CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH - COURT NO.I

Excise Appeal No.2233 of 2012

(Arising out of Order-In-Original No.04/Commissioner/Noida/2012-13 dated 30.04.2012 passed by Commissioner of Customs, Central Excise & Service Tax, Noida)

M/s Nutech Packaging **.....Appellant**
(B-56-B, Sector-7, Noida (U.P.)

VERSUS

Commissioner of Central Excise, Noida **....Respondent**

(Commissionerate, Noida)

WITH

Excise Appeal No.2234 of 2012

(Arising out of Order-In-Original No.04/Commissioner/Noida/2012-13 dated 30.04.2012 passed by Commissioner of Customs, Central Excise & Service Tax, Noida)

Mr. Mukul Mehndiratta, Manager **.....Appellant**
(M/s Nutech Packaging, B-56-B, Sector-7, Noida (U.P.)

VERSUS

Commissioner of Central Excise, Noida **....Respondent**

(Commissionerate, Noida)

AND

Excise Appeal No.2235 of 2012

(Arising out of Order-In-Original No.04/Commissioner/Noida/2012-13 dated 30.04.2012 passed by Commissioner of Customs, Central Excise & Service Tax, Noida)

Mr. Jatinder Shroff, Director **.....Appellant**
(M/s Nutech Packaging, B-56-B, Sector-7, Noida (U.P.)

VERSUS

Commissioner of Central Excise, Noida **....Respondent**

(Commissionerate, Noida)

APPEARANCE:

Shri Atul Gupta & Shri Prakhar Shukla, Advocates for the Appellant
Shri S.T. Khairnar, Authorised Representative for the Respondent

CORAM: HON'BLE MR. P.K. CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO.70217-70219/2023

DATE OF HEARING : 07.11.2023
DATE OF DECISION : 07.11.2023

<u>SANJIV SRIVASTAVA:</u>

This appeal is directed against Order-In-Original No.04/Commissioner/Noida/2012-13 dated 30.04.2012 passed by Commissioner, Customs, Central Excise & Service Tax, Noida. By the impugned order learned Commissioner has held as under:-

"12. Based on the discussions held above, I pass the order as under:-

(i) I order confiscation of the Varnished Paper valued at Rs. 2,59,065.50 (Rupees two lacs fifty nine thousand sixty five & fifty paisa only) under erstwhile Rule 173 Q of the Central Excise Rules 1944. However I give an option to redeem the varnished paper on payment of redemption fine of Rs. 1,00,000.00

(ii) Seizure of un-printed laminated sheets, numbering 6984 valued at Rs. 13000.00. seizure of three wheeler No, UP1439016 and seizure of carton boxes valued at Rs. 1,20,861.00 is ordered as vacated;

(iii) Central Excise duty on laminated sheets amounting to Rs. 36,081.00 is confirmed under Sec. 11A of the Central Excise Act-1944;

(iv) Interest at appropriate rate on the amount of duty confirmed above is ordered to be demanded under erstwhile Sec 11AB of the Central Excise Act 1944;

(v) Penalty of Rs. 36081.00 is imposed upon the party under Rule 173(Q) of the Central Excise Rules 1944 read with section 11AC of the Central Excise Act 1944;

(vi) A penalty of Rs. 1,00,000.00 is imposed on Sh. Jatinder Shroff, under erstwhile Rule 209A of the Central Excise Rules 1944.

(vii) A penalty of Rs. 50,000.00 is imposed on Sh. Mukul Mandiratta under erstwhile Rule 209A of the Central Excise Rules 1944;

(viii) Rest of the proceedings other than detailed above, initiated against the party under this show cause notice are ordered to be dropped."

2.1 The appellant is engaged in the manufacture of Boxes of Duplex Paper board and Varnished printed paper sheets.

2.2 During the course of transit check officers intercepted a three wheeler on which around 6894 sheets of unprinted and laminated duplex paper board were found. In the follow up action the officers visited the factory of the appellant and resumed certain records for further investigation under Panchnama. During the course of the investigation physical verification was undertaken and it was observed that **carton/boxes of duplex paper** valued at Rs.1,20,861/-

and **varnished paper sheets** at Rs.2,59,065.50/- found in excess in the recorded stock.

2.3 After making further investigation and necessary enquiries a show cause notice dated 24.07.1997 was issued to the appellant asking him to show cause as to why :-

> *"i) Unprinted laminated sheets numbering 6984 and valued at Rs.13000.00 which were intercepted on 29.01.97 during transit checking andreized on 30.01.97 should not be confiscated under Rule 1730 (1)(bb). The three wheeler bearing No.UP-14 8 9016 which was also seized on 30.01.97 should not be confiscated under Section 115 of the Customs Act,62 provisions of which are applicable for the Central Excise matters also.*
>
> *ii) Cartons of duplex paper and Varnished paper sheets valued at Rs.379926.50 which were seized in the factory on 30.01.97 should not be confiscated under Rule 1730 (1)(b) ibid.*
>
> *iii) credit amounting to Rs.3745.00 which was required to be paid on the Modvatable inputs should not be recovered under Rule 571(2) read with 57F (6),*
>
> *iv) duty amounting to Rs.17677.00 payable on the packing charges, Rs.208941.00 payable on the art & development charges. Rs. 1,50.408.00 payable on varnished paper and Rs.1818014.00 payable on laminated sheets (totalling Rs. 21.95.040.00 should not be recovered under proviso to Section 11 A(1) of the Central Excise Act, 44. of*
>
> *v) penalty should not be imposed on them under Rule 1730 (1) (a) (b) (bb) read with Section 11AC of the Central Excise Act. 44 for the contravention Rules, stated above.*

vi) interest payable on the amount determined under Section 11A (2) of the Centrál Excise Act,44 should not be recovered from them under Section 11AB of the Central Excise Act, 44 "

2.4 The appellant No.2 & 3 were asked to show cause as to why penalty under Rule 209A of the Central Excise Act, 1944 should not be imposed against them as they were actively involved in removing and dealing with the goods which they know were liable for confiscation.

2.5 Show cause notice was adjudicated vide Order-In-Original No.09/Commissioner/2001 dated 10.12.2001.

2.6 Appeal filed by the appellant against the said order was dismissed by the Tribunal vide Final Order No.397-400/2003 -NB (B) dated 18.06.2003 disposed of the appeal observing as follows:

1. *Lamination/ varnishing paper on printed/ unprinted paper amounts to manufacture, as a new and different article having distinct name, character or use having come into existence;*
2. *laminated/ varnished goods being capable of being brought and sold, were liable to excise duty and goods being 'intermediate' perse does not make the goods non marketable;*
3. *laminated/ varnished paper/ paperboard was classifiable under Heading 48.11 of CETA and subsequent printing is irrelevant to its classification under Heading 48.11 based on CESTAT's judgment in the case of Srikumkar Agencies;*

4. *Cost of packing in which goods were sold in wholesale market is includible in assessable value;*
5. *Art and development charges is includible in assessable value, being part of intrinsic value of the product.*

2.7 The matter was taken by the appellant before the Hon'ble Supreme Court. The Hon'ble Supreme Court vide order dated 27.11.2008 in Civil Appeal No.9731 of 2003 observed as follows:-

> *"1. In this case the CESTAT followed the order passed in the case of Srikumar Agencies who was one of the respondents in Civil Appeal Nos.4872-4892 of 2000 we have set aside the order of CESTAT and remitted the matter to it to be dealt with afresh. The decision in the said case shall apply to the facts of the present case.*
> *The appeal will be heard afresh by the appropriate bench of CESTAT."*

2.8 In light of the judgment of the Apex Court, Tribunal in the de novo proceedings vide Final Order No 596/09-Cx dated 27.08.2009, remanded the matter back to the Original Authority for deciding the issue afresh on the grounds mentioned in Para 6 of the order as reproduced below:-

> *"We have carefully considered the submissions for both sides. The claim of the appellants is that they are manufacturing books and the laminated sheets used as cover are coming at intermediate stage. From the order of the Commissioner, it is not clear whether the appellants were manufacturing books as a whole or they were only undertaking processes of laminating covers for the books and binding the books. The benefit of exemption under the Notifications No.49/87, 101/94, though appears to have been claimed by the party, admissibility or otherwise of the same has not been specifically dealt with by the*

Commissioner. Further, there are references to clearances of unprinted laminated sheets by the appellants. If they are not printed at all, whether the same can be considered as product of printing industry has also not been dealt with by the Commissioner. On the valuation aspect, the submission of the appellants is that the art and development charges have been charged to duty at one go without reference to the clearances of the final product and without taking only the amortized cost of the said art and development charges has not been dealt with by the Commissioner. As these are all factual aspects which require to be considered by the original authority, we deem it appropriate to set aside the order of the Commissioner and remand the matter for fresh decision. The appellants are permitted to make written submissions with 45 days from today and the Commissioner shall decide the matter expeditiously after granting reasonable opportunity of hearing to both sides. We clarify that we have not expressed any views on the merits of the case."

2.9 Impugned order referred in Para 1 of this order has been passed by the Commissioner in the remand proceedings.

2.10 Aggrieved by the impugned order present appeal has been filed by the appellant.

3. We have heard Shri Atul Gupta, Advocate & Shri Prakhar Shukla, Advocate for the appellants-assessee and Shri S.T. Khairnar Authorized Representative for the Revenue.

4.1 Arguing for the appellant learned counsel submits that vide impugned order:

- ➢ The Commissioner has dropped all other demands except for the demand made in respect of 07 invoices which are referred in Para 10 of his order.
- ➢ No evidence has been produced in the order as to why the demand against these invoices needs to be confirmed and

how they were different from the other invoices against which demand has been dropped.

- No evidence as to the nature of work done or the raw material used supplied by the client manufactured for job work has been produced in the show cause notice or in the adjudication order.
- The demand has been confirmed on the basis of conjectures and presumptions which are not supported by the evidence available on record.
- For the reasons as above this demand made in respect of the these seven invoices cannot be upheld;
- As regards confiscation of the goods, Adjudicating Authority has himself recorded that there is no evidence available in the record to show that these varnished sheets are either printed varnished sheets to qualify as the products of printing industry under Chapter 49 or packing material eligible to exemption as cartons/ boxes or container;
- The only reason which has been stated for confiscation is his inability to determine the exact nature of the product sought to be confiscated from the facts on record. The confiscation should have been done on the basis of the categorical findings with regards to the excisable nature of the goods ought to be confiscated which is lacking in the present case. Hence the confiscation cannot be justified.
- No finding has been recorded for imposition of the penalty upon the Appellant No.2 & Appellant No.3 except stating

that for deliberate omission and for contravention of the provisions of Central Excise Rules 1944, Appellant No.2 & 3 are liable for penalty without even finding what has been contravened.

- In support of his submissions he has relied upon the decisions as follows:-
  - Garware Nylons Ltd. [1196 (87) ELT 12 (SC);
  - H P L Chemicals Ltd. [2006 9197) ELT 324 (SC)]
  - Hindustan Ferodo Ltd [1997 (89) ELT 16 (SC)]
  - Bombay Paints and Allied Products Ltd. [1985 (21) ELT 663 (Bom)];
  - Singhal cable Industries [2019 (2) TMI 1859 CESTAT Allahabad]
  - Birla Corporation Limited [2023 (3) TMI 1067 CESTAT New Delhi] affirmed at [2023 (10) TMI 168 SC]
  - Anand Nishikawa [2005 (188) ELT 149 (SC)]
  - Pushpam Pharmaceuticals [1995 (78) ELT 401 (SC)]
  - Shreenath Plasto pack Pvt Ltd [2018 (2) TMI 1310 CESTAT Ahmedabad]
  - H M M Limited [1995 (1) TMI 70 Supreme Court]
  - Natraj Stationery Products (P) Ltd [2017 (348) ELT 568 (T-Chand)]

4.2 Learned Authorized Representative appearing on behalf of the respondent reiterates the findings recorded in the impugned order.

5.1 We have considered the impugned order along with the submissions made in the appeal and during the course of the argument.

5.2 Commissioner has in the impugned order in Para 10.17 observed as follows:-

> *"10.17. Now coming to the next issue of duty demand of Rs. 18,18,014/-, demand has been raised based on the invoices detailed in Annexure-III of the show cause notice. From the details contained in the text of the show cause notice in this regard, it has been alleged in the show cause notice that on the paper supplied by the buyers, process of lamination alone was done by the party on job work. The show cause notice does not give further details about the paper received by the party for lamination i.e. paper received was printed or not. About the aspect that paper received for lamination was printed or not, Shri Jatinder Shroff, Director of M/s New Tech in his statement dated 21.05.1997, which has been relied upon in the show cause notice, disclosed* ***that varnishing or lamination was done on the printed sheets****. Laminated sheets and varnished sheets were used in the manufacture of books, posters etc. Word 'etc'. used above, includes cartons and boxes, because manufacture of carton and boxes is also an activity undertaken as per the facts involved in the case. Although M/s Neutech have claimed that laminated sheets, prior to lamination were printed paper sheets, for verification of this claim of the party, examination of the invoices issued was necessary. Details of the invoices is contained in Annexure-III to the show cause notice. Invoices detailed in Annexure-III to the show cause notice on examination were found to have been issued to BPB Publications, Sahni Brothers, National Book Trust etc. Perusal of these invoices further reveals that M/s Newtech have issued the invoices for the manufacture of complete books. Towards a job undertaken for*

manufacture of books, number of copies find mention in the invoices, charges have been collected for plates, printing, binding and lamination. Process of lamination alone is not involved. During the production of books printed sheets have been laminated, which have been further used in making of books. As already discussed in para 10.14, printed sheets, resulting in the making of books are products of printing industry and are exempt. Similarly invoices issued to M/s Hari Darshan Industries and others are either for printed posters or printed packing materials. Printed posters are again exempt being product of printing industry and inputs used in manufacture of packing materials are also exempt as per discussions held in para 10.15. On verification of all relevant invoices only the invoices mentioned below were found to have been issued for lamination jobs alone, further use of which is not verifiable as it has not come out on record. Further on perusal of invoices, the same are either for 'lamination of various sheets' or are for lamination jobs like 'Laminating of various jobs as per your specifications' as detailed below:

S N	*Invoice No*	*Date*	*Name of the Party*	*Amount as per show cause notice/Rs.*
1	*276*	*5.9.95*	*Frank Educational Aids*	*10775*
2	*279*	*7.9.05*	*Frank Educational Aids*	*10597*
3	*290*	*18.9.95*	*Frank Educational Aids*	*10583*
4	*341*	*31.10.95*	*Frank Brothers*	*1687*
5	*34*	*29.4.95*	*Frank Brothers*	*95483*
6	*69*	*30.5.95*	*Frank Brothers*	*392*
7	*353*	*31.10.95*	*Frank Brothers*	*1687*
				1,31,204/-

Duty is demandable on above Seven invoices only and on calculation of duty as per the formulas adopted for

> *duty calculation in the show cause notice, it comes out to Rs. 36081.00 @25% of value. For duty calculation profit@ 10% has been added on the above value. In view of the discussions held above, duty demand of Rs. 36,081/- is sustainable out of the total duty demanded of Rs. 18,18,014/- on lamination."*

5.3 From the above it is observed that the Commissioner has dropped the major portion of the demand after inspecting the invoices and concluding that in respect of all other invoices except the seven listed in table above. The basic reason for confirming the demand in respect of these invoices is that these invoices are in respect of processes of lamination only and do not qualify to be in respect of activities that would take the finished products in the category of articles of the printing industry. Appellants contended that in respect of these invoices also processes similar to the processes stated in the other invoices have been undertaken and the process of lamination alone is not involved but various otter processes are involved which make these goods also as goods of the printing industry. On sample basis we perused one of the invoice, in the table above having maximum value i.e. invoice No.95/0034 dated 29.04.1995 against which demand has been confirmed by the Adjudication Authority, available at Page No.128 of the paper-book.

5.4 On perusal of the said invoice we find that the said invoice is in respect of a P O for ***"Atlas Cover".*** The invoices gives the break up of amounts charged as follows:

Processing - 336 sq" @ 0.50	168
Add Plates - 4 * 150	1,800

Add Ptg 8 (500 * 4 *250)	8,500
Add Lamination ….	34,983
Add Carriage	50
Paper by Party	
Total	45,501

Above clearly shows that this invoice is not in respect of simple lamination but for a job which involves more activities and the job is undertaken as per purchase order for Atlas Cover. We do not find that this case is in any case different from the case where demands have been dropped by the Adjudicating Authority holding the end products as a product of the printing industry. This is the major amount on which in the demand confirmed i.e. total value of the goods as per the table in Para 10.17 is Rs.98,483/-. Nothing has been stated in the impugned order as to why and on what basis invoice value has been changed from Rs 45,501/- to Rs 98,483/-. We do not find any merit in confirmation of this demand when exact facts in respect of these invoices had not been adduced/adjudicated in the present order. The order in respect of these seven invoices is only made on the basis of surmises and presumptions.

5.5 As regards the confiscation, we find that Commissioner has in Para 10.19 observed as follows:-

> *"10.19 Now coming to the next issue that cartons of Duplex paper and Varnished paper sheets seized were liable to confiscation or not based on discussions held above in the preceding paragraphs, I have already come to the conclusion that carton/boxes made of paper are not leviable to Central Excise duty. Therefore seizure of carton/boxes valued at Rs. 1,20,861/-found over and above the recorded balance in the*

> *factory is not justified at all when the cartons/boxes do not attract any Central Excise duty. As regards the seizure of varnished paper valued at Rs. 2,59,065/- found over and above the recorded balance, in the factory, the facts on record in this regard do not give slightest indication that these varnished sheets are either printed varnished sheets to qualify as the products of printing industry under Chapter 49 or packing material eligible to exemption as cartons/boxes or containers. Varnished sheets seized, further details of which are not ascertainable from the facts on record are finished products are subject to multifarious uses and are leviable to Central Excise duty, confiscation of these goods is justified."*

5.6 From the perusal of the said para we are of the view that the Commissioner has not recorded that the goods that are to be confiscated are excisable goods but he has only expressed his doubt and observed that the unaccounted finished goods are subject to multifarious uses and are leviable to Central Excise duty. In the first part he says these may not be excisable or subject to excise duty as per the facts on record and in the next breath without ascertaining the exact fact and nature of the goods he held them liable for confiscation. It is a settled law that while passing an order for confiscation at least the excisable nature of the goods should have been determined. It is the predetermined mindset of the adjudicating authority whereby he has in respect of these goods without deciding the excisability held the goods to be liable for confiscation. Confiscation cannot be made on the basis of such doubts as expressed by the Commissioner.

5.7 In case of K I Pavunny [1997 (90) ELT 241 (SC)], Hon'ble Supreme Court has observed as follows:

"32. It is true that in criminal law, as also in civil suits, the trial Court and the appellate Court should marshal the facts and reach conclusion, on facts. In a criminal case, the prosecution has to prove the guilt beyond doubt. The concept of benefit of doubt is not a charter for acquittal. Doubt of a doubting Thomas or of a weak mind is not the road to reach the result. If a Judge on objective evaluation of evidence and after applying relevant tests reaches a finding that the prosecution has not proved its case beyond reasonable doubt, then the accused is entitled to the benefit of doubt for acquittal. …."

Thus in the present case the benefit of the doubt which existed in the mind of adjudicating authority as is evident from above should have been extended to the appellant. Order for confiscation and redemption fine needs to be set aside.

5.8 As demand of duty and order for confiscation are set aside, we do not find any reason for imposition of penalty under Section 11 AC of the Central Excise Act and these penalties are set aside.

5.9 As penalties on appellant No.1 is set aside, we do not find any merit for imposition of penalty on appellant No.2 & 3 accordingly the same are set aside.

6 Accordingly the appeals are allowed.

(Dictated and pronounced in open court)

(P.K. CHOUDHARY)
MEMBER (JUDICIAL)

(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

Nihal