80,83,376/- was wrongly made and the same atleast deserves to be reduced.

2.10 As regard penalty he submits that since there is no violation of any nature committed by the appellant and they have bonafidely acted. Moreover, there is no specific reason or ground spelled out in the order for imposing penalty and thus penalty could not be imposed on hearsay or presumption. Regarding penalty imposed on Sh. Nilesh Shah, he submits that there is no evidence or statement on record to link Sh. Nilesh Shah with the alleged offences, therefore, penalty under 209A could not have been imposed.

3. Sh. L. Patra, Ld. Assistant Commissioner (AR) appearing on behalf of the Revenue reiterates the findings of the impugned order. He further submits that all the arguments made by Ld. Counsel will not help their case for the reason that as per the facts of this case M/s Jolly Electrical Industries cleared the goods clandestinely in the guise of manufacture and clearance of goods by other two units M/s Kinitronics and M/s Jolly Enterprises. For the same reason, the extended period was also rightly invoked. In support of the Revenue’s case, he placed reliance on the following judgments:

- Elemec Industries 2003 (158) ELT 595 (Tri. Del.)
- CCE vs Tightwell Fastners 2008 (230) ELT 163 (Tri. Ahmd.)
- CCE vs Supreme Electrical Appliances 2001 (113) ELT 271 (Tri. Del.)
- CCE vs Meco Tronics Pvt. Ltd. 2003 (159) ELT 628 (Tri. Chen.)
- CCE vs Sompura Ceramics 2001 (130) ELT 195 (Tr. Del.)
- CCE Trichirapalli v/s Devi Silicates (P) Ltd. 2004 (178) ELT 1018 (Tri. Chennai)
- K.R. Balachandran 2003 (151) ELT 68 (Tri. Chennai)
- CGST vs Unitech Containers Pvt. Ltd. 2017 (358) ELT 99 (Del.)
- CCE vs Diamond Scaffolding Co. 2011 (274) ELT 10 (Cal.)
- Premier Heavy Engineering Corpn. 2016 (337) ELT 332 (Guj.)
- Krishna Clearing Agency vs UOI 2016 (334) ELT 427 (Guj.)
- M/s Vyas Shantilal Jethala Sons Co. Order No. A/10721-10723/2018 dated 03.04.2018 passed by CESTAT, Ahd.

4. We have heard both the sides and perused the records. In the first round of adjudication order, the adjudicating authority has dropped the demand holding that all the three units are independent in respect of manufacture and clearance of the goods, therefore, they should not be clubbed. Being aggrieved by the order in original dated 06.10.95 Revenue filed appeal before the Tribunal. The Tribunal allowed the Revenue's appeal by remanding to the adjudicating authority to re-determine the issue. The present appellants application for restoration of appeal was also dismissed by the Appellate Tribunal. Second application was filed by the present appellant for restoration of Revenue's Appeal was also rejected by the Tribunal. Meanwhile, the adjudicating authority passed a de novo order whereby the duty demand against the present appellants with interest and penalties were confirmed, therefore, the present appeal filed by the appellants. Ld. Counsel vehemently argued on the following points:

(i) In the first round the then Ld. Collector dropped the proceedings against all the noticees whereas the Revenue filed appeal only against Jolly Electrical Industries. Accordingly, the finding in the first order that M/s Kinitronics and M/s Jolly Enterprises are not dummy units attained finality if that be so, then the clearances of all the three units cannot be clubbed.

(ii) Though in the SCN there was proposal to demand Modvat Credit from M/s Kinitronics and M/s Jolly Enterprises but the same was dropped in the impugned order, therefore, the allegation of these two units being dummy does not sustain.

(iii) For clubbing of clearances of all alleged dummy units, against all the units, appeal should have been filed, therefore, in absence of any appeal filed by the Revenue before the Tribunal against M/s Kinitronics and M/s Jolly Enterprises their clearances cannot be clubbed with the clearances of Jolly Electrical Industries.

(iv) As per the findings of facts in the order dated 06.10.95 clubbing is not permissible.

(v) The case of the appellant does not fulfill the criteria as laid down by the Trade Notice dated 14.07.92 based on CBEC Order No. 6/92 for clubbing of more than one unit.

(vi) The demand is time barred as no suppression of facts involved.

(vii) The appellant is eligible for cum duty price.

5. As regard the submission regarding the first adjudicating order dropping proceeding against two of the alleged dummies and the same was not challenged by the Revenue, we observe from the copy of the appeal memo filed by the Revenue under Appeal No. E/2474/96 of Bom before the Mumbai Tribunal, the cause title shows as under:

"Commissioner of Central Excise and Customs … Appellant

Vs

M/s Jolly Electrical Industries and Others …Respondent"

From the above cause title it is very clear that the appeal was filed not only against M/s Jolly Electrical Industries but all others which were noticees in the SCN.

6. In the Revenue's appeal memo the relief sought in the appeal was as under:

"(13) Therefore, under the provisions of Section 35E (1) of the Act, the Commissioner, Central Excise, Vadodara, hereby apply to Customs, Excise and Gold (Control) Appellate Tribunal (hereinafter referred to as the 'Tribunal') for the correct determination of the following points arising out of the said order:-

(a) whatever after taking into consideration the facts stated above, ready with Show Cause Notice, the said order of the Commissioner in dropping the demand of duty, non-confiscation of land, building, plant and machinery allowing Modvat benefit and non-imposition of penalty on the noticees is legal and proper?

(b) Whether by an order passed under Section 55C of the Act, the Tribunal should set aside the order passed by the Commissioner? And

(c) Whether the Tribunal should pass any other order as deemed fit?"

7. From the above points raised in the appeal by the Revenue, they sought to set aside the entire order which is against all the noticees, therefore, this shows that the appeal filed by the Revenue is not only against M/s Jolly Electrical Industries but also against other noticees in the SCN.

8. The adjudicating authority has observed and recorded in the order that as per the letter F. No. V(Misc.)2-494/96/RC dated 11.11.1996 memorandum of appeal and appeal paper book was forwarded to the Assistant Registrar – CESTAT- Bombay and a copy of the same was also forwarded to all 8 noticees to whom the SCN was issued. We find that even if one appeal was filed making number of parties as respondent in the Revenue's appeal itself the appeal deemed to have been filed against all the respondents.

9. It is also observed from the remand order of this Tribunal bearing No. A/622/WZB/2004/C-III dated 08.07.2004 that the following order was passed.

> "When the matter was called, no one appeared for the Respondents. Heard the Departmental Representative and nothing that the issue in this appeal filed by the Revenue involved the clubbing of clearances of two units with that of the clearances effected from the Respondents' unit and finding that some of the partners are common, the appeal filed by the revenue is allowed as remand to the original authority to redetermine the issue, after hearing the respondents. While redetermining the issues, the Supreme Court's decision in the case of Supreme Washers Pvt. Ltd. vs CCE 2003 (151) ELT 14 (SC) should be applied.
>
> 2. Revenue's appeal allowed in above terms."

From reading of the above order, it is clear that the Tribunal consistently mentioned respondents "and not respondent", therefore, the remand order was passed not only against one appellant i.e. Jolly Electrical Industries but all the respondents who were the noticees in the SCN. The appellant after disposal of the Revenue's appeal vide order dated 08.07.2004 the appellant filed an application for restoration of appeal and recalling of final order dated 08.07.2004 which is reproduced below:

Annex – VII/106

E/ROA-2456/04-MUM

Date: - 01.10.2004

BEFORE THE CUSTOMS, EXCISE AND SERVICES TAX APPELLATE TRIBUNAL, MUMBAI

Annex :-

In Appeal No. E/2474/96

CCE, Baroda — Appellant

Versus

M/s Jolly Electrical Industries
Petitioner/Respondent

Subject: - Prayer for restoration of appeal & recalling of final order No. A-622 /WZB / 2004 / C-III dt. 08.07.2004 by the respondent.

The above numbered appeal has been decided ex-parte by the Hon'ble Tribunal vide the above numbered Final Order. **(Copy of the order is annexed hereto as 'A')**

The departmental appeal was listed for a hearing for the first time on 08.07.2004.

However on this date, the Counsel of this appellant could not appear for the hearing on account of his serious sickness. To this effect a fax was sent on 07.07.2004 followed by a letter through speed post to the Hon'ble Tribunal in advance which was also placed before the Hon'ble Bench. (Copies of fax/letter, fax journal and speed post receipt are enclosed as **annexures 'B'**)

Hon'ble Tribunal is, therefore, prayed to recall its Final Order & list this appeal for a hearing. For this favour, the appellants shall be deeply obliged.

This prayer/petition is supported by the following judgments: -

1. **2004 (163) E.L.T. A 039** *in the case of* ***Commissioner Vs. Elepur Industries (India) Pvt. Ltd.***

2. **1996 (086) E.L.T. 0472(S.C)** *in the case of* ***J.K. Synthetics Ltd. Vs. Collector of Central Excise.***

3. **2002 (149) E.L.T. 1455(T)** *in the case of* ***Ganesh Agro pack (P) Ltd. Vs. Collector of Central Excise, Madurai.*** *(The Tribunal relied upon two High Courts' judgments in support of its judgment, one of Calcutta and another of Kerala High Court)*

Contd...2...

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It must, however, be submitted that the departmental appeal is otherwise not maintainable/sustainable on account of the Department having failed to also file two more appeals in the cases of the two clubbed parties i.e. M/s Jolly Enterprises & M/s Kinitronics. And this proposition is supported by the following judgments: -

1. **2003 (158) E.L.T. 0595(T)** *in the case of* ***Elemec Industries Vs. Commissioner of Central Excise, Pune.***

2. **2001 (131) E.L.T. 0271(T)** *in the case of* ***Collector of Central Excise, Bombay Vs. Supreme Electrical Appliances.***

3. **2003 (159) E.L.T. 0628(T)** *in the case of* ***Commissioner of Central Excise, Chennai Vs. Meco Tronics (P) Ltd.***

4. **2001 (130) E.L.T. 0195(T)** *in the case of* ***Commissioner of Central Excise, Rajkot Vs. Sompura Ceramics.***

5. **1999 (113) E.L.T. 0597(T)** *in the case of* ***Commissioner of Central Excise, Mumbai Vs. Maganlal Nandlal & Sons.***

As in duty bound, the petitioners pray accordingly.

For and on behalf of
M/s Jolly Electrical Industries

(Nilesh V. Shah)

From the above application it can be seen that after disposal of the appeal by the Tribunal in respect of all the respondents the appellant have raised a specific ground in the ROA application that departmental appeal is not maintainable as the same was not filed against clubbed parities M/s Kinitronics and M/s Jolly Enterprises. This Tribunal dismissed the application for restoration, vide order No. M-250/WZB/2004-C-III dated 25.11.2004. As per above given facts firstly, we are of the view that the Revenue had filed appeals against all the respondents which further get reinforced on the basis that even though the appellants have raised specific ground for restoration of appeal that the appeals were not filed against M/s Kinitronics and M/s Jolly Enterprises but the same was dismissed, therefore, the issue that the

Revenue's appeal was against all the noticees attained finality. The appellants have not challenged either the remand order or the Miscellaneous Order by which the application for restoration of appeal was dismissed. In this position, the appellant has no locus standi to dispute or to raise the issue that the Revenue's appeal was only against one party i.e. M/s Jolly Electrical Industries. We therefore, hold that the Revenue's appeal was filed against all the noticees before this Tribunal; therefore, the issue related to all the noticees were open before the adjudicating authority in de novo adjudication.

10. The appellants have strongly argued that the present adjudicating authority has not considered the findings of fact narrated by the predecessor Commissioner in the first Adjudication Order dated 06.10.1995. In this regard, we find that the first adjudication order was set aside in the Revenue appeal, therefore, the present adjudicating authority is not judicially required to look into the said order as the same was not in existent. Once, the earlier adjudication order was set aside the entire case has gone back to the stage of SCN and thereafter since the entire matter was kept open the present adjudicating authority was free to take independent view on the overall case without getting influenced by the first order and finding of the predecessor Commissioner, therefore, the submission of the Ld. Counsel on this count is fatal and cannot be accepted.

11. As regard, the submission made by the Ld. Counsel that all the three units are independent and registered with various authorities, filing of returns with various tax authorities does not help their case for the reason that in the present case the case of the department is not on the basis of that all the three units are independently manufacturing and clearing the goods and due to mutual interest, inter unit fund flow availing of common amenities etc., the units are clubbable whereas the adjudicating authority on the basis of strong evidences such as insufficient production facility, electricity consumption and various other aspects came to the conclusion that the other two units i.e. M/s Kinitronics and M/s Jolly Enterprises did not have set up for manufacture of excisable goods, therefore, the present case of the department is that all the goods cleared were manufactured by M/s Jolly Electrical Industries and not by M/s Kinitronics and M/s Jolly Enterprises, if that be so, than all the clearances are of M/s Jolly Electrical Industries and the clearances

claimed to have manufactured by M/s Kinitronics and M/s Jolly Enterprises are clearly a clandestine removal of M/s Jolly Electrical Industries, therefore, the demand was rightly made from M/s Jolly Electrical Industries. The submission of Ld. Counsel that since M/s Kinitronics and M/s Jolly Enterprises were not demanded duty, the clubbing of clearances is illegal. As we discussed above, there is no clearance of M/s Kinitronics and M/s Jolly Enterprises but all the clearances are of M/s Jolly Enterprises, therefore, there is no reason or question to implicate M/s Kinitronics and M/s Jolly Enterprises for the purpose of making demand, therefore, even though these two parties were not implicated in the order in original does not make any impact on the demand raised against M/s Jolly Electrical Industries. On these facts even the judgments relied upon by the Ld. Counsel that for clubbing of clearances of other units they should be made party in the case is not relevant. As regard, the argument of Ld. Counsel that though the demand of Modvat Credit was raised in the SCN against M/s Kinitronics and M/s Jolly Enterprises and the same was dropped in the impugned order, it is otherwise established that they have rightly availed the modvat credit and therefore, the clubbing of both the units with M/s Jolly Electrical Industries cannot be made. In this regard, we find that there was an independent proceeding of modvat case against both the units even though the demand was dropped against both the units therefore but at the same time all the clearances of so called M/s Kinitronics and M/s Jolly Enterprises were also considered, the clearances of M/s Jolly Electrical Industries and the demand was confirmed. The dropping of modvat demand has no impact as far as clandestine removal of goods manufactured and cleared by M/s Jolly Electrical Industries in the guise of manufacture and clearances of M/s Kinitronics and M/s Jolly Enterprises, therefore, merely because the case proceedings of modvat credit has been dropped against M/s Kinitronics and M/s Jolly Enterprises it will not affect the case of clandestine removal against M/s Jolly Electrical Industries, therefore, this argument is of no help to the appellant.

12. As regard the heavy reliance made by Ld. Counsel on the Trade Notice No. 59/1992, we find that we have already given our above finding that all the clearances are of M/s Jolly Electrical Industries, therefore, the Trade Notice which deals with the admitted clearances of more than one unit, is not relevant in the facts of the present case.

13. Ld. Counsel also argued vehemently on the point of time bar. As we observed above that M/s Jolly Electrical Industries were indulged into clandestine removal of excisable goods to intention to evade duty in the guise of manufacture and clearance of goods from M/s Kinitronics and M/s Jolly Enterprises, there is a clear fraud, suppression of fact, misstatement, collusion with intention with evade duty, therefore, as per the facts of the present case it is a fit case to invoke the extended period, therefore, the demand for extended period is clearly sustainable.

14. As regard, the relief sought by the appellants with regard to the benefit of cum duty price, we find that this issue is no longer res-integra and the same has been decided in following judgments in favour of the assessee that as and when the duty is calculated the sale price has to be taken as cum duty price and for the purpose of demand the excise duty needs to be deducted. The judgments are cited below:

- Hans Ispat Ltd Vs. Commr. Of C.E.X. C.U.S. & S.T., Rajkot 2016 (343) E.L.T. 622 (Tri.-Ahmd.)
- Commissioner of Central Excise Vs. Uday Auxichem 2012 (275) E.L.T. 565 (Tri.Ahmd.)
- Saafalya Industries Pvt. Ltd. Vs. Commr. Of C.EX. (Appeals), Manglore 2010 (261) E.L.T. 1071 (Tri.-Bang.)
- Commr. Of Cen. Ex., Delhi Vs. Maruti Udyog Ltd. 2002 (141) E.L.T. 3 (S.C.)

15. In view of the above settled position of law, the appellant is entitled for the cum duty benefit. Accordingly, the demand of duty and corresponding penalty needs to be recomputed by extending the benefit of cum duty price.

16. As per the above discussion and findings, the appeals are dismissed except for the re-quantification of the duty by extending the cum duty price. Appeals are disposed of in the above terms.

(Pronounced in the open court on 01.10.2019)

(Ramesh Nair)
Member (Judicial)

(Raju)
Member (Technical)

Neha