CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH - COURT NO.I

Excise Appeal No.70917 of 2016

(Arising out of Order-in-Appeal No.GZB-EXCUS-000-APP-0337 & 0338-16-17 dated 08/07/2016 passed by Commissioner (Appeals) Customs, Central Excise & Service Tax, Noida)

M/s Ganpathi Plastics & Engineering, **.....Appellant-I**
(E-189, Kavi Nagar Industrial Area, Ghaziabad)

VERSUS

Commissioner of Central Excise &

Customs, Meerut-II **....Respondent**

(C-56/42, Sector-62, Noida)

WITH

Excise Appeal No.70918 of 2016

(Arising out of Order-in-Appeal No.GZB-EXCUS-000-APP-0337 & 0338-16-17 dated 08/07/2016 passed by Commissioner (Appeals) Customs, Central Excise & Service Tax, Noida)

Shri Avenish Kumar Garg, Proprietor of **.....Appellant-II**
(M/s Ganpathi Plastics & Engineering,
E-189, Kavi Nagar Industrial Area, Ghaziabad)

VERSUS

Commissioner of Central Excise &

Customs, Meerut-II **....Respondent**

(C-56/42, Sector-62, Noida)

APPEARANCE:

Shri Sharad Chandra Tewari, Advocate for the Appellants
Shri A.K. Choudhary, Authorised Representative for the Respondent

CORAM: **HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)**

FINAL ORDER NOs.70746-70747/2024

DATE OF HEARING : 10 July, 2024
DATE OF DECISION : 10 July, 2024

SANJIV SRIVASTAVA:

These two appeals are directed against Order-in-Appeal No.GZB-EXCUS-000-APP-0337 & 0338-16-17 dated 08/07/2016 passed by Commissioner (Appeals) Customs, Central Excise & Service Tax, Noida. By the impugned order Commissioner (Appeals) has rejected the appeals filed by both company and its proprietor against Order-in-Original dated 29.06.2015.

2.1 Appellant is engaged in manufacture of plastic moulded parts of water purifier and are availing exemption from payment of duty under Notification No.08/2003-CE dated 01.03.2003.

2.2 On the basis of information received, factory premises of the appellants were visited and searched. After scrutiny of documents recovered during search and audit investigations carried out, a show cause notice dated 01.04.2014 was issued to the appellant asking them to show cause as to why:-

"(a) The goods total valued at Rs.39,17,405/- which were detained on 03.10.2013 and subsequently seized on 28.03.2014, as detailed in para 14 ibid, should not be confiscated under Rule 25 of the Central Excise Rules, 2002 read with Notification No. 68/63-Cus dated 04.05.1963.

(b) Central Excise duty amounting to Rs. 20,17,869/- (Rs. 19,59,096/- BED + Rs 39,182/- Ed. Cess + Rs. 19,591/- SHE Cess) involved on the finished excisable goods valued at Rs. 1,63,25,803/- removed clandestinely without payment of duty during the period from)1.04.2013 to 30.06.2013 (as detailed in Annexure-II) should not be demanded & recovered from them under Section 11A of the Central Excise Act, 1944. An amount of Rs. 20,17,869/- already deposited by the party should not be appropriated against the aforesaid demand of Central Excise Duty.

(c) Interest amounting to Rs. 44,641/- should not be demanded & recovered from them under Section 11AA of

the Central Excise Act, 1944. An amount of Rs 44.641/- already deposited by the party on this account should not be appropriated against the said demand of interest.

(d) Penalty should not be imposed upon them in terms of Rule 25 of the Central Excise Rules, 2002 read with Section 11AC of the Central Excise Act, 1944. An amount of Rs. 5,04,467/-(25% of duty amount) already deposited by the party on this account should not be appropriate against the said penalty."

2.3 The proprietor (Appellant 2) of the appellant 1 was also asked to show cause as to why penalty should not be imposed upon him under Rule 26 of the Central Excise Rules, 2002.

2.3 This show cause notice was adjudicated as per the Order-in-Original referred in para-1 above by holding as follows:-

"Order

1. *I order confiscation of the goods total valued at Rs. 39,17,405/- which were detained on 03.10.2013 and subsequently seized on 28.03.2014, under Rule 25 of the Central Excise Rules, 2002 read with Notification No. 68/63-Cus dated 04.05.1963. However, I allow the party to get the same redeemed by depositing a redemption fine of Rs. 19,58,703/- (Rs. Nineteen lakhs fifty eight thousands seven hundreds and three only)*
2. *I confirm the demand of Rs. 20,17,869/- (BED Rs. 19,59,096/- + Ed. Cess 39,182/- + SHE Cess Rs. 19,591/-) as proposed, under Section 11A of the Central Excise Act, 1944. Since the amount in full has been deposited by the party, I order appropriation of the same against the demand hereby confirmed.*
3. *I also confirm the interest amounting to Rs. 44,641/- as proposed, under Section 11AA of the Central Excise Act, 1944. Since an amount of Rs. 44,641/- already deposited*

by the party on this account, I order appropriation of the same against the demand hereby confirmed.

4. *I confirm penalty of Rs. 20,17,869/- under Rule 25 of the Central Excise Rules, 2002 read with Section 11AC of the Central Excise Act, 1944. As the party have deposited 25% of the same before issuance of SCN which suffice the requirement of the statute. I order appropriation of the amount deposited against this penalty.*
5. *I also impose a penalty of Rs. 5,00,000/- (Rs. Five lakhs only) against Shri Avenish Kumar Garg, partner of M/s Tirupati Engineering, E-180, Kavi Nagar Industrial Area, Ghaziabad and proprietor of M/s GPE."*

2.4 Aggrieved appellants filed appeal before First Appellate Authority, who dismissed the appeal of the appellants.

2.5 Aggrieved appellants have filed these two appeals before the Tribunal.

3.1 We have heard Shri Sharad Chandra Tewari learned Counsel appearing for the appellants and Shri A.K. Choudhary learned Authorised Representative appearing for the revenue.

3.2 Arguing for the appellant learned Counsel submits that-

- Appellants have not collected the excise duty from the buyers, the value taken in the show cause notice for alleged clandestine removal is included the excise duty and benefit of cum duty valuation must be allowed.
- For allowing the assessable value for determination of duty should be allowed as has been held by Hon'ble Supreme Court in the case of M/s Maruti Udyog Ltd. 2002 (141) ELT 3 (SC).
- Penalty @ 15% was required to be paid on the amount of duty was confirmed to Rs.2,69,385/- where as penalty of Rs.5,04,467/- has been paid by the appellant.
- Penalty of Rs.2,35,082/- paid in excess due to wrong calculation, should be refunded.
- When the duty, interest and penalty is deposited as per provisions of Section 11AC the entire proceedings are required to be closed.

- Clandestine removal has been alleged on the basis of file resumed at Sl No.18 to the Panchnama dated 03.10.2013. The alleged clandestine removal of goods was alleged and calculated on the basis of this file which has been stated to be record of goods.
- There is no corroborative evidence to support this clandestine removal except the statement of proprietor and his brother who is owner of the premises and has rented the premises to the proprietor of the firm.
- When the statements of the Proprietor, his brother and the SCN admit that the file containing the details of production and clearance of the goods during the audit period 01.04.2013 to 30.09.2013 was maintained and was available with the appellants and recovered is not reasonable and correct to say that goods were manufactured and cleared clandestinely.
- As the goods were manufactured for original manufacturer i.e. Eureka Forbes Ltd. and there were customized and tailor-made, these cannot be sold locally as there can be no buyer and these can only be scrapped and re-melted or sold as plastic scrap. Therefore, a reasonable suspicion arises as to the genuine nature of the said production file resumed.
- There is no corroborative evidence to prove the clandestine removal and as such the case is not sustainable.
- Reliance is placed on the following decision:-
    - Chandan Tobacco Co 2011 (270) ELT 87 (Tri.-Ahmd).
- Personal penalty of Rs.5 lakhs have been imposed separately on the Company and its proprietor. The firm of the proprietor and its proprietor are the same person and do not have a different identity. Therefore, personal penalty cannot be imposed separately. Reliance is placed on the decision of the Tribunal in the case of CCE, Lucknow Vs M/s Vinayak Drawings 2011 (268) ELT 410 (Tri.-Del.)

- Reliance is also placed on the following decisions:-
  - Chanderpal Singh 2018 (363) ELT 851 (Tri.-Del.);
  - Mohit Rollers Pvt. Ltd. 2018 (9) GSTL 389 (Tri.-Del.);

3.3 Learned Authorised Representative reiterates the findings recorded in the orders of the lower authorities.

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

4.2 For upholding the impugned Order-in-Original, impugned order records the following findings:-

> *"3. The appellant No. I has not challenged duty, interest and penal liabilities determined by the original authority and its appeal is limited to the issue of confiscation of goods on two counts. The appellant No.1 has canvassed that, (1) the original authority has erroneously confiscated raw materials like ABS, PP and master batch in addition to finished goods, the original proceedings record detention & seizure of raw material in addition to finished goods, raw material could not be subjected to confiscation and (ii) the redemption fine of Rs.19,58,703/- is very high & unjustified. The appellant No.2 has challenged imposition of penalty on the proprietor by canvassing that proprietor and the firm were same legal entity and has placed reliance on decisions reported in 2008 (228) ELT 166, 2013 (287) ELT 54, 2012 (279) ELT 66, 2010 (256) ELT 158, 2010 (258) ELT 204, 2013 (289) ELT 278, etc to claim protection against penal provisions of rule 26 of the CX Rules. A combined hearing was held on 15.06.2016. Shri Bimal Jain, Id. advocate, appeared for both the appellants, reiterated the grounds of appeal and sought two weeks time for making additional written submissions. The request was allowed. The appellant No. I presented additional written submissions on 29.06.2016 challenging confiscation of raw material/packing material and has canvassed that such raw material/packing material was valued at Rs. 12,51,750/- as certified by the CA. The*

appellant No.1 has deposited Rs.1,46,903/-, equal to 7.5% of redemption fine amount, vide challan dated 18.11.2015 to satisfy the provisions of pre-deposit in terms of section 35F of the CX Act. The appellant No.2 has deposited Rs.37,500/-, equal to 7.5% of penalty amount, vide challan dated 18.11.2015 to satisfy the provisions of pre-deposit in terms of section 35F of the CX Act. The jurisdictional central excise officer has verified the pre-deposits.

4. I have considered at length the records of the case, grounds of appeal and the submissions made at the time of personal hearing. The appellant No.1 has challenged confiscation of raw material and the quantum of redemption fine. The appellant No.2 has challenged imposition of penalty in terms of rule 26 of the CX Rules. I proceed to deal with the issues in same sequence.

(a) The appellant No.1 has not challenged clandestine manufacture and clearance of excisable goods without payment of duty. The records unambiguously demonstrate that the appellant admitted the acts of clandestine manufacture and clearance of excisable goods without payment of duty. It is also admitted that finished and under-process goods were lying unaccounted for in the factory as well as beyond the factory premises. The appellant has challenged confiscation by canvassing that the same included raw material & packing material also in addition to finished goods. I note that the original order records that seized goods included raw materials / packing materials'. The appeal memorandum admits that initially goods worth Rs.47,25,269/- were detained, then goods worth Rs.8,07,864/- were released on representation of the appellant and balance goods worth Rs.39,17,405/- were subjected to seizure/confiscation. The records demonstrate that the appellant No.1 did not raise the issue

of seizure of raw material/packing material at any point of time in the course of original proceedings. It is admitted that detained goods worth Rs.8,07,864/- were released in the course of investigation on the grounds that the same did not attract seizure/confiscation provisions. The appellant No.1 has now presented a certificate issued by a CA to the effect that seized/confiscated goods included raw materials valuing Rs.12,51,750/-. The said certificate has been issued on 25.06.2016, i.e. even after conclusion of hearing in the appeal on 15.06.2016 and the certificate is stated to be prepared on the basis of a 'stock register of the firm. The original proceedings demonstrate that search was conducted on 03.10.2013 and the appellant admitted non availability of any records of any type at that time. The appellant has never produced any stock register during the course of investigation and adjudication. I note that the so called 'stock register' is nothing but a bunch of six loose sheets of computer printouts showing certain entries. It is pertinent that the said CA certificate has been prepared & signed on 25.06.2016 and is based on some information claimed to be maintained in 2013 which was never part of the records or declared or presented during investigation or adjudication. In other words, the appellant has advanced an argument which was never raised in the course of investigation & original adjudication and consequently never subjected to any enquiry/investigated and was not subject matter of determination in the original proceedings challenged in the instant appeal. In the given facts & circumstances, I hold that the claim of inclusion of raw materials valuing Rs. 12,51,750/- in confiscated goods is devoid of any legally admissible cogent documentary evidence and, hence, not sustainable. The appellant No.2 has additionally canvassed that the redemption fine imposed by the original authority is very high and deserves to be reduced. The hon'ble CESTAT considered the issue of quantum of redemption fine in the case of Jagson

International Vs CC Chennai, reported in 2006 (199) ELT 553, and held as under,-

> *"11. It was then contended by the learned counsel for the appellant that the redemption fine of Rupees Five crores imposed on the appellant was excessive, and that normally the redemption fine should not exceed ten percent of the market value of the goods. The value declared by the appellant in respect of the said goods, in the bill of entry No. 14315, dated 28-4-1993 was US$ 340000 (C&F) equivalent to Rs. 10,79,55,397.50 (CIF). By the impugned order, the said goods, namely, second hand jack-up rig deep sea mat drill were confiscated under Section 111(1) of the said Act, but the appellant was given the option to redeem the same on payment of a fine of Rupees Five crores in lieu of confiscation.*
>
> *11.1 Section 125 of the said Act provides for option to pay fine in lieu of confiscation. Under the proviso to Section 125(1), it is, inter alia, provided that such fine shall not exceed the market price of the goods confiscated, less, in the case of imported goods, the duty chargeable thereon. Under subsection (2) of Section 125, where any fine in lieu of confiscation of goods is imposed under sub-section (1), the owner of such goods or the person referred to in sub-section (1) shall, in addition, be liable to any duty and charges payable in respect of such goods. By Section 126 of the Act, it has been provided that if any goods are confiscated under this Act, such goods shall thereupon vest in the Central Government, and that the officer adjudging confiscation shall take and hold possession of the confiscated goods. Since by virtue of confiscation, the goods vest in the Central Government, there is a clear justification for imposing fine in lieu of confiscation which is to the*

> *extent of market price of the goods confiscated. In other words, the rationale behind this provision lies in giving the equivalent in terms of the value of the goods to the Central Government which would become the owner of the goods by virtue of confiscation. This rationale is required to be kept in mind while considering the ambit of the discretion that may be exercised by the adjudicating officer while fixing the amount of fine in lieu of confiscation to enable the owner of the goods to exercise the option. Ordinarily, the assessing officer has to ascertain the market value of the offending goods, but no enquiry would be necessary where the fine to be imposed is equivalent to the CIF value of the goods, as the market value is normally more than the CIF value of the goods plus duty.*
>
> *In the present case, the Commissioner of Customs has imposed a fine of only Rupees Five crores in lieu of confiscation which is less than even one-half of the CIF value declared by the appellant in the bill of entry. Therefore, there is absolutely no warrant for any interference with the quantum of fine which is fixed in lieu of confiscation to enable the appellant to exercise the redemption option. We also find absolutely no valid reason for interfering with the amount of penalty of Rupees Two crores imposed on the appellant under Section 112(a) of the said Act."*

The property in confiscated goods vests in the Central Government as laid down in rule 28 of the CX Rules. The hon'ble Tribunal held in re Jagson International (supra) that "there is a clear justification for imposing fine in lieu of confiscation which is to the extent of market price of the goods confiscated. In other words, the rationale behind this provision lies in giving the equivalent in terms of the value of the goods to the Central Government which would become the owner of the goods by virtue of confiscation.

The argument of the appellant on quantum of redemption fine is not supported by any argument or material regarding the true market value of confiscated goods. The argument is rather generic and bald. The appellant has not claimed that the redemption fine was higher than the market value of confiscated goods. The appellant has also not disputed the quantum of value of goods seized/confiscated and such admitted value would denote normal market price in the absence of any counter claim/evidence. The original authority has determined redemption fine at 50% of the value of confiscated goods. I note and find that the appellant has failed to present any credible argument/material to justify any tinkering with the amount of redemption fine determined in the original order. On consideration of facts, circumstances, appellant's submissions, relevant statutory provisions and judicial pronouncements on the issue, I hold that the appellant has failed to set up a credible case for seeking reduction in redemption fine. Appeal of Appellant No.1 deserves to be rejected as enunciated above.

(b) Appellant No.2 has challenged imposition of penalty on the proprietor by canvassing that proprietor and the firm were same legal entity. The original authority has imposed penalty on the appellant No.2 by holding as under,-

> *3.2.4 As far as the case against Shri Avenish Kumar Garg, partner of M/s Tirupati Engineering, E-180, Kavi Nagar Industrial Area, Ghaziabad and proprietor of M/s GPE is concerned it is evident from the facts on record that the entire illegal activity in respect of clandestine manufacture, storage and clearance were being going on under his direct supervision and guidance. All these are established from the facts narrated in the Panchnama and various statements recorded during the course of investigation. Shri Avenish Kumar Garg himself also has admitted his*

> *full involvement in his statements dated 03.10.2013, dated 06.11.2013 and dated 14.03.2014 recorded under Section 14 of Central Excise Act, 1944. Therefore, I find that a penalty under Rule 26 of the Central Excise Rules, 2002 is imposable upon Shri Avenish Kumar Garg for his omission and commission in respect of goods seized valuing Rs. 39,17,4051- which have been found liable to confiscation as discussed supra. I also find that Shri Avenish Kumar Garg is liable for a penalty under Rule 26 of the Rules ibid for his omission and commission in respect of clandestine removal of the goods involving Central Excise duty to the tune of Rs. 20,17,869/-."*

The appellant No.2 has not denied or disputed his role at any point of time. The defence is based on the sole ground that he should not be penalized once the firm has been penalized. The appellant has placed reliance on a plethora of decisions. It is trite that question of imposition of penalty be examined in its own set of facts. The hon'ble Supreme Court considered the issue of simultaneous imposition of penalty on firm and partners in the case of Vikas Shipping Agency Vs Commissioner of Customs, Mumbai, reported in 2005 (185) 95, in a matter under the Customs Act, 1962 and held as under,-

> *"8. In regard to the contention that since no duty could be collected on the destroyed goods no penalty should have been imposed we observe that the act of importation of contraband goods was complete before the alleged fire occurred destroying the goods. A subsequent event like this cannot determine the consfiscability or otherwise of the goods themselves. The importer brought goods into India in contravention of import policy. They are therefore liable to confiscation. In regard to the contention that penalty should not have been*

> *imposed on the firm and its partner we observe that there is no such bar. The firm as an importer has an identity of its own. The partner as a person who has masterminded the whole operation can be saddled with a penalty.*
>
> *9. We hold that the goods are liable to confiscation and the importing firm and its partner are liable to penalties under the various sections of the Customs Act respectively."*

The Apex Court held that a partner who as a person master minded whole operation could be saddled with a penalty simultaneously with the firm. The Apex Court upheld imposition of penalty on partner in addition to the firm in the decision given in re Frakash Metal Works, reported in 2007 (216) ELT 660, extracted as under.-

> *"4. On the main question of clandestine removal and non-maintenance of statutory records and accounts, penalty of Rs. 10 lakhs has been imposed on the assessee firm, Rs. 2 lakhs is imposed as penalty on the partner, since deceased, and Rs. 1 lakh is imposed as penalty on the supplier of raw material.*
>
> *5. In the present case, the appellant has violated Rule 9 read with Rule 1730 of the Central Excise Rules. The appellant has not maintained RG-1 register, it has not filed the classification list, it has not maintained statutory records and accounts and, in the circumstances, penalty, has been rightly imposed. The statutory rules were not complied with and, as a result, the appellant was rightly found guilty of clandestine removal of the goods without filing the classification list. We are in agreement with the view expressed by the Tribunal, vide the impugned judgment, that the penalty was leviable on the appellant for clandestine removal of the goods in question. In fact, this was the only point on which the Tribunal has focused its entire attention.*

> *Therefore, we uphold the order of the Tribunal imposing the penalty as stated hereinabove. To this extent, the civil appeals stand dismissed."*

The hon'ble CESTAT considered the issue of simultaneous imposition of penalty on firm and partners in the case of Kajalwala Process Vs CCE Ahmedabad, reported in 2003 (154) ELT 509, in a matter under the Central Excise Act, 1944 and held as under,-

> *"5. The appellants are further contesting against the imposition of penalty equal to the duty amount on them and against the penalty imposed on Shri Farooq bhai under Rule 209A. It is contended that the penalty under Section 11AC is maximum amount laid under these provisions. It is contended that the Commissioner (Appeals) acted without jurisdiction in confirming the order of the Addl. Commissioner that penalty of Rs. 1,35,494/-had to be imposed as mandatory penalty. On this submission of the appeals it may be observed that the Hon'ble Madras High Court in the case of C.C.E.. Trichy-1 v. CEGAT, Chennai 2001 (133)ELT 536 (Mad.) have observed; "Despite prescription of penalty in the statutory provision, the element of discretion still lies and what is provided in the provision is the maximum. Discretion, which should no doubt be exercised judiciously, can be exercised, having due regard to the facts and circumstances of the case, which is what the Tribunal has done". In the present case as per the facts on record and the statements given by Shri Farooqbhai, partner of the firm, the appellants manufactured and cleared excisable man-made fabrics without payment of duty consciously and with full knowledge of law in contumacious disregard of the provisions of the Act and the Rules with an intent to evade payment of duty. Therefore, in the facts and circumstances of the case, I am of the view that*

> *imposition of penalty equal to the amount of duty is called for in terms of the provisions of 11AC. Shri Farooqbhai, partner of the appellant firm in his two statements has admitted that the clandestine removal of the excisable goods by way of their sale to some agents/dalals was in his full knowledge and therefore, imposition of penalty under Rule 209A on him is also fully justified."*

The case dealt with imposition of penalty on the partner in terms of rule 209A of the erstwhile Central Excise Rules, 1944 simultaneously with penalty on the firm in terms of section 11AC of the CX Act and it was held that same was permissible under the law. The CESTAT in the case of CCE Surat Vs. Shri Anand Mahendra Kapadia, Order No. A/11396/2014 dated 18.07.2014 of Ahmedabad bench reported in 2014 (3) ECS (133), held that penalty was imposable on the partner in terms of rule 209A of the erstwhile Central Excise Rules, 1944/rule 26 of the CX Rules 2002 simultaneously with penalty on the firm. The appellant No.2 has not denied his role in the admitted evasion of excise duty in violation of various statutory provisions. The appellant No.2 ran a complex & covert operation in complete defiance of the law to evade payment of excise duty. The admitted facts of the case demonstrate that appellant No.2 masterminded the operation of evasion of central excise duty. In the given facts and circumstances, I find that the penalty imposed on appellant No.2 is valid & justified and does not call for any interference in the instant appeal proceedings.

The appeal of appellant No.2 deserves to be rejected as discussed above."

4.3 It is settled position in law that benefit of cum duty cannot have been given in the cases of clandestine clearances, for the reason that no person could be allowed the benefit of his own wrong doings. The documents recovered so indicates that the appellants have deliberately cleared these goods clandestinely to

M/s Eureka Forbes Ltd. or any other person with intend to evade payment of duty. In such case, I do not find much merit in the submissions made by the appellant. Appellants have themselves admitted to be engaged in the act of clandestine clearance and the duty evasion that being so relying upon the decision of Hon'ble Supreme Court in the case of M/s Systems and Components Pvt. Ltd. 2004 (165) ELT 136 (SC) wherein following has been held:-

> *"**5.**The Appeal filed by the Department has been disposed of by the Tribunal by holding that the Department has not proved that these parts were specifically designed for manufacture of Water Chilling Plant in question. The Tribunal has noted the Technical details supplied by the Respondents and the letter of the Respondents dated 30th November, 1993 giving details of how these parts are used in the Chilling Plant. The Tribunal has still strangely held that this by itself is not sufficient to show that they are specifically designed for the purpose of assembling the Chilling Plant. We are unable to understand this reasoning. Once it is an admitted position by the party itself, that these are parts of a Chilling Plant and the concerned party does not even dispute that they have no independent use there is no need for the Department to prove the same. It is a basic and settled law that what is admitted need not be proved".*

4.4 In case of Viva Herba Pvt. Ltd. [2023 (383) E.L.T. 423 (Bom.)] Hon'ble Bombay High Court observed as follows:

> ***"13.****The second contention is that even assuming there was a removal of goods to DTA without permission, the benefit of cum duty price could not have been denied to the Petitioner. The reasoning of the Settlement Commission on this aspect has been reproduced above. The Settlement Commission has referred to the decision of the Hon'ble Supreme Court in the case of Amit Agro Industries (supra) and the decision of Asian Alloys Ltd. [2006 (203) E.L.T. 252*

(Tri. - Del.)] and Sarla Polyester Ltd. [2008 (222) E.L.T. 376 (Tri. - Ahmd.)]. The Tribunal has held that since all sales were clandestinely done in contravention of the provisions of EXIM Policy and Rules applicable to the 100% EOU, there is no scope to treat the sale price as a cum duty price. Apart from this, the Tribunal has also held that had the Petitioner cleared the goods from their unit and had they loaded the price of goods after duty paid clearance. There was evidence of the price released being inclusive of duty, and therefore, the Petitioner had to show that the price of the goods includes excise duty payable by it, and there is no question of exclusion of duty element from the price determination of the value. The observations of the Hon'ble Supreme Court in the case of Amit Agro Industries (supra), observed in paragraph 14, are reproduced in the order of the Commission, which is extracted above. In the present case, since the Tribunal has opined that in the light of the transaction of the Petitioner, there is no evidence based on which it could be held that the price realized was inclusive of duty, and therefore, the benefit of cum duty could not be granted.

14.*Considering the limited scope of challenge against the order of the Settlement Commission, the Petitioner had to show that the impugned order was in breach of a settled position of law which covered the facts of the Petitioner's case. The order of the Settlement Commission cannot be assailed as if it is an order passed under an ordinary adversarial adjudication or as if the appellate power is being exercised. There are two facets in the Petitioner's case. First, the Petitioner cleared the goods from a 100% EOU without permission in the Domestic Tariff Area and without paying the duty. Second, most important, is that the Petitioner resorted to use M/s. Speciality to effect clearances from their factory. Panchnama of the factory premises of M/s. Speciality revealed that only five items of machinery were functional. The rest of the machinery was non-functional, and the boiler was in a stage of scrap. There was no stock of raw* *materials. Mr. Pendse was the proprietor of both, M/s. Speciality and the Director of the Petitioner. The Petitioner not only did not clear the goods to the DTA but used some other entity to route the goods and create fabricated documents. Therefore, as per the opinion of the Commission, no reliable documents existed on record. It is in this context that the Settlement Commission concluded that there was no evidence of the price realized being conclusive of duty given the manner in which the goods were removed; the value of the goods as a benefit of cum duty price of clearance of goods could not be granted. The decisions cited by the Learned Counsel for the Petitioner before us do not arise from the facts and circumstances similar to that of the Petitions enumerated above. In the decision of Sarla Performance Fibers Ltd. (supra), the Hon'ble Supreme Court considered the challenge to the order passed by the Customs Excise Service Tax Appellate Tribunal, and the allegations against the Petitioners therein were that the goods were removed in the Domestic Tariff Area without permission. The Learned Counsel for the Respondents has rightly pointed out that the decisions in the case of Maruti Udyog and Srichakra Tyres Ltd. [1999 (108) E.L.T. 361 (Tri. - LB)] also did not deal with the factual situation where the documents from which the cum duty price could be ascertained were themselves of doubt having routed under a fictitious entity. Therefore, we are not shown any judicial decision directly dealing with the fact situation such as the Petitioner, where the documentation itself was in grave doubt."*

4.5 In case of Sri Rama Machinery Corporation Ltd. [2017 (348) E.L.T. 540 (Tri. - Chennai)] Chennai Bench has observed as follows:

> ***"20.*** *Beginning from the show cause notice all the authorities have erroneously held that the appellant is entitled to cum-duty benefit. It is shocking to know that how such a concession can be given to an evader who did not maintain authentic record recognized by law to demonstrate cum-duty clearance. Appellant resorted to*

clandestine removal and no records were maintained in respect of such clearance. Therefore the duty evaded transactions which have never seen the light of the day deserve no concession of cum-duty benefit at all. The tainted deals should be banned by coercive measures of law to prevent recurrence thereof as were as to discourage evasion. If such benefit is granted, that shall legalise illegalities. The very false documentation by the bill traders and spurious bank accounts maintained in the name of non-existing concerns establishes mala fides of the appellant-company which does not permit it to any concession in law including the cum-duty benefit. Therefore, this benefit should not be allowed by learned Adjudicating Authority while re-computing the liability of the appellant."

4.6 In the case of Jay Jalaram Processors [2014 (313) E.L.T. 724 (Tri. - Ahmd.)], Ahmedabad bench observed as follows:

"6. *At this stage, the ld. Advocate, submits that the duty amount should be re-quantified by treating the entire realization as cum-duty price. I find that the appellate authority, while dealing with the above contention of the appellant, has recorded that the assessable value stands adopted by the Revenue on the basis of statement and admission of Shri Mashruwala. If the value adopted, which is based upon the disclosure made by the appellant, does not stand disputed by the appellant, the question of re-quantification of duty by treating the entire realization as cum duty does not arise. I agree with the above reasoning of the lower authority. Admittedly, the value of the fabrics was disclosed by the appellant and stands accepted by them.*

7. If that be so, such value has to be adopted as assessable value for the purpose of quantification of duty. It has to be kept in mind that the clearances were effected by the appellant without payment of any duty and the consideration received by him from

merchant manufacturer was without including the element of duty. It is not a simpliciter case of non-payment of duty, in which case the entire realization has to be treated as cum duty price where the duty is being subsequently confirmed against an assessee. It is the case of clandestine removal and the Revenue, while adopting the value of fabrics, has not adopted the cum duty value but has adopted the value at which the finished fabrics were cleared without including the factor of duty. *As such, I find no merits in the contention of the learned advocate that the duty is required to be re-quantified. Learned advocate has further contended that the Original Adjudicating Authority has imposed penalty to the extent of 100% in terms of Rule 25 of Central Excise Rules, 2002 read with Section 11AC of Central Excise Act, 1944. By drawing my attention to the Tribunal's decision in the case of M/s. Agarwal Pharmaceuticals v. CCE, Delhi as reported in 2002 (146) E.L.T. 190 (Tri.-Del.), wherein it was held that the penalty is not sustainable for want of apportionment under Section 11AC of Central Excise Act, 1944 and Rule 173Q of erstwhile Central Excise Rules, 1944, the same were set aside. However, I find that the ratio of above decision would not apply in the present case, inasmuch as the Tribunal in the case of M/s. Agarwal Pharmaceuticals set aside the penalty on the ground of non-apportionment of the same under Section 11AC and Rule 173Q. The said decision relates to the period when the quasi-judicial authorities were exercising powers to impose lesser penalty under Section 11AC of Central Excise Act, 1944. It was in these circumstances, the Tribunal observed that it cannot be found out as to how much was the penalty under Section 11AC and how much was under Rule 173Q, the penalty has to be set aside."*

4.7 In case of Ahmednagar Rolling Mills Pvt. Ltd. [2014 (300) E.L.T. 119 (Tri. - Mumbai)], Mumbai Bench observed as follows:

> ***"5.5****The next question is whether the appellant would be eligible for cum-duty benefit, inasmuch as they have not collected excise duty separately. In the present case, the appellants have cleared the goods without payment of duty and without the cover of any Central Excise invoices and the transactions were made in cash. Thus, there is no documentary evidence indicating that the price of the goods included the excise duty payable. Therefore, as per the decision of the Hon'ble Apex Court in the case of Amrit Agro Industries Ltd. (cited supra), the question of exclusion of duty element will not arise for determination of value under Section 4(4)(d)(ii) of the Central Excise Act, 1944. Therefore, we do not find any merit in this claim made by the appellant."*

4.7 In case of Eon Polymers Pvt. Ltd. [2011 (263) E.L.T. 545 (Tri. - Del.)], Delhi Bench observed as follows:

> ***5.*** *We have carefully considered the submissions from both the sides and perused the records. Since during the course of hearing of appeal, a specific plea had been made on behalf of the Appellant that the price realized by the Appellant company in respect of clandestine clearances must be treated as cum-duty price in view of Hon'ble Supreme Court's judgments in the case of CCE, Delhi v. Maruti Suzuki Ltd. (supra) and Collector v. Shri Chakra Tyres Ltd. (supra). We, relying upon Tribunal's judgements in the cases of Sarla Polyester v. CCE reported in 2008 (222) E.L.T. 376 and Asian Alloys v. CCE, Delhi reported in 2006 (203) E.L.T. 252, had distinguished the present case involving clandestine clearances without payment of duty and clearances of goods produced in the EOU from DTA unit at nil rate of duty by fraudulently availing an exemption meant for DTA units, from the cases of Maruti Suzuki Ltd. (supra) and Shri Chakra Tyres Ltd. (supra) and in para 9.1 and 9.2 of the order, had given a finding that the Apex Court's judgements cited by the Appellant are not be*

applicable to the facts of this case. Hon'ble Supreme Court in the case of Amrit Agro Industries Ltd. v. CCE, Ghaziabad reported in 2007 (210) E.L.T. 183 (S.C.) has held that unless it is shown by the manufacturer that price of the goods includes excise duty payable by him, no question of exclusion of duty element from price will arise for determination of value under Section 4(4)(d)(ii) of Central Excise Act, 1944 and one cannot go by general implication that wholesale price would always mean cum-duty price, particularly when the assessee had cleared the goods during relevant years on the basis of an exemption notification. In cases of clandestine clearances without payment of duty which are not reflected in the books of account of the assessee, and in respect of which no invoices have been issued, it is impossible to say as to whether the price charged by the assessee includes the element of excise duty and if so, to what extent and in such a situation, treating the price charged for clandestinely cleared goods as cum-duty price and permitting abatement of excise duty presumed to have been paid for the purpose of determining the assessable value would result in the tax evader being rewarded by lower duty liability. Similarly in a case where a 100% EOU deliberately clears the goods actually manufactured in its factory, from its DTA unit at nil rate of duty by claiming some duty exemption available to DTA units, by falsely claiming the goods to be manufactured in DTA unit, the EOU on being caught and asked to pay the duty in terms of proviso to Section 3(1) of the Central Excise Act, 1944 cannot claim the price realized in respect of such DTA clearances to be cum-duty price and claim abatement of duty from sale price for determining the assessable value. In case of Maruti Suzuki Ltd., the Assessee was clearing steel scrap without payment of duty under impression that no duty was chargeable and there was no allegation of clandestine removal or deliberate duty evasion against them. In case of Shri Chakra Tyres, the

Assessee continued to pay duty on lower price inspite of upward price revision resulting in short payment of duty, which according to them happended due to oversight. There is nothing in Apex Court's judgments in cases of CCE, Delhi v. Maruti Suzuki Ltd. (supra) and Collector v. Shri Chakra Tyres (supra) from which it can be inferred that the ratio of these judgments is also applicable to the cases of well planned deliberate evasion of duty.

5.1 *From cum-duty price, the assessable value is determined by formula –*

$$Assessable\ Value = Cum\ duty\ price/(1 + rate\ of\ duty)$$

A look at this formula would reveal that the higher is the rate of duty, the lower will be the assessable value derived from cum-duty price. Normally the goods with higher rate of duty attract more duty evasion. In such a situation, in respect of goods cleared clandestinely or in respect of the goods cleared at nil rate of duty by fraudulently claiming some exemption, if the price realized is treated as cum-duty price and abatement of duty presumed to have been paid is allowed and thereby considerably reducing the tax evader's duty liability, it would amount to rewarding the tax evasion, which would be against one of the basic principles of interpretation of Statutes that the interpretation to be adopted must be the one which advances the remedy and suppresses the mischief. Therefore, when the Section 4(4)(d)(ii) of Central Excise Act, 1944 as it stood during period prior to 1-7-2000 and Section 4(3)(d) of the Act, as it stood during the period w.e.f. 1-7-2000 provided that the normal price/transaction value does not include the duty of excise, sales-tax and other taxes if any, actually paid or payable, it could not be the intention of the legislature to provide for the abatement of taxes for determining the assessable value even when the taxes had not been paid by an Assessee deliberately by taking recourse to fraud, mis-statement, suppression of facts or willful contravention of *the provision of the Central Excise Act or of the Rules made thereunder with intent to evade the payment of tax.*

4.8 In view of the decisions as above I do not find any merits in the claim made by the appellant for allowing the benefit of the cum duty price for determining the duty evaded by the appellant.

4.9 In view of the above, I do not find much merits in any of the submissions made by the appellants.

4.10 However, taking note of all facts and circumstances, such as that

- the entire duty along with interest and penalty of 25% as per Section 11AC had been deposited by the appellant during the course of investigation even prior to issuance of Show Cause Notice,
- The goods confiscated were within the factory of production at the time of search and seizure and would have been cleared on redemption on payment of appropriate duty

I find that redemption fine imposed in respect of the goods confiscated, equivalent to the fifty percent of value of the confiscated goods is much on higher side. To meet the end of justice the redemption fine is reduced to Rs.50,000/-.

4.11 All the dues including twenty five percent of duty evaded as penalty was paid by the appellant 1 much prior to the issuance of show cause notice. Section 11AC (1) (c) & (d) of the Central Excise Act, 1944 reads as follows:

(c) where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, by reason of fraud or collusion or any wilful misstatement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, the person who is liable to pay duty as determined under sub-section (10) of Section

11A shall also be liable to pay a penalty equal to the duty so determined:

Provided that in respect of the cases where the details relating to such transactions are recorded in the specified record for the period beginning with the 8th April, 2011 up to the date on which the Finance Bill, 2015 receives the assent of the President (both days inclusive), the penalty shall be fifty per cent of the duty so determined;

(d) where any duty demanded in a show cause notice and the interest payable thereon under Section 11AA, issued in respect of transactions referred to in clause (c), is paid within thirty days of the communication of show cause notice, the amount of penalty liable to be paid by such person shall be fifteen per cent. of the duty demanded, subject to the condition that such reduced penalty is also paid within the period so specified and all proceedings in respect of the said duty, interest and penalty shall be deemed to be concluded;

In view of the above provisions the entire proceedings should have been closed against the appellants immediately, without warranting imposition of any penalty on the Appellant 2 who is proprietor of the Appellant 1. In case of Chanderpal Singh [2018 (363) E.L.T. 851 (Tri. - Del.)] Delhi bench after referring to the above two provisions held as follows:

"5. *As is seen from above, the provisions of sub-section (d) are invocable in respect of transactions mentioned in sub-section (c). The said sub-section provides for conclusion of the proceedings in case an assessee deposits the dues as mentioned in the sub-section within a period of 30 days of the issue of the show cause notice. The said provision is with a purpose to reduce the litigation.*

However, the lower authorities have observed that as much as in the present case there was suppression with an intent to evade payment of duty, the confiscation of the goods as also the vehicle can be adjudicated upon. I find no merit in

> *the above stand of the Revenue. On a careful reading of both the sub-sections, an inevitable conclusion is drawn that the conclusion of proceedings in terms of sub-section (d) is provided in respect of cases mentioned in sub-section (c). Sub-section (c) relates to the evasion of duty by reason of fraud or collusion. As such it has to be held that in cases of fraud, conclusion, etc., the entire proceedings would get finally concluded on an assessee depositing the dues as mentioned in sub-section (d), thus not permitted further adjudication relatable to the confiscation of the goods [or] the vehicle, etc."*

I have no hesitation in holding that the said decision should be applied in case of the demand of duty but the observation made vis a vis the closure of proceedings in respect of seizure and confiscation do not appeal to me. The fiscal statutes need to be interpreted in light of what has been stated in the statute and not by adding or subtracting the phrase in the statute as has been held by Hon'ble Supreme Court in series of decisions including case of Dilip Kumar & Co [2018 (361) E.L.T. 577 (S.C.)] wherein following has been observed:

> ***"19.*** *The well-settled principle is that when the words in a statute are clear, plain and unambiguous and only one meaning can be inferred, the Courts are bound to give effect to the said meaning irrespective of consequences. If the words in the statute are plain and unambiguous, it becomes necessary to expound those words in their natural and ordinary sense. The words used declare the intention of the Legislature. In Kanai Lal Sur v. Paramnidhi Sadhukhan, AIR 1957 SC 907, it was held that if the words used are capable of one construction only then it would not be open to the Courts to adopt any other hypothetical construction on the ground that such construction is more consistent with the alleged object and policy of the Act.*
>
> ***20.*** *In applying rule of plain meaning any hardship and inconvenience cannot be the basis to alter the meaning to*

the language employed by the legislation. This is especially so in fiscal statutes and penal statutes. Nevertheless, if the plain language results in absurdity, the Court is entitled to determine the meaning of the word in the context in which it is used keeping in view the legislative purpose [Assistant Commissioner, Gadag Sub-Division, Gadag v. Mathapathi Basavannewwa, 1995 (6) SCC 355]. Not only that, if the plain construction leads to anomaly and absurdity, the Court having regard to the hardship and consequences that flow from such a provision can even explain the true intention of the legislation. Having observed general principles applicable to statutory interpretation, it is now time to consider rules of interpretation with respect to taxation.

21. *In construing penal statutes and taxation statutes, the Court has to apply strict rule of interpretation. The penal statute which tends to deprive a person of right to life and liberty has to be given strict interpretation or else many innocent might become victims of discretionary decision-making. Insofar as taxation statutes are concerned, Article 265 of the Constitution [265. Taxes not to be imposed save by authority of law - No tax shall be levied or collected except by authority of law.] prohibits the State from extracting tax from the citizens without authority of law. It is axiomatic that taxation statute has to be interpreted strictly because State cannot at their whims and fancies burden the citizens without authority of law. In other words, when competent Legislature mandates taxing certain persons/certain objects in certain circumstances, it cannot be expanded/interpreted to include those, which were not intended by the Legislature."*

4.12 Impugned order has relied upon various decisions which have been rendered in case of partner and partnership firms to uphold penalty imposed upon the proprietor of the proprietorship company. In case of Vinayak Drawings [2011 (268) ELT 410 (Tri.-Del.)] Delhi Bench has held as follows:

"4. …. As regards, the penalty on Shri Shyam Sawaria, Proprietor of the respondent firm, since penalty on the respondent firm has been imposed, separate penalty on Shri Shyam Sawaria is not called for and as such, the Commissioner (Appeals)'s order setting aside the penalty on him is upheld."

4.13 Thus I do not find any merits in the impugned order to the extent it upholds the penalty imposed on Appellant 2.

4.7 In view of the above, impugned order is modified as follows:-

- Redemption fine imposed on the confiscated goods is reduced to Rs.50,000/-, &
- Penalty imposed on the Appellant 2 is set aside.

5.1 Appeal of the Appellant-I is partly allowed and appeal of the Appellant-II is allowed.

(Operative part of the order pronounced in open)

(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

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