

**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL
REGIONAL BENCH : ALLAHABAD
COURT No. I**

APPEAL Nos.E/1648-1653/2010-EX[DB]

(Arising out of Order-in-Original No. 06/Commr./LKO/CX/2010 dated 28/02/2010 passed by Commissioner of Central Excise & Service Tax, Lucknow)

M/s Amkap Marketing Pvt. Ltd.,

Shri Ambrish Kumar, Director of,

Shri Raj Narain Sukhla, C/o,

Shri Jai Sankar Sharma,

Shri Hari Sankar Sharma,

Shri N.K. Agarwa, Managing Director,

Appellants

Vs.

Commissioner of Central Excise & S.T., Lucknow

Respondent

Appearance:

Shri Bipin Garg & Ms Stuti Saggi, Advocates
Shri Pawan Kumar Singh, Supdt (AR),

for Appellant
for Respondent

CORAM:

Hon'ble Mr. Anil G. Shakkarwar, Member (Technical)

Hon'ble Mrs. Rachna Gupta, Member (Judicial)

Date of Hearing : 01/11/2018
Date of Pronouncement : 27/12/2018

FINAL ORDER NOs-72939-72944 / 2018

Per: Anil G. Shakkarwar

Above stated appeals are arising out of common impugned Order-in-Original No. 06/Commr./LKO/CX/2010 dated 28/02/2010 passed by Commissioner of Central Excise & Service Tax, Lucknow, therefore, they are taken together for decision. Through the

impugned Order-in-Original, Original Authority has adjudicated two show cause notices dated 07.08.2003 issued by Additional Commissioner and another dated 13.02.2007 issued by Commissioner. M/s Amkap Marketing Pvt. Ltd. is manufacturer-appellant and remaining appeals are filed by individuals on whom personal penalties have been imposed.

2. Brief facts of the case are that the manufacturer-appellants were engaged in the manufacture of Organic Composite Solvents and Thinners and were classifying the final product under Chapter 38 of Central Excise Tariff Act, 1985 and were paying Central Excise duty @ 16% Ad-valorem. Through show cause notice dated 07.08.2003 classification claimed by the appellant-manufacturer was disputed by revenue and through the said show cause notice Revenue proposed classification of the goods manufactured by appellants-manufacturer under Sub-heading 271011 attracting 16% BED plus 16% SED total 32% duty Adv. The unit of the appellants-manufacturer was visited by officers of revenue on 26.02.2003. They made certain seizures after conducting stock taking of inputs and final products. The stock taking was done through the method of dip reading. On the basis of said investigation Central Excise duty demand of Rs.1,10,400/- and

Rs.10,61,000/- was raised and there was proposal for confiscation of 120 Thousand letters of final product OCS-II and 14 Thousand letters of final product OCSP-I. Further, there were proposal to impose personal penalty on all the appellants. Revenue further conducted investigations and on 02.09.2014 recorded statement of Shri Ambrish Kumar, Director of the appellant-manufacturer. It was noticed by revenue that the books of accounts, particularly sales general maintained by manufacturer-appellants reflected sale of value of Rs.91,83,213/- between the period from 03.03.2002 to 31.03.2002 which did not tally with the value of clearance reflected in ER-1 return filed for the month of March, 2002. When the inquiries were made with Shri Ambrish Kumar in respect of said discrepancies Shri Ambrish Kumar through his statement dated 02.09.2004 stated that the manufacturer-appellants were also in the business of sale and purchase of Benzene and Toluene. He informed that during the month of March, 2002 they have purchased Toluene valued at around Rs.45 lakhs from M/s Naman Traders, Ghaziabad and during the said month they sold Toluene of approximately Rs.63 lakhs to M/s Kumar Bansal Traders Pvt. Ltd., Ghaziabad. Further, in respect of Benzene he stated that during the month of March, 2002 they purchased Benzene having value of approximately Rs.23 lakhs from M/s Naman Traders, Ghaziabad and sold

Benzene valued at around Rs. 28 lakhs to M/s Kumar Bansal Traders Pvt. Ltd., Ghaziabad. On the said information revenue conducted further inquiries by sending letters to various authorities such as Assistant Commissioner, Central Excise, Ghaziabad, Assistant Commissioner Trade Tax, Ghaziabad and Division Chief Controller of Explosive Central Circle, Agra. On the basis of information received by them, Revenue entertained a view that the said traders by name M/s Naman Traders and M/s Kumar Bansal Traders (P) Ltd. did not exist and therefore, it appeared to revenue that manufacturer-appellants did not undertake any trading and the quantum of sale reflected in sales general maintained by manufacturer-appellant for the period from March, 2002 to March 2004 was in respect of sale of clandestinely removed final products. Therefore, through show cause notice dated 13.02.2007 appellants were called upon to show cause as to why Central Excise duty to the tune of Rs.3,90,51,589/- on sales value of Rs.12,20,36,215/- should not be demanded and recovered from them. Through the said show cause notice it was proposed to impose personal penalty on Shri N.K. Agarwal and Shri Ambrish Kumar. Above stated both show cause notices were adjudicated on contest through the impugned Order-in-Original. The manufacturer-appellants submitted before the Original

Authority that entire duty on two invoice books had been paid along with interest and the delay in payment was due to facility of fortnightly payment and that the goods were classifiable under Chapter 38 and attracted 16% rate of duty and contended that Tribunal had already held that unless the final product with any other product is proved to be used as fuel in spark engine, it cannot be classified under Chapter 27. They further submitted that the entire stock taking was done in a defective manner and recorded huge shortage which was in fact not there. They further submitted that stock taking was done by dip method which was not accurate method and therefore, they denied shortages in raw materials and finished goods. Further, in respect of proposal for confiscation of goods and vehicles they submitted that duty was already deposited and therefore, the question of confiscation does not arise. In respect of the show cause notice dated 13.02.2007 they submitted before the Original authority that the entire case was made out on the basis of balance sheet and that the revenue has attributed trading turnover as clandestine clearance of finished goods. They further submitted that their final product OCS with different grades got manufactured only out of three raw materials namely Naphtha, MFO and Pentane and that MFO and Pentane were procured from M/s Gas Authority of India Ltd. against

invoices issued by GAIL. They further submitted that the principal raw material Naphtha is under strict regulation by Ministry of Petroleum. They further submitted that revenue has not brought out any evidence of customers to whom said goods were sold. They have further submitted that revenue could not produce any evidence about higher electricity consumption for the goods alleged to have been clandestinely manufactured and cleared. Their submissions as recorded in para-16.12 of impugned Order-in-Original and the same are reproduced bellow:-

“16.12 It has further been submitted that there is total lack of evidence whatsoever of any degree of credibility as to the alleged production and clearance of OCS equal to the traded turnover. It has been held in a number of cases by the Hon’ble Tribunal/Courts that unless there is sufficient corroborative evidence of:-

- *Purchase of raw materials;*
- *Abnormal production in the factory*
- *Excess of stock of raw materials*
- *Excess of stock of finished products;*
- *Details of customers to whom goods have been sold and their affirmative statements;*
- *Check post records which prove evidence of goods having passed through the check post outside the state;*
- *Transport vouchers like LRs, consignment notes etc. and statement of transporters;*
- *Payment to transporters for freight;*

- *Transporters records vouching such clandestine removal of goods;*
- *Excess consumption of electricity;*
- *Flow back funds/cash;*

In the present case, it was submitted that not even semblance of such evidence has been brought on record even though a huge quantity of 60,98,804 ltrs. of goods have been alleged to have been cleared in a clandestine manner in the guise of trading turnover.”

The Original Authority did not appreciate the arguments and passed an order which is summarized below:-

- (i) The classification of OCS was held to be under Chapter heading 2710.11 during the relevant period i.e. during 2001-02, 2002-03 and 2003-04.
- (ii) Demand of Rs.3,79,67,279/- was confirmed against M/s Amkap Marketing Pvt. Ltd. under Section 11A(1) along with interest under Section 11AB.
- (iii) Demand of Rs.10,61,000/- was confirmed against M/s Amkap Marketing Pvt. Ltd. under Section 11A(1) along with interest under Section 11AB. Amount of Rs.5,30,500/- deposited against the said liability was ordered to be appropriated.
- (iv) Demand of Rs.7,00,428/- was confirmed against M/s Amkap Marketing Pvt. Ltd. under Section 11A(1) along with interest under Section 11AB.
- (v) Demands of Rs.1,10,400/- and Rs.10,84,320/- were dropped.
- (vi) Seized goods i.e. OCS-II and OCS P-I totally valued at Rs.3,45,000/- were confiscated and in lieu of redemption fine, Rs.86,250/- was ordered to be appropriated by encashment of Bank Guarantee no.63/03 dated 12.03.2003 submitted as security at the time of provisional release.
- (vii) Seized Tanker No.UP 14-E-2368 valued at Rs.7,00,000/- was confiscated and in lieu of redemption fine, Rs.7,00,000/- was ordered to be appropriated by encashment of Bank Guarantee

- No.65/03 dated 12.03.2003 submitted as security at the time of provisional release.
- (viii) Seized Tanker No.UMO-8872 valued at Rs.7,00,000/- was confiscated and in lieu of redemption fine, Rs.7,00,000/- was ordered to be appropriated by encashment of Bank Guarantee No.65/03 dated 12.03.2003 submitted as security at the time of provisional release.
 - (ix) Penalty of Rs.3,97,28,697/- was imposed upon M/s Amkap under Section 11AC r/w Rule 25 of the Central Excise Rules with option of reduced penalty of 25% under first proviso to Section 11AC if entire confirmed duty along with interest is paid within 30 of the communication of this order.
 - (x) Personal penalty under Rule 26 of Central Excise Rules, 2002 were imposed as under:-
 - (a) Shri N.K. Agarwal, M.D.-Rs.1,00,000/-
 - (b) Shri Ambrish Kumar, Director-Rs.1,00,000/-
 - (c) Shri Raj Narain Shukla, Authorised Signatory,- Rs.50,000/-
 - (d) Shri Vishnu Dubey, Driver-Rs.10,000/-
 - (e) Shri Ram Narain Yadav, Driver-Rs.10,000/-

Aggrieved by the said order, above stated appellants are before this Tribunal.

3. Heard the learned Counsel for appellant, he has heavily relied on the submissions made before the Original Authority and further submitted that on the basis of trading volume reflected in books of account without establishing manufacture, revenue presume that the said volume of sale was in respect of clandestine removal of goods. He has further submitted that the classification of goods manufactured by the manufacturer-appellant has been settled by this Tribunal through Final Order No.71317/2017 dated 03.10.2017 wherein it was held by

this Tribunal that the said goods manufactured by manufacturer-appellants were properly classifiable under Chapter 38 and therefore, he submitted that the goods attracted 16% Adv. duty. He contended that demand was raised by applying rate of duty to be 32% whereas the rate of duty is 16%. Therefore, because of the said reasons, the demand gets reduced to half. He has further submitted that the transaction of trading activity was through banking channels and that sales tax assessment orders and balance sheet clearly shows a separate trading activity in addition to manufacturer. He has further submitted that whole case of revenue is based on presumption and there is no evidence of clandestine manufacture and clandestine clearance. Further, he has relied on the Final Order of this Tribunal in the case of M/s Arya Fibres Pvt. Ltd. Vs Commissioner of Central Excise, Ahmedabad-II reported at 2014 (311) ELT 529 (Tri.-Ahmd.). He has further submitted that this Tribunal in the said Final Order in para-40 has very clearly laid down certain fundamental criteria which have to be established by revenue for proving allegations of clandestine manufacture and clearance. He has submitted that revenue did not fulfill any of the criteria stated therein. He has therefore pleaded for setting aside the impugned order.

4. Heard the learned A.R. for revenue. He has submitted that inquiries conducted at the premises of purchasers of trading transactions revealed that such traders did not exist and therefore, the contention of the appellant that the figures reflected in sales general were in respect of traded goods and not manufactured goods is not established and therefore, he has supported the impugned order.

5. Having considered the submissions made from both the sides and on perusal of record, we note that the appellant had raised various points, as recorded hereinabove before the Original Authority and we do not find any evidence brought forward by revenue to establish manufacture. We note that through the impugned show cause notice Central Excise duty is demanded and the duty of excise is on the activity of manufacture. We note that unless the manufacture is established Central Excise duty cannot be demanded. We note that the case of revenue is that since the transactions of trading cannot be established, the entire sales value is treated as value of clearance of goods manufactured by the appellants. We find the same to be pure presumption. We note that this Tribunal in the case of M/s Arya Fibres Pvt. Ltd. (supra) has held that there are certain fundamental criteria to

establish clandestine manufacture and removal. For sake of appreciation, we reproduce para-40 of the said Final

Order:-

“40. After having very carefully considered the law laid down by this Tribunal in the matter of clandestine manufacture and clearance, and the submissions made before us, it is clear that the law is well-settled that, in cases of clandestine manufacture and clearances, certain fundamental criteria have to be established by Revenue which mainly are the following :

(i) There should be tangible evidence of clandestine manufacture and clearance and not merely inferences or unwarranted assumptions;

(ii) Evidence in support thereof should be of :

(a) raw materials, in excess of that contained as per the statutory records;

(b) instances of actual removal of unaccounted finished goods (not inferential or assumed) from the factory without payment of duty;

(c) discovery of such finished goods outside the factory;

(d) instances of sale of such goods to identified parties;

(e) receipt of sale proceeds, whether by cheque or by cash, of such goods by the manufacturers or persons authorized by him;

(f) use of electricity far in excess of what is necessary for manufacture of goods otherwise manufactured and validly cleared on payment of duty;

(g) statements of buyers with some details of illicit manufacture and clearance;

(h) proof of actual transportation of goods, cleared without payment of duty;

(i) links between the documents recovered during the search and activities being carried on in the factory of production; etc.”

We note that the manufacturer-appellants have raised various such issues before the Original Authority and in

fact there are no evidences in the whole proceedings which satisfied any of the criteria mentioned above. We, therefore, hold that revenue has failed to establish manufacture of goods in respect of which demand was raised. We, further, note that revenue has also failed to establish that the allegations in the show cause notice dated 07.08.2003 are sustainable.

6. We, therefore, set aside the impugned order and allow all the appeals. All the appellants are entitled for consequential relief, as per law.

(Pronounced in Court on-27/12/2018)

Sd/-
(Rachna Gupta)
Member (Judicial)

Sd/-
(Anil G. Shakkarwar)
Member (Technical)