CUSTOMS EXCISE & SERVICE TAX APPLELLATE TRIBUNAL
ALLAHABAD

Regional Bench

Excise Appeal No. 70289 of 2017

(Arising out of Order-in-Original No. LKO/EXCUS/000/COM/EX/036/2016-17 dated 25.01.2017 passed by the Commissioner Central Excise & Service Tax, Lucknow)

M/s Jai Prakash Chaurasia **Appellant**
279/75, Pan Dariba Market, Charbagh
Lucknow

Vs.

The Commissioner of Central Excise & Service Tax, Lucknow **Respondent**
7-A, Ashok Marg, Lucknow

<u>Appearance</u>

Present for the Appellant: Shri T.K. Srivastava, Advocate

Present for the Respondent: Shri Amit Bhardwaj, Authorized Representative

With

Excise Appeal No. 70384 of 2017

(Arising out of Order-in-Original No. LKO/EXCUS/000/COM/EX/036/2016-17 dated 24.01.2017 passed by the Commissioner Central Excise & Service Tax, Lukhnow)

M/s Simla Gomti Pan Products, **.....Appellant**
286/73, Niwaz Khera, Aishbagh, Lucknow

VERSUS

Commissioner of Central Excise, Lucknow **....Respondent**
Commissioner, Central Excise, 7A, Ashok Marg, Lucknow

<u>Appearance</u>

Present for the Appellant: Shri Anurag Mishra Advocate

Present for the Respondent: Shri Amit Bhardwaj, Authorized Representative

With

Excise Appeal No.70385 of 2017

(Arising out of Order-in-Original No. LKO/EXCUS/000/COM/EX/036/2016-17 dated 24.01.2017 passed by the Commissioner Central Excise & Service Tax, Lucknow)

M/s Simla Gomti R G Pan Products, **...Appellant**
59B, Meerpur Pinwat, Daroga Khera, Lucknow

VERSUS

Commissioner of Central Excise, Lucknow **....Respondent**
7A Ashok Marg, Lucknow

Appearance
Present for the Appellant: Shri Anurag Mishra Advocate

Present for the Respondent: Shri Amit Bhardwaj, Authorized Representative

With

Excise Appeal No.70386 of 2017

(Arising out of Order-in-Original No. LKO/EXCUS/000/COM/EX/036/2016-17 dated 24.01.2017 passed by the Commissioner Central Excise & Service Tax, Lucknow)

M/s Simla Gomti R G Pan Products, **...Appellant**
59A, Meerpur Pinwat, Daroga Khera, Lucknow

VERSUS

Commissioner of Central Excise, Lucknow **....Respondent**
Ashok Marg, Lucknow

Appearance

Present for the Appellant: Shri Anurag Mishra Advocate

Present for the Respondent: Shri Amit Bhardwaj, Authorized Representative

With

Excise Appeal No.70387 of 2017

(Arising out of Order-in-Original No. LKO/EXCUS/000/COM/EX/036/2016-17 dated 24.01.2017 passed by the Commissioner Central Excise & Service Tax, Lucknow)

M/s Simla Gomti R G Pan Products, **...Appellant**
287/18, Kayam Khera, Rajendra Nagar, Lucknow

VERSUS
Commissioner of Central Excise, Lucknow **....Respondent**
7A Ashok Marg, Lucknow

Appearance
Present for the Appellant: Shri Anurag Mishra Advocate

Present for the Respondent: Shri Amit Bhardwaj, Authorized Representative

With

Excise Appeal No.70388 of 2017

(Arising out of Order-in-Original No. LKO/EXCUS/000/COM/EX/036/2016-17 dated 03.02.2017 passed by the Commissioner Central Excise & Service Tax, Lucknow)

M/s Himachal RKG Trading Company, **...Appellant**
278/67, Aishbagh, Lucknow

VERSUS

Commissioner of Central Excise, Lucknow **....Respondent**
7A, Ashok Marg, Lucknow

Appearance
Present for the Appellant: Shri Anurag Mishra Advocate

Present for the Respondent: Shri Amit Bhardwaj, Authorized Representative

With

Excise Appeal No.70389 of 2017

(Arising out of Order-in-Original No. LKO/EXCUS/000/COM/EX/036/2016-17 dated 24.01.2017 passed by the Commissioner Central Excise & Service Tax, Lucknow)

Shri Shankar Lal Sahu, **...Appellant**
370, Noor Begh Ka Hatta, Sadetganj
Partner M/s Simla Gomti Pan Products
286/73, Niwaz Khera, Aishbagh, Lucknow

VERSUS

Commissioner of Central Excise, Lucknow **....Respondent**
7A, Ashok Marg, Lucknow

Appearance

Present for the Appellant: Shri Anurag Mishra Advocate

Present for the Respondent: Shri Amit Bhardwaj, Authorized Representative

With

Excise Appeal No.70390 of 2017

(Arising out of Order-in-Original No. LKO/EXCUS/000/COM/EX/036/2016-17 dated 24.01.2017 passed by the Commissioner Central Excise & Service Tax, Lucknow)

Mrs Janaknandini Gupta, **...Appellant**
286/73, Niwaz Khera, Aishbagh, Lucknow

VERSUS

Commissioner of Central Excise, Lucknow **....Respondent**
7A, Ashok Marg, Lucknow

Appearance

Present for the Appellant: Shri Anurag Mishra Advocate

Present for the Respondent: Shri Amit Bhardwaj, Authorized Representative

With

Excise Appeal No.70391 of 2017

(Arising out of Order-in-Original No. LKO/EXCUS/000/COM/EX/036/2016-17 dated 24.01.2017 passed by the Commissioner Central Excise & Service Tax, Lucknow)

Shri Ram Mani Tripathi, Authorized Signatory, **...Appellant**
286/73, Niwaz Khera, Aishbagh, Lucknow

VERSUS

Commissioner of Central Excise, Lucknow **....Respondent**
7A, Ashok Marg, Lucknow

Appearance

Present for the Appellant: Shri Anurag Mishra Advocate

Present for the Respondent: Shri Amit Bhardwaj, Authorized Representative

CORAM:
HON'BLE MR. P V SUBBA RAO, MEMBER (TECHNICAL)
HON'BLE MS. RACHNA GUPTA, MEMBER (JUDICIAL)

Date of Hearing/Decision: 08/12/2021

FINAL ORDER NO. 70266-70274 /2021

PER: P V SUBBA RAO

1. These eight appeals have been filed by the appellants aggrieved by the same impugned order. The facts of the case, in brief, are that the officers of the Commissioner of Central Excise and service tax Lucknow learnt that the commercial tax department of Lucknow raided two premises and found an illegal pan masala pouch packing machine and that pan masala was seized. They obtained details of that case from the commercial tax department and thereafter found the illegal pan masala packing machine and seized it. After follow up with investigations, they issued show cause notice dated 12.08.2015 to thirteen noticees including the appellants herein. Adjudicating on the show cause noticees the impugned order-in-original dated 24.01.2017 was passed by the learned Commissioner of Central Excise and Service Tax, Lucknow confirming the demand of duty of Rs. 3,50,50,450/ on two of the noticees, namely, Shri Shankar Lal Sahu and Mrs. Janak Nandani Gupta who were the partners of the Simla Gomti R G Pan products. He also imposed penalties upon these two as well as on several other noticees.

2. At the outset, we find that the show cause notice relies heavily on several statements recorded from various persons to conclude that Pan Masala has been clandestinely manufactured and removed without paying Central Excise Duty and that noticees are responsible for this clandestine removal and

consequently they need to be penalised. A perusal of the impugned order shows that reliance was placed on the statements recorded by the Central Excise Officers. A statement made and signed by a person before any Central Excise Officer of gazetted rank during the course of any inquiry or proceeding under the Act shall be relevant for proving an offence on the Act under any prosecution and also for proving any relation to any other proceeding under the Act subject to some conditions as per Section 9D which reads as follows:

> **"Section 9D in the Central Excise Act, 1944**
>
> 1[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 provisions of sub-section (1) shall, so far as may be, apply in relation to any proceedings under this Act, other than a proceeding before a Court, as they apply in relation to a proceeding before a Court."

4. The impugned order shows that the statements that have been relied upon in the impugned order have not passed through the procedure required under section 9D. 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. It has been held by the Hon'ble High Court of Punjab and Haryana in the case of **Jindal Drugs Pvt. Ltd.**[1] as follows:

> **9.**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 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.
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> **10.**Section 9D of the Act came in from detailed consideration and examination, by the Delhi High Court, in *J.K. Cigarettes Ltd.* v. *CCE*, 2009 (242) E.L.T. 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. 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.
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> **11.**As already noticed hereinabove, 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

[1] **2016 (340) ELT 67 (P&H)**

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).

12. 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.

13. 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.

14. 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.

15. 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 appeal, the petitioners have also invited attention to an unreported short order of the Supreme Court in *UOI and Another* v. *GTC India and Others* in SLP (C) No.

2183/1994, dated 3-1-1995 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.

16. 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.

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

18. 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.

19. 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). For this, he has to summon the person who had made the statement, examine him as witness before him in the adjudication 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.

20. 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.

21. 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.

22. 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.

5. Both sides agreed that the procedure under section 9D has not been followed with respect to the statements. We are of the

opinion that the Commissioner should be given an opportunity to follow the procedure under section 9D and come to the conclusion as to which of the statements relied upon in the show cause notice should be admitted in evidence and thereafter decided the matter. Needless to say that if any person is examined as a witness under section 9D and if any of the noticees wishes to cross-examine such a person an opportunity of cross-examination should also be provided.

6. In view of the above without passing any remarks on the merits of the case, leaving all issues open we remand the matter to the Original authority to follow the procedure under section 9D in respect of all the statements that have been relied upon and pass reasoned order after following principles of natural justice.

7. All appeals are allowed by way of remand to the original authority and the impugned order is set aside.

(Pronounced in open court)

(**P V SUBBA RAO)**
MEMBER (TECHNICAL)

(RACHNA GUPTA)
MEMBER (JUDICIAL)

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