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

APPEAL Nos. E/2979 & 2980/2005-EX[SM]

(Arising out of Order-in-Original No.16-COMMR./LKO/2005 & Order-in-Original No.17-COMMR./LKO/2005 dated 19/05/2005 passed by Commissioner of Central Excise, Lucknow)

M/s J M Agarwal Tobacco Company
(In Appeal No. E/2979/2005-EX[SM])
&
M/s J M Agarwal Tobacco Co. (P) Ltd. **Appellants**
(In Appeal No. E/2980/2005-EX[SM])
Vs.

Commissioner of Central Excise, Lucknow **Respondents**

Appearance:

Shri Kapil Vaish (C.A.) for Appellant
Shri Gyanendra Kumar Tripathi (Asstt. Commr.) AR for Respondent

CORAM:

Hon'ble Mr. Anil Choudhary, Member (Judicial)

Date of Hearing : 20/04/2018
Date of Decision : 20/04/2018

FINAL ORDER NOs. – 70913-70914/2018

Per: Anil Choudhary

The brief facts of the case are that J.M. Agarwal Tobacco Company is a partnership concern partners are Laxmi Narain Agarwal, Mr. Satya Prakash Agarwal, Mrs. Shakuntala Devi & Mr. Jai kumar Agarwal. J.M. Agarwal Tobacco Company Pvt. Ltd. is a private limited company of which the directors are Laxmi Narain Agarwal, Mr. Satya Prakash Agarwal and Mrs. Shakuntala Devi. Both the assessees are manufacturer of branded chewing tobacco under the brand name “Bandar Brand" falling under Chapter 24 of First Schedule to CETA, 1985. Both the appellants have their factory at Bye-pass road, Kaimganj, District Farrukhabad, U.P. Both are registered with the Central Excise Department and paying the applicable duty.

2. There was a search in the premises of the appellants on 08/06/2001 wherein the stocks were verified and also certain records were resumed. Follow up searches had also been conducted in the premises of some customers and transporters of the appellants. Both the assessees/appellants are sister concern and some of the buyers and transporters are common. Subsequently, separate show cause notices of even date 09/01/2003 were issued.

3. Appeal No. E/2979 of 2005, J.M. Agarwal Tobacco Company: –

It is alleged in the SCN that Shri Chandra Prakash Agarwal father of Laxmi Narain Agarwal in his statement recorded under Section 14 on the day of search *inter-alia* admitted the clandestine purchase of raw tobacco and shortage of 1682.50Kg of raw tobacco noticed during the stock taking. Subsequently, premises of five buyers located in Assam and two transporters one at Kaimganj and the other at Kanpur were also searched. Subsequently, during September, 2002, premises of another 14 buyers located in Assam were searched. As a result of searches some documents were recovered from the buyers. It appeared to Revenue that there were some mismatches in the invoices issued and the GR's found from the premises of the appellants as well as the GR's found at the premises of the buyers. Whatever GR's the Revenue could tally during investigation and enquiry with the invoices were accepted and rest of the GR's appeared to be by way of clandestine removal.

4. One Mr. SP Agarwal of M/s Nagar Mal Push Raj, Tezpur, Assam one of the buyers tendered a file containing miscellaneous newspapers (papers, bills, GR's, commercial invoices etc.) to the inspecting officer's. On perusal of said file a handwritten slip signed by Shri Laxmi Narain Agarwal was noticed. This slip revealed that partner was confronted with the discrepancies observed as the result of comparison of the said GR's with the invoices. In his statement dated 21/11/2001, he inter alia stated that the said differences in weight were due to the advertisement and scheme material sent along with the said goods. Such contention did not appear to be good in view of correspondence found with respect to

Nagar Mal Push Raj, Tezpur. Thus it appeared that the appellant was clearing some goods without duty in lieu of gift items to be given in the 'Sales Promotion Scheme' alongwith duty paid goods and sent 11 cartons of the said goods in place of a Fridge that he was supposed to have sent to M/s Nagar Mal Push Raj under the 'Sales Promotion Scheme'. Further perusal of the slip indicated that extra 11 cartons of the said goods are dispatched along with the consignment of 330 cartons of the said goods. Thus a hand written letter was found to be attached to a letter dated 22/09/2001 of the appellant duly signed by Shri Laxmi Narain Agarwal and Commercial Invoice No.126 dated 22nd September, 2001 both addressed to M/s Nagar Mal Push Raj. It appeared to Revenue that both the letter and commercial invoice indicates transportation of only 330 cartons of the said goods on which Central Excise duty amounting to Rs.1,26,522/- appear to be paid thereby indicating that no duty had been paid on the extra 11 cartons sent. Further an office copy of letter dated 06/08/2000 M/s Nagar Mal Push Raj, Tezpur addressed to appellant found in this file indicated that Nagar Mal Push Raj had requested to the appellant to send stock against pending scheme material that is three cycles and one Samsung refrigerator. This corroborated the fact that JMATC – appellant had been sending the said goods against the scheme material to their dealers/distributors. Another letter dated 20/06/2001 written by M/s Nagar Mal Push Raj addressed to appellant stating that 16 cartons of "Bandar Brand" 'Sada' had been received by them towards adjustment of pending lucky coupon claimed amount of Rs.17,330/- on which it appeared no duty was paid. Hence it appeared that appellant had been dispatching finished goods in place of gift items under the promotion scheme and on such dispatches no duty have been paid.

5. In his statement recorded on 21/11/2001 Shri Laxmi Narain Agarwal *inter-alia* admitted the manner of clandestine removal of the said goods. An amount of Rs.12 lakhs was voluntary deposited by appellant vide TR-6 Challan dated 02/07/2001 and 03/07/2001 as advance Central Excise duty towards the probable liability.

6. While in most of the cases the details mentioned in the GR's tallied with those indicated in the Central Excise duty paying invoices, issued on a particular day, but in some of the cases the weight shown in the GR's was found more than that shown in the corresponding

Central Excise Invoices. This differential weight appeared to be the quantity of goods dispatched clandestinely from appellant mainly under cover of GR's of Gupta Road Lines, Kaimganj. Shri Laxmi Narain Agarwal stated on comparison of said GR's with the invoices, in his statement dated 21/11/2001, he *inter-alia* stated that the said difference is due to advertisement and promotion scheme material sent along with the said goods. Such contention did not appear to be good in view of correspondence found with respect to M/s Nagar Mal Push Raj, Tezpur, Assam. Thus it appeared that the appellant was clearing some goods without duty in lieu of gift items given to the 'Sale Promotion Scheme' alongwith duty paid goods. One diary/notebook was recovered and seized from Tata Indica car belonging to Shri Chandra Prakash Agarwal at the time of search in the factory of the appellant. On perusal of Page-40 of the said diary indicated entries 'Titled Milk' under which some amount had been shown against each month during the year 2000. The total of the amount stated on the said page totals to Rs.18.01 lakhs. It appeared to Revenue that this amount shown as the amount for milk is in connection with the month wise payment received against clandestine sale of unaccounted "Bandar Brand" tobacco during the year 2000. Based on this, a chart was prepared by Revenue as Annexure C-5 to the SCN for alleged clandestine removal. Shri Laxmi Narain Agarwal was confronted with the said Page-40 of the diary in the statement recorded on 08/11/2001 wherein he *inter-alia* stated that the said entries were for the movement of raw tobacco as ascertained from his father Shri Chandra Prakash, this account 'titling milk' was the account for the clandestine sale of the said goods by the appellant in the nearby places. Thus it appeared to Revenue that 'milk' was the code word used for clandestine removal of the said goods.

7. Another register maintained for movement of tobacco which was recovered and seized from the factory premises of the appellant revealed that on the left side of Page-18 it was noticed that 800 bags on 24/04/2001 and 1036 bags on 29/04/2001 of unaccounted "Bandar Brand" tobacco had been dispatched to a party by the name Soneylal on which no Excise duty appear to have been paid. Shri Laxmi Narain Agarwal confronted with this page of the said register who stated in his statement dated 8th December, 2001 that the entries in the said register was towards movement of raw material from one godown to the other. However this contention appeared

to be not correct inasmuch as goods shown there in and removed from the Permanand Mill dated on 24/04/2001 and 29/04/2001, has remarks in the description column of the said page suggesting clearance of finished goods to one Shri Soneylal.

8. In the further statements of Laxmi Narain Agarwal, it appeared that their family-owned 4 firms/company namely – J.M. Agarwal Tobacco Company (firm), J.M. Agarwal Tobacco Company Pvt. Ltd., Satya Prakash & Company and Shri Ram Chandra Prakash. M/s SRCP purchases raw tobacco from the farmers and manufacture different grade of raw tobacco with leaves of raw tobacco – 'Garia' are crushed to produce three different grades of raw tobacco namely 'Orcha Dana', 'Rawa' and 'Garda'. Further by crushing wood of the said raw tobacco – 'Garia', 'Nas Dana', 'Nas Rawa' and 'Nas Bukki' are obtained. That SRCP sells 'Patti Dana' & 'Nas Dana' so obtained to the appellant.

9. Based on such allegations, SCN proposed to demand Central Excise duty of Rs.90,31,720/- for the period 1998-99 to 2001-02 as detailed in Annexure A to the SCN invoking the extended period of limitation; further proposing penalty with further proposal to appropriate the sum of Rs.12 lakhs deposited during

investigation. Further personal penalty on Shri Laxmi Narain Agarwal was also proposed under Rule 26 of Central Excise Rules, 2001. The SCN was adjudicated vide Order-in-Original dated 19th of May, 2005 by the Learned Commissioner who was pleased to drop the demand of Rs.72,78,086/- wherein the appellant was able to reconcile several invoices with the GR's and the fact of movement of goods from one godown to the other was accepted. However the learned Commissioner confirmed the duty of Rs.17,53,634/-. He also imposed an equal amount of penalty under Section 11AC and further penalty under Rule 52-A of Central Excise Rules, 1944 of Rs. 25,000/-.

10. Aggrieved by above order, the appellant is in appeal before this Tribunal. The learned counsel states that in spite of their best efforts they could not reconcile some of the invoices with the GR's and as such the appellant does not want to contest the demand of Rs.5,16,960/-. The balance amount in dispute is as follows:–

SI No.	Particulars	Amounts (In Rs.)
I.	difference in weight between GR and invoice	Rs.3,96,460/-
II.	sale of goods worth Rs.18.01 lakhs (as per Revenue Laxmi Narain Agarwal in his statement dated 8th November, 2001 accepted clandestine removal)	Rs.6,00,640/-
III.	demand on the basis of loose paper	Rs.2,39,574/-

	(wherever the words tobacco or Truck Bhada/fair is figuring, it is considered as sale of tobacco)	
	Total	**Rs.12,36,674/-**

11. So for the demand relating to difference in weight between GR and invoice is concerned, the learned counsel draws my attention to Annexure C-3 and C-4 at Page-84 of the appeal paper book. It is a chart prepared by Revenue having columns for serial number of GR book as per panchnama, GR number, date, number of packaging (bag or carton), quantity in Kg, name of the party/buyer, truck number, invoice number, date, quantity and difference in quantity – Kg. The learned counsel demonstrates that in most of the cases the difference of weight is a few Kg of about 1% or 2%. For example with respect to GR No.5 dated 18th of May, 1999 the total weight of the goods is shown bags + cartons 8960Kg dispatched to Tirupati Enterprises, Dhubari, Assam, on the same date wherein the number of bags and cartons is tallying and the weight as per invoices 8952Kg. There is an excess weight of 08Kg as per the GR as compared to the invoice. Similarly with respect to GR No.12 dated 8th of July, 1999 the number of bags 425 and weight is 4975Kg dispatched to Sitaram Om Prakash, Assam wherein as per invoice the number of

bags is tallying the weight as per invoices 4972.5 thus a difference of 2.5Kg only. Thus it is evident that the nominal difference of about 1% or 2% is due to weight of the packing material. In the invoice the appellant gives the weight of the goods as tobacco is normally sold by weight. Whereas the transporters waste the finally packed goods which include secondary packing and that there is bound to be some nominal difference calling for no adverse inference.

12. The learned counsel further points out from the statement recorded of Shri Laxmi Narain Agarwal on 21/11/2001 wherein in answer to the question – with respect to GR No.49 dated 31/07/1999 shows weight of consignment 9620Kg whereas the invoice No.106 dated 31/07/1999 reflects weight 8970Kg. Thus there is difference of 65Kg, please explain. In reply it was answered that from time to time along with the dispatch of finished goods, they also dispatch advertisement and publicity material and also the item/gift to be given under the promotion scheme and for the purpose of transport charges these are all weight together. Sometimes there are only advertisement and publicity goods and sometimes both advertisement goods as well as gifts are sent under the promotion scheme. The

transporter is not concerned what is being dispatched, they are concerned with the number of cartons/packages and the weight and accordingly they mentioned the gross weight of the GR. Further during the season of fruits they also dispatch alongwith the finished goods packages of seasonal fruits like mango, watermelon etc., to their purchasers/distributors. The learned counsel further urges that in view of cogent explanation given here at the initial stages of investigation, the adverse view drawn with respect to a few instances where the difference in weight is significant like 100Kg, 400Kg, 1000Kg, no adverse view was required to be drawn. Moreover in view of the support of this contention at the buyers end and also moreover it is worthwhile to take note that the number of cartons and bags of finished goods as per invoice have always found to be tallying with the corresponding GR. Accordingly, prays for deletion of this demand of Rs.3,96,460/-.

13. As regards the demand of Rs.6,00,640/- on the basis of Page No.40 in the diary seized whereas it is mentioned milk and some amounts have been shown against each month for the year January, 2002 December 2002 totalling Rs.18,01,921/-; the learned counsel points out that the said page of the

notebook/diary is in the handwriting of Shri Chandra Prakash Agarwal father of Shri Laxmi Narain Agarwal. That no explanations have been sought regarding the said page and its contents from Shri Chandra Prakash Agarwal in spite of his statement having been recorded by the Revenue. He further draws attention of the Tribunal to the allegation in the SCN at Para-6.10 wherein it is stated that the said diary was recovered and seized from the car of Shri Chandra Prakash Agarwal at the time of search of factory premises of the appellant as reflected at SI. No.8 of Annexure A to the Panchnama. It appeared to Revenue that this page showing the heading is milk and certain amounts against each month are appeared to be month wise payment received against clandestine sale of the finished product without payment of duty. It is further alleged that Shri Laxmi Narain Agarwal was confronted with the said page of the said diary and in his statement he *inter-alia* stated that he ascertained from his father Shri Chandra Prakash Agarwal this account 'titling milk', was the amount of clandestine sale of the finished goods by the appellant firm in the nearby places. That it appeared to Revenue that milk was the codeword used for accounting the clandestine removal of goods valued at Rs.18.01 lakhs.

The learned counsel further points out that it is recorded in the impugned order by the learned Commissioner that immediately after two days on 10th of November, 2001 Shri Laxmi Narain Agarwal retracted his statement as a same having been obtained under coercion from him by the Revenue officers. A copy of the said retraction dated 10th of November, 2011 have been placed in the appeal paper book as Annexure 11 wherein it is categorically stated that he is not aware for what purpose Shri Chandra Prakash Agarwal made those entries. The said retraction was made by way of an affidavit sworn before the Notary Public. However the learned Commissioner treating their retraction statement as an afterthought did not rely on the same observing that appellant have failed to produce any convincing reply/clinching evidence in support of their contention that the figure relates to transaction of milk. Further taking note that the partners of the appellant had also made an alternative submission that the said amount may be treated as cum-duty price has got force and is more acceptable. And accordingly giving the benefit of cum-duty price confirmed the demand of duty at Rs.6,00,640/-, thus deleting the amount of Rs.3,22,320/- as originally proposed.

14. The learned counsel further states that without

examination of the author of the said page Shri Chandra Prakash Agarwal and further without there being any corroborative evidence of the figures noted on the said page, the drawing of adverse inference is only presumptive and based on surmises having no legs to stand. Accordingly prays for setting aside the said demand in the interest of Justice.

15. As regards the demand of Rs.2,39,574/- based on the basis of a loose paper wherein some transaction appeared to have been written without any date, the learned counsel urges that Shri Chandra Prakash Agarwal father of Shri Laxmi Narain Agarwal was confronted with the said paper in his statement recorded on 8th June, 2001 wherein he stated that these are rough calculation and which are not for purchase or sale of tobacco. On being so satisfied, Revenue did not make any further enquiry with respect to said loose paper. The Revenue had picked up 3 items from the said loose paper wherein amount of the tobacco written being Rs.3,47,702/- + Rs.2,10,293/- + Rs.80,869/- totaling to Rs.6,38,864/-. That there is no investigation as to whether entries relate to the purchase or sale; whether for raw tobacco or finished/manufactured tobacco. The Learned counsel further states that there is no duty on

raw tobacco. Further in view of lack of appropriate investigation in view of the said page and there being no corroborative evidence available; the adverse inference drawn and demand of duty on the same is bad and fit to be set aside. Further there is no confession of any of the partners of the firm that these said amounts relates to any clandestine purchase/sale. Accordingly, prays for setting aside the demand of Rs.2,39,574/-. The learned counsel in support of this contention have relied on the following decision:- CCE, Kolkata-III vs. Loknath Prasad Gupta 2009 (245) E.L.T. 211, wherein Division Bench of the Tribunal have held that on account of weight difference in the invoices and in consignment note, no adverse inference can be drawn when the consignment note prepared by the transporter contains weight of packaging material as well as gift articles supplied to dealers/customers and there was correlation by the customer/dealers regarding the fact of receipt of gift articles, the demand on account of difference of weight was held to be not sustainable.

16. Portland Cement India Ltd., vs. CCE 2015 (326) E.L.T. 304 (Tri.-Del.), wherein also some loose papers resumed from the factory premises without bearing name of factory and description of goods. It was held that slips

are not sufficient to establish charge of clandestine manufacture and clearance of goods. Though some of the persons name was there on the slips but none of the persons brought on record to establish the fact that such pertain to the transaction of the assessee. In absence of proper investigation conducted from related persons to the said transaction, the charge of clandestine removal is not tenable mainly on the basis of confessional statement of director without there being any corroborative evidence.

Shree Nakoda Ispat Ltd. vs. CCE 2017 (348) E.L.T. 313 (Tri.-Del.), wherein some photocopies of invoices were recovered which were recovered from the factory premises and there being no reference to the source of such photocopies and further not produced for verification/comparison, neither there being any confirmation from buyers regarding receipt of goods, it was held that there is no evidentiary value of such documents under Section 63 of Evidence Act, 1872. It was further observed that there is no name and identity of the person preparing such sheets nor the name of appellant is mentioned on such sheets in absence of any corroborative evidence, the allegation of clandestine removal is not sustainable on the basis of suspicion alone.

17. The learned A.R. for Revenue have relied upon the impugned order.

18. Having considered the rival contentions, I find that demand on account of differences of weight is bad as the appellant and its partners have given cogent explanation during investigation regarding difference of material weight in any consignment being on account of dispatch of advertisement and publicity material at times and also the gifts to be given under the 'Sales Promotion Scheme'. I also find that the said fact has been corroborated by the buyer(s) of the appellant in the further investigation made by Revenue, particularly Shri Nagar Mal Pusp Raj, Tezpur, Assam. Thus I hold that the said demand is only presumptive and as such is fit to be set aside. I also take notice that the number of packages of finished goods have been found to be exactly same in the GR note with the corresponding invoices.

19. As regards the demand of Rs.6,00,640/- based on the Page No.40 in the diary/notebook seized from the car of Shri Chandra Prakash Agarwal, I find that investigation done by Revenue was not adequate, as no enquiry have been made regarding the said entries by the author of the said entry Shri Chandra Prakash Agarwal.

Further in respect of those entries Shri Laxmi Narain Agarwal had retracted his statement, immediately within two days, categorically alleging that his statement on 8th of November, 2001 was recorded under coercion/or pressure by the officers. He had categorically stated that the exact nature of such entries can be explained by the author of the said entries. I find that Revenue have not made any further investigation and enquiry from the author of the entry Shri Chandra Prakash Agarwal. Thus, I find this demand to be simply presumptive in nature without any cogent evidence brought on record. Accordingly, I set aside this demand of Rs.6,00,640/-.

20. As regards the demand of Rs.2,39,574/- on the basis of loose sheet recovered from the factory premises, I find that a cogent explanation was given during the investigation particularly the statement recorded of Shri Chandra Prakash Agarwal, wherein he stated that these are rough calculations in relation to purchase and sale of tobacco etc. Further it has come on record that the appellants purchase raw tobacco which is not dutiable. Revenue has not made any enquiry as to the nature of such entries, as to its period and as to which party with whom such transactions were entered. From perusal of the said page available on the appeal paper book, I find

that there are no dates, only amount and account had been mentioned against the amount. Accordingly, I find that the demand is simply presumptive and un-substantiated. Accordingly, I hold that the said loose paper/sheet does not lead to any evidence of procuring any dutiable inputs and/or clearance of any taxable outputs, save and except presumptions of the Revenue. Further, I find that the Department has failed to adduce any corroborative evidence in support of the charge of clandestine removal. Accordingly, I set aside the said demand of Rs.2,39,574/-.

21. So far penalty under Section 11AC is concerned, I find that the total demand confirmed by the learned Commissioner is Rs.17,53,634/-. The appellant had submitted in writing that per the GR, said invoices relate to preceding years and they are unable to reconcile them fully, in order to purchase peace they have surrendered and/or not contested the said demand of Rs.5,16,960/-. Accordingly, I find that the demand is confirmed/and or not contested, is not by way of any active clandestine removal found on the part of the appellant, but was rather surrendered by the appellant for lack of reconciliation of GRs, invoices, for whatever reason including clerical reasons.

22. Thus the balance contested demand of Rs.12,36,674/- stands deleted and set aside by this Tribunal. In this view of the matter, I hold that the penalty under Section 11AC is not imposable and accordingly, I set aside the same. So far the penalty under Rule 52-A of CER, 1944 is concerned. I find that the said penalty is imposed for alleged violation, as defined under Section 11AC of the Act. Accordingly, I set aside the said penalty under Rule 52-A of the Central Excise Rules, 1944.

23. Accordingly the appeal is allowed and the impugned order is set aside to the extent of the demand of Rs.12,36,674/- and penalties thereon other words demand of Rs.5,16,960/- only stands confirmed entire penalties under Section 11AC and Rule 52-A of the Central Excise Rules, 1944 are set aside. The appellant shall be entitled for consequential benefits, in accordance with law.

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24. In this appeal of J.M. Agarwal Tobacco Company Pvt. Ltd., learned Commissioner has confirmed demand of Rs.10,02,393/- and has imposed equal penalty. Appellants are contesting demand of Rs.2,60,385/- and not contesting demand of Rs.7,42,008/-. The only issue

with regard to demand of Rs.2,60,385/- is regarding confirmation of duty demand on account of difference in weight as per the GR note and the corresponding invoice. The facts herein are also similar that the number of finished goods packages in bags and cartons were found to be tallying in consignment notes and invoices. Accordingly in view of my finding hereinabove, I set aside this demand of Rs.2,60,385/- along with the penalty under Section 11AC and also the penalty under Rule 52-A of the Central Excise Rules, 1944. Similarly herein also, I find that the appellant had surrendered and not contested the demand of Rs.7,42,008/- at the adjudication stage for want of reconciliation mainly due to clerical errors and further the transactions being related to previous years. Thus in view of the admitted demand, no penalty is attracted under Section 11AC on the same.

25. Thus both the appeals are allowed as indicated hereinabove.

(Dictated & Pronounced in Court)

Sd/-
(Anil Choudhary)
Member (Judicial)

Lks