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

APPEAL Nos.E/2606-2607/2012-EX[DB]

(Arising out of Order-in-Appeal No. 180-CE/APPL/KNP/2012 dated 24/05/2012 passed by Commissioner of Central Excise & Customs (Appeals), Kanpur)

Commissioner of Central Excise, Kanpur **Appellant**

Vs.

M/s Aditya Flexi Pack &

Shri Raman Tandon Partner **Respondents**

Appearance:

Shri Mohammad Altaf, Assistant Commissioner (AR) for Appellant
Shri Vaibhav Dixit, Advocate for Respondents

CORAM:

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

Date of Hearing : 22/05/2018
Date of Decision : 22/05/2018

FINAL ORDER NOs-71009-71010/2018

Per: Archana Wadhwa

Being aggrieved with the order passed by Commissioner, revenue has filed the present appeals. We have heard Shri Mohammad Altaf, Assistant Commissioner (AR) for revenue and Shri Vaibhav Dixit, Advocate for respondents.

2. As per facts on record, the appellants are engaged in the manufacture of Branded Laminated Poly Rolls and pouches, etc. Officers of DGCEI searched the premises of three manufacturers of LD film, which is the raw material for the present respondents and based upon the recovery of alleged

loose slips entertained a view that the said three raw material manufacturers have supplied the LD film to the respondent, who have utilized the same for manufacture of their final product, without reflecting the same into statutory records and have cleared their final products without payment of duty. Statements of the representative of the three raw material suppliers were recorded, admitting the fact that LD film in question were manufactured and cleared by them without payment of duty, to the present respondents. The statement of Managing Director of respondent's firm was also recorded wherein he admitted, having placed orders for supply of LD film in question but showed his inability to comment upon the same.

3. Based upon the above evidences, revenue issued a show cause notice to the respondent alleging clandestine manufacture and clearance of the goods and proposing to confirm the duty to the tune of Rs.14,27,158/-. The notice culminated into impugned order passed by the original authority, confirming the demand along with confirmation of interest and imposition of penalty of identical amount.

4. On appeal, Commissioner (Appeals) observed that apart from the recovery of loose slips from the premises of 3rd party read with the statements of their representatives and the statements of the respondent's Managing Director, the revenue has not produced any other concrete evidence to

show removal of final products from the respondent's factory. He also scrutinized the statement of the Managing Director of the company and arrived at a finding that there is no admission of clandestine removal by him and he has simplicitor accepted that he had placed order for purchase of LD film from the said manufacturers. Accordingly, he by observing as under, set aside the order of lower authority:-

> *"On analyzing the cited part of the statement, I am of the opinion that the averment made cannot be held as admission of clandestine removal. The wordings used in the statement only create suspicion which cannot take place of the evidence. Further, in the impugned case no unaccounted for raw-material has been recovered; no manufacture and clearance in clandestine manner without genuine invoice; none-rebuttal of the fact that LD films cannot be used in the manufacture of the packing material being sold by them; none-existence of the other inputs which are essential for the manufacture of packaging material; absence of flow back or receipt of any amount in clandestine manner; are the circumstance which separates the instant case from the cases relied upon by the department. Under the circumstances I am of the opinion that the cases relied upon by the department are not applicable in the instant case. Further, on analyzing the findings recorded by the adjudicating authority I am of the opinion that burden of proof has not been discharged by the department. Further, I also take cognizance of the arguments and citations relied by the respondent."*

Hence, the present appeal by the revenue.

5. The revenue in their memo of appeal had again reiterated the reasons as reflected in the show cause notice, praying for setting aside the impugned order of Commissioner (Appeals). However, we find that they have not referred to and/or produced any additional evidence on record to reflect upon the clandestine activities.

6. Undisputedly, the revenue's case is based upon the recovery of some loose slips from the 3rd party premises. It is well settled law that allegations and findings of clandestine removal are required to be based upon positive evidences produced by the revenue. There is admittedly no such evidence available on record which could show that there was unaccounted production and clearance of final products. The Hon'ble Supreme Court in the case of Commissioner Vs Vishwa Traders Pvt. Ltd. reported at 2014 (303) ELT A24 (SC) have upheld the order of the Hon'ble Gujarat High Court reported at 2013 (287) ELT 243 (Guj), vide which the order of the Tribunal laying down that in the absence of evidence of unrecorded procurement and use of raw material, the allegation of clandestine removal cannot be upheld. Similarly, the Hon'ble Allahabad High Court in the case of Commissioner Vs Sunil Kumar Gupta reported at 2015 (315) ELT A89 (All.) has rejected the revenues appeal by observing that the demand of clandestine removal cannot be based solely on the statement of Director, without corroborative

evidence. The burden of proof to establish clandestine removal is on the revenue and is required to be discharged effectively. In the present case we note that apart from the confessional statement and the recovery of the loose slips from the premises of 3rd party, there is factually no other evidence to indicate any clandestine activity on the part of the respondents. Accordingly, we find no justifiable reasons to interfere in the impugned orders.

6. In view of the foregoing, both the appeals filed by the revenue are rejected.

(Pronounced in Court)

(Anil G. Shakkarwar)
Member (Technical)

(ArchanaWadhwa)
Member (Judicial)

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