IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

REGIONAL BENCH : ALLAHABAD

COURT No. I

APPEAL Nos.E/70265, 70279-70285, 70305 & 70596-70649/2016-EX[DB]

Sl. No.	Appeal Numbers	Appellants (M/s, Shri or Ms.)	Respondents	Impugned Order Number, date & passed by
1.	E/70265/2016-EX[DB]	Deepak Hinges Pvt. Ltd. Unit-ii	Commissioner of Customs & Central Excise, Noida	Order-in-Appeal No.NOI-EXCUS-001-APP-0215 to 0223-15-16 dated 30.12.2015 passed by CC & CE (Appeals), Noida
2.	E/70279/2016-EX[DB]	Monica Steel Pvt. Ltd.	CCE, Noida	-do-
3.	E/70280/2016-EX[DB]	Deepak Hinges Pvt. Ltd.	CCE, Noida	-do-
4.	E/70281/2016-EX[DB]	Jai Hardware Pvt. Ltd.	CCE, Noida	-do-
5.	E/70282/2016-EX[DB]	Abdul Kadir Khan	CCE, Noida	-do-
6.	E/70283/2016-EX[DB]	Door devices Manufacturing Co. Unit-ii	CCE, Noida	-do-
7.	E/70284/2016-EX[DB]	Garg Industries Unit-ii	CCE, Noida	-do-
8.	E/70285/2016-EX[DB]	D P Garg Exports Pvt. Ltd.	CCE, Noida	-do-
9.	E/70305/2016-EX[DB]	Garg Industries Unit-i	CCE, Noida	-do-
10.	E/70596/2016-EX[DB]	Deepak Hinges Pvt. Ltd.	CCE, Noida	Order-in-Original No.39/Commissioner/ Noida/2015-16 dated 29.01.2016 passed by CC & CE, Noida
11.	E/70597/2016-EX[DB]	Monica Steel Pvt. Ltd.	CCE, Noida	-do-
12.	E/70598/2016-EX[DB]	Giriraj Trading Co.	CCE, Noida	-do-
13.	E/70599/2016-EX[DB]	Saurashtra Roadway Delhi Logistics Pvt. Ltd.	CCE, Noida	-do-
14.	E/70600/2016-EX[DB]	Indian Iron & Agriculture Associated	CCE, Noida	-do-
15.	E/70601/2016-EX[DB]	Subhash Verma	CCE, Noida	-do-
16.	E/70602/2016-EX[DB]	Fateh Chand Rikhab Chand	CCE, Noida	-do-

17.	E/70603/2016-EX[DB]	Ram Lal Chain Industries	CCE, Noida	-do-
18.	E/70604/2016-EX[DB]	Sudershan Sales Corporation	CCE, Noida	-do-
19.	E/70605/2016-EX[DB]	Sher Bahadur	CCE, Noida	-do-
20.	E/70606/2016-EX[DB]	Jai Kishore Singh Manager	CCE, Noida	-do-
21.	E/70607/2016-EX[DB]	Neel Kamal	CCE, Noida	-do-
22.	E/70608/2016-EX[DB]	Vardhman Trading Co.	CCE, Noida	-do-
23.	E/70609/2016-EX[DB]	Malik Trading Co.	CCE, Noida	-do-
24.	E/70610/2016-EX[DB]	Rakesh Kumar Sharma	CCE, Noida	-do-
25.	E/70611/2016-EX[DB]	Doordevices Manufacturing Co.	CCE, Noida	-do-
26.	E/70612/2016-EX[DB]	Kodana Rama Ganesh Hardware Stores	CCE, Noida	-do-
27.	E/70613/2016-EX[DB]	Onkar Fasteners	CCE, Noida	-do-
28.	E/70614/2016-EX[DB]	D.P. Garg Exports Pvt. Ltd.	CCE, Noida	-do-
29.	E/70615/2016-EX[DB]	Tara Chand Jagdish Chand	CCE, Noida	-do-
30.	E/70616/2016-EX[DB]	Krishan Dev Shukla	CCE, Noida	-do-
31.	E/70617/2016-EX[DB]	Deepak Hinges Pvt. Ltd. Unit-ii	CCE, Noida	-do-
32.	E/70618/2016-EX[DB]	D.P. Garg & Sons	CCE, Noida	-do-
33.	E/70619/2016-EX[DB]	Ramesh Chand	CCE, Noida	-do-
34.	E/70620/2016-EX[DB]	Prakash Traders	CCE, Noida	-do-
35.	E/70621/2016-EX[DB]	Nagpal Traders	CCE, Noida	-do-
36.	E/70622/2016-EX[DB]	Garg Industries Unit-i	CCE, Noida	-do-
37.	E/70623/2016-EX[DB]	Ganesh Trading Co.	CCE, Noida	-do-
38.	E/70624/2016-EX[DB]	Convieneo Sales Pvt. Ltd.	CCE, Noida	-do-
39.	E/70625/2016-EX[DB]	Niranjan Dass & Co.	CCE, Noida	-do-
40.	E/70626/2016-EX[DB]	Deepak Mishra	CCE, Noida	-do-
41.	E/70627/2016-EX[DB]	Vikas Strips Ltd.	CCE, Noida	-do-

42.	E/70628/2016-EX[DB]	V.P. Garg	CCE, Noida	-do-
43.	E/70629/2016-EX[DB]	Surender Mishra	CCE, Noida	-do-
44.	E/70630/2016-EX[DB]	B.M. Garg	CCE, Noida	-do-
45.	E/70631/2016-EX[DB]	Singhal Sales Corporation	CCE, Noida	-do-
46.	E/70632/2016-EX[DB]	K.K. Nayak	CCE, Noida	-do-
47.	E/70633/2016-EX[DB]	Raj Kumar Goel	CCE, Noida	-do-
48.	E/70634/2016-EX[DB]	Sunil Kumar	CCE, Noida	-do-
49.	E/70635/2016-EX[DB]	Prashant Road Lines	CCE, Noida	-do-
50.	E/70636/2016-EX[DB]	Prahlad Rai & Sons	CCE, Noida	-do-
51.	E/70637/2016-EX[DB]	Adesh Tiwari	CCE, Noida	-do-
52.	E/70638/2016-EX[DB]	Govind Agencies	CCE, Noida	-do-
53.	E/70639/2016-EX[DB]	Rakesh Kumar Tiwari	CCE, Noida	-do-
54.	E/70640/2016-EX[DB]	Agarwal Trading Co.	CCE, Noida	-do-
55.	E/70641/2016-EX[DB]	D.D. Hardware Pvt. Ltd.	CCE, Noida	-do-
56.	E/70642/2016-EX[DB]	Nav Bharat Steel Trading Co.	CCE, Noida	-do-
57.	E/70643/2016-EX[DB]	Lucky Enterprises	CCE, Noida	-do-
58.	E/70644/2016-EX[DB]	G.D. Mittal	CCE, Noida	-do-
59.	E/70645/2016-EX[DB]	Doordevices Manufacturing Co.	CCE, Noida	-do-
60.	E/70646/2016-EX[DB]	Jai Hardware Pvt. Ltd.	CCE, Noida	-do-
61.	E/70647/2016-EX[DB]	Sukhnandan Bros.	CCE, Noida	-do-
62.	E/70648/2016-EX[DB]	R.N. Tripathi	CCE, Noida	-do-
63.	E/70649/2016-EX[DB]	Garg Industries Unit-ii	CCE, Noida	-do-

Appearance:

Shri Rupesh Kumar, Shri Jitin Singhal &
Shri Pravesh Bahuguna, Advocates for Appellants
Shri Rajeev Ranjan, Joint Commissioner (AR), for Respondents

CORAM:

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

Date of Hearing : 06/03/2018
Date of Pronouncement : 07/08/2018

FINAL ORDER NOs-**71846-71908 / 2018**

Per: Anil Choudhary

The aforementioned appeals have been filed by the appellants, challenging the Order-in-Original No.39/Commissioner/ Noida/2015-16 dated 29.01.2016 passed by CC & CE, Noida, confirming duty and penalty jointly and severally along with interest and also against Order-in-Appeal No.NOI-EXCUS-001-APP-0215 to 0223-15-16 dated 30.12.2015 passed by CC & CE (Appeals), Noida, upholding duty, redemption fine and penalty on the appellants. As common facts and circumstances are involved in all the appeals being, the entire case of the Department is that, all the Appellant firms/companies are the dummy units of one Shri B.M. Garg (proprietor of Garg industries), - which have been created to fragment and/or bifurcate the total clearances so as to fall within the exemption limit of SSI benefit. For the sake of convenience we are referring to the facts involved in the case of Deepak Hinges Private Ltd (appeal number E/70265/16). So far as other appeals are concerned the facts are similar and the difference is only of duty and penalty amount and

further the evidence relied upon in all the appeals is more or less the same arising from the same facts and circumstances and the evidences collected in the search of the premises of the appellants on 3/4 July 2013.

2. The appellant Deepak Hinges private Ltd is engaged in the manufacturing of building hardware namely– butt hinges, piano hinges, cut hinges, hinges & gauge, hook & band, boards, et cetera falling under chapter 83 of the Central excise tariff act 1985. The appellant clears its goods either for export under form H or clears in the domestic market, without payment of duty availing the SSI exemption granted under notification number 8/2003 – CE dated 01/03/2003 as amended.

3. The factory premises of the appellant was searched by the C.Ex. Officers on 03/04.07.13 which resulted into issuance of SCN dated 19.07.14 [Period June 2009 – 02.07.13] proposing demand of C.Ex.Duty of Rs.3,72,02,700/- along with interest and penalty. The entire basis of the demand raised in the SCN is certain alleged private records recovered by the department from one premises located at 11/30, 2nd Floor, Ambey Complex, Sharma Market, Harola, Sector-5, Noida which was also searched on 03/04.07.13 and the proceedings were recorded vide Panchnama dated 03/04.07.13 as per which following documents were recovered:

- Annexure '1' – File No. 1, titled in the Panchnama as "File containing Misc. loose papers"
- Annexure '2' – File Nos. 10 & 11,both titled in the Panchnama as "File containing Misc. loose papers
- Annexure '3' & '4'– File No. 12 titled in the Panchnama as "File containing Misc. Invoices/Challans]
- Annexure '5' - Three Note books mentioned at Sl. Nos. 41, 43 & 50 titled in the Panchnama as "Note book containing used pages'. The said pages contained details of the customers. The SCN had taken entire sales made by the said customers (dealers) as purchases from the appellant and other named parties.

4. Relying upon the said Panchnama and statements recorded during investigation, it is the case of the revenue that the recovered documents contained details of clandestine manufacture and clearances made by the appellant as well as other named companies/firms which were created by one Shri B.M. Garg, proprietor of M/s Garg Industries, only to fragment the total clearances so as to fall within the purview of SSI benefit. As the documents recovered were not companywise/firmwise, therefore, for the purpose of quantifying the duty demand individually against the appellant and other named companies/firms, the SCN had relied upon statement dated 29.08.13 of Shri Sh. K.D. Shukla (despatch Supervisor of Deepak Hinges). Further, relying upon the alleged statement of Shri Sunil Kumar – Security Guard dated 27.08.13, it is the case of department that the term 'piece' mentioned in the recovered documents would mean 'box' and the term 'box' would mean 'carton'. Relying

upon the aforesaid, in the SCN demand of Central excise duty from the appellant is calculated in the following manner:

- Annexure '1' – Rs. 15,40,861/- [Period : 2012 – 02.07.13]
- Annexure '2' – Rs. 2,06,52,363/- [Period : 01.10.12 – 02.07.13]
- Annexure '3' – Rs. 5,72,788/- [Period : June 2009 – June 2013]
- Annexure '4' – Rs. 32,76,162/- [Period : June 2009 – June 2013]
- Annexure '5' – Rs. 1,11,60,526/- [Period : June 2009 – June 2013]

Rs. 3,72,02,700/-

5. The said SCN was adjudicated by the ld. CCE, Noida vide impugned OiO dated 29.01.16 confirming the allegations of clandestine manufacture and removal, as alleged in the SCN and, consequently, confirming the entire duty as proposed in the SCN on the appellant along with interest and imposed penalty of equal amount u/s 11AC o f the Act r.w. Rule 25 of C.Ex. Rules. Thus, the present Appeal by the appellant.

6. The appellants, in all the appeals, are represented by Shri Rupesh Kumar, Advocate with Shri Jitin Singhal and Shri Pravesh Bahuguna who have made detailed submissions pointing out infirmities in the evidence relied upon in the show cause notice as well as the error committed by the Commissioner. For the department, we have heard Shri Rajeev Ranjan, Joint Commissioner (AR) who, in response, has reiterated the findings of the Commissioner.

7. The first submission of Mr Rupesh Kumar, Advocate is that the Panchnama proceedings dated 03/04.07.13 of Harola Premises from where the private records, which form basis of entire demand, were recovered, was wholly illegal and against the settled principles of law and, therefore, the Commissioner was not correct in fastening the duty, interest and penal liability on the appellant relying upon the said private records even on the principles of preponderance of probability. While challenging the authenticity of the Panchnama proceedings, it was submitted that the documents recovered thereunder were manipulated and fabricated to falsely implicate the appellant as the appellant does not even have the production capacity to manufacture the quantities on which the demand has been confirmed on the charge of clandestine manufacture and removal. In support, the appellant had relied upon the fact that the Panchnama does not give any description of the documents recovered and, instead uses the expression “file containing misc. loose pages”. The Panchnama does not specifically state who had actually found the documents sought to be relied upon and from where he had found them. The Panchnama simply states that documents pertaining to sale and purchase, manufacture and clearance of goods were found in the room. Moreover, the panchnama is totally silent on the aspect whether the documents recovered were sealed or not,

so as to avoid any manipulation and, in case they were sealed, whether any panchnama proceedings were recorded while de-sealing the said records. Even though the panchanama stated to have recovered the CPU of the computer found in the premises for further investigation and the said CPU was sealed with paper seal containing signatures of panchas, department officers and Shri Shukla however, there is nothing in the SCN as to the manner in which the said seal was broken i.e. whether any panchnama proceedings were carried or not. The appellant, in support, relied upon the decision of this Tribunal in the case of **Kuber Tobacco Products Ltd. v CCE, Delhi** – (2013) 290 ELT 545 (T).

8. We find that this Tribunal in the aforesaid case laid down detailed guidelines to be followed by the officers while preparing Panchnama, in order to verify the truthfulness of the case put forth by the Department and the defence sought to be raised by the persons proceeded against. The said guidelines are reproduced hereunder, for ready reference:

a. The panchnama has to be specific and clear about the location and the description of the premises irrespective of the fact whether it is in the course of criminal investigation or tax evasion investigation. Thus, the panchnama ought to describe the premises

or the location of the premises with reference to the neighbouring surroundings; the interior of the premises; number of accesses available to the premises and whether the premises were accessible or not from any of those accesses before unlocking the rooms. There should be description of the entire building *vis-a-vis* the portion of the building which was allegedly used for impugned activities. The panchnama should also specify the location of the documents alleged to have been found in the premises.

b. The panchnama ought to disclose as to who had found the documents in question and where exactly those documents were located in the said premises. It should clearly state whether the documents were seized by concerned officers as also whether the officers seizing the documents had taken any care to ensure that the documents are properly enclosed in an envelope or some other packing material, so as to avoid the possibility of access to or interference with those documents by any stranger. The panchnama should also disclose the time period during which it is conducted.

c. The panchnama ought to disclose as to from where the keys of the premises were acquired and whether there was only one key or there were more keys. The panchnama should also disclose as to whether after the conclusion of the panchnama proceedings, the premises were closed or possessed by some official. The panchnama should also mention whether there was any person or persons in the premises before entering the premises or after completion of the panchnama proceedings. It should also describe the number and names of the officers who had allegedly conducted the search in the premises and whether the search was conducted in the presence of the panchas and/or any officials.

d. The panchnama ought to disclose the nature of the use to which the premises in question were put to. The investigating agency should establish a link between the concerned premises and the occupants thereof being the persons proceeded against. It should also be disclosed in the panchnama as to whether the premises were at all being used for any purpose or not.

e. It is not enough that the panchnama merely records that the officers on search found certain records and

that the same are described in some Annexure but it must also give the description of the so-called records. It is absolutely necessary to do so in order to give credibility to the panchnama, particularly when the entire proceedings in that regard are sought to be challenged and disputed.

f. It is not sufficient that the Annexure to the panchnama contains a list of documents found but it must give details of the documents stated to have been found in the premises. Thus, in relation to the seizure of documents, it is necessary not only to record that the documents were recovered from the premises but it is also necessary to record a brief description of the exact place where the documents were located in the premises and from where they were seized by the seizing officer. It is further necessary to record as to what steps the seizing officer had taken so as to refrain himself and persons accompanying him from causing any damage to the documents as also to avoid any interpolation or inference in any manner with such documents and contents thereof. It is also necessary to record as to what steps were taken to safeguard the documents and to avoid possibility of any stranger's interference with the seized materials. In other words, when any

document is seized, it is necessary to enclose the same in a cover and to seal such cover so that no other person gets opportunity to interfere with such document.

9. We find force in the submission of the counsel for the appellant. Upon perusing the Panchnama, we find that the same does not give any description of the documents recovered and, instead uses the expression “file containing misc. loose pages” without indicating what the said misc. loose papers are. The Panchnama does not specifically state who had actually found the documents sought to be relied upon and from where he had found them. The Panchnama simply states that documents pertaining to sale and purchase, manufacture and clearance of goods were found in the room. Moreover, there is nothing stated in the panchnama as to whether the documents recovered were sealed or not, so as to avoid any manipulation and, in case they were sealed, whether any panchnama proceedings were recorded while de-sealing the said records. Even though the panchanama stated to have recovered the CPU of the computer found in the premises for further investigation and the said CPU was sealed with paper seal containing signatures of panchas, department officers and Shri Shukla. However, there is nothing in the SCN as to the manner in which the said seal was broken i.e. whether any panchnama

proceedings were carried or not. Under these circumstances, the documents relied upon in the SCN, on the basis of which demand has been confirmed, creates serious doubts.

10. We also find that the Commissioner had accepted the authenticity of the said documents in view of the fact that various persons whose statements were recorded during the course of investigation, had admitted the contents of the said private record. The appellant, in order to establish its defence, has specifically requested in the reply to the SCN that in case the Commissioner wants to rely upon the private record which have been corroborated only by statements recorded during the course of investigation, the authenticity of which the appellant had seriously disputed, opportunity may be given to them to cross examine. We find that the appellant had given the reasons pointing out certain infirmities, as to why the statements could not be relied upon. The appellant had also referred to various statements which shows that during the course of their recording, documents/record which are voluminous and not feasible to verify at one go, were made to affirm. In this regard, while referring to the statement dated 25.10.13 of Shri B.M. Garg, it was pointed out that, as per his statement, he had read and verified the contents of following statements and documents viz., Panchnama dated 3/4.7.2013 drawn at the office premises at Ambey Complex;Statements of Shri Krishan Dev Shukla, Shri Ramesh Chander, and Shri Rakesh Kumar Tiwari, all dated

4.7.2013;File no.1 allegedly containing 659 pages; File no. 12 allegedly containing 253 pages;File No. 10 and 11 allegedly containing 261 and 381 pages respectively; Statements of 11 employees, in total 17 statements; Statements of 20 customers; Statements dated 6.7.2013 and 5.9.2013 of Shri V.P.Garg;Statements dated 27.8.2013 of Shri Sunil Kumar and Shri Adesh Tiwari; Quantification charts (Annexure-1 and 2 to the SCN) for computation of central excise duty proposed to be demanded on the basis of Files nos. 1, 10 and 11;Statement dated 19.7.2013 and 2.8.2013 of Shri Sunil Kumar

11. On the issue of cross-examination, we find that the assessee cannot as a matter of right ask for cross examination and it is only in case the department wants to rely upon the statements that the opportunity to cross-examine needs to be afforded in compliance of the principles of natural justice as held by the Apex Court in the case of Andaman Timber Industries v CCE, Kolkata - 2015 (324) ELT 641 (SC) as well as the Allahabad High Court in the case of CCE v Kurele Pan Products Pvt. Ltd. – 2014 (307) ELT 42 (All). As no opportunity of cross-examine has been given to the appellant, we hold that the Commissioner has committed error in law in relying upon the statements.

12. However, it has been argued on behalf of the department that the case of the department would stand even without the statements also. On the other hand, counsel for the appellant had argued that the entire demand has been confirmed only on assumption and presumption. We agree with the submission of the appellant that it is not humanly possible for a person to verify and confirm such voluminous facts pertaining to five companies and 22 customers for the last four years, without even checking any record of any of the said companies. We are surprised to find that this fact has been accepted by the Commissioner in his order that *"Shri B.M. Garg in the statements have verified the mentioned records only on sample basis and he has not verified each and every entry of records..."* This clearly establishes the point of the appellant, beyond any doubt, that the statements cannot be relied upon, being not voluntary. Similar is the fact regarding all the statements wherein, voluminious documents were stated to have been verified, relying upon which the entire case has been built by the department. Therefore, for this reason also, no reliance can be placed on the statements.

13. We find that the charge of clandestine clearance is a serious charge and the department is required to prove the allegations of clandestine clearance by producing sufficient positive and cogent evidence. In the present case, the case of the department is based upon certain private records which

are seriously disputed by the appellant and, corroborating the same by statements for which the appellant had not been afforded opportunity to rebut. We find that even though the private record relied upon was common but, for the purpose of quantifying the demand on individual appellant, reliance was placed on statement of Shri K.D. Shukla, wherein he had stated to have identified the variety of finished goods manufactured by each company/firm, in the private records recovered during the panchanama dated 03/04.07.13 of Harola Premises. However, the counsel for the appellant had pointed from the record that that the appellant has been manufacturing and clearing the variety of Hinges which, though not indicated in the statement of Shri Shukla, but the statutory invoices recovered by the department from the factory premises of the appellant, clearly shows the manufacture and clearances of such variety. This itself shows that quantification of demand cannot be based relying upon statements and the same is without any basis. There is clear assumption and presumption by the department regarding alleged clandestine activities. In the absence of any positive evidence brought on record by the department except for private record the authenticity of which have been doubted and the statements which we have already held to be not voluntary, the allegations of clandestine clearance cannot be upheld in the present case. On this issue we are guided by the principles laid down by the Apex Court in the case of

Oudh Sugar Mills Ltd. v Union of India, 1978 (2) E.L.T. J172 (S.C.) which has been consistently followed by the Tribunal.

14. Another issue raised in these appeals relates to availability of SSI benefit under Notification No. 8/2003-CE as amended. As all the appellants firms/companies have availed the benefit of SSI exemption except M/s Garg Industries, the SCN had proposed to deny the benefit of the said Notification on grounds viz., use of the brand name "Deepak"/"Maruti"/"BMG" by the appellant which were owned by Shri B.M. Garg; value of all the companies/firms in the present proceedings are liable to be clubbed for the purpose of determining the total value of clearances in terms of Notification No. 8/2003-CE, as Shri B.M. Garg is the person behind all the companies/firms [by lifting corporate veil] having total pervasive financial control and management control over them. Reliance was also placed on earlier SCN dated 20.02.08 r.w. addendum dated 16.09.11, which was confirmed against the appellants by OIO dated 31.03.13.

15. It is submitted by the appellant that to deny the SSI exemption benefit on the ground of use of brand name belonging to some other person, the onus is on the department to establish as to who is the other person who owned the brand name. The appellant has placed reliance on various decisions viz., CCE, Ahmedabad-II Vs. Gujarat

Healthcare, 2010 (259) ELT 140 (Tri), Ample Industries Vs CCE, Rajkot, 2007 (218) ELT 456 (Tri), Hukum Aqua Minerals (P) Ltd. Vs. CCE, Banglore, 2006 (195) ELT 289 (Tri) and CCE, Visakhapatnam Vs. Balaji Electrodes (P) Ltd, 2005 (191) ELT 204.

16. We find from the records that since beginning, it is the stand of all the appellants that neither of them nor Shri B.M. Garg or any other individual are owner of the brand names in issue. Shri Adesh Tiwari- Manager of Deepak Hinges, had also confirmed this fact in his statement dated 25.06.14. Nothing has been brought on record by the department to establish that the said brand names belonged to any "other person". Thus, SSI benefit cannot be denied to the appellant(s) on the ground of using the brand name of other person, in view of settled position of law, as relied upon by the appellant.

17. On the issue of clubbing of clearances, it has been held by the Commissioner that all the companies including the appellant were only a façade created by Shri B.M. Garg, just to avail unauthorized SSI benefit. Reliance is also placed on the SCN dated 20.02.08 r.w. addendum dated 16.09.11 which was affirmed vide OiO No. 73-81/Commissioner/Noida/2012-13 dated 31.03.13. However, the facts of the case does not warrant clubbing of clearances of all the units as we find that the Commissioner has confirmed the demand jointly as well

as severally on each of the companies/firms thus accepting their separate and independent identity, as held by this Tribunal in the case of Punjab General Manufacturing Works Vs. CCE, Lucknow, 2017-TIOL-1837-CESTAT-ALL, and in the case of Bentex Industries v CCE, New Delhi – 2003 (151) ELT 695 (T) affirmed by the Apex Court reported in 2004 (173) ELT A79 (SC). Further, the issue is also covered by the decision of the Allahabad High Court in the case of CCE, Noida-I versus M/s Garg Industries – C. Ex. Appeal No. 281 of 2015 decided vide order dated 06.11.15 pertaining to parties before us wherein it has been held, under identical facts, that merely because Shri B.M.Garg is the person behind all the companies/firms, including the appellant, cannot be a ground to club the clearances of all the companies/firms in question and further held that merely because the proprietor of Garg Industries has interest in the other six units (Pvt. Ltd. Companies) does not entitle the department to club all the shares of the assessee in other units. Further, the earlier OiO dated 31.03.13 has already been set aside by this Tribunal vide Final Order dated 71748-71756/2017-Ex (DB) dated 8.6.2017, reported as 2018-TIOL-651-CESTAT-ALL.

18. For the purpose of denying SSI benefit, the Commissioner has relied upon para 2(v) of Notification No. 8/2003-CE which refers to 'manufacturer clearing specified goods from one or more factories'. However, we find that for

the applicability of this para, the Commissioner should have decided as to who the 'manufacturer' is, who is having one or more factories. However, the fact is that, the Commissioner has confirmed demand against individual (assesses)/appellants, which would only mean accepting the identity of individual (assessee) or each appellant as manufacturer because under section 3 of the Central Excise Act, 1944, central excise duty is payable by manufacturer. Our view also gets support from the decision of the Apex Court in the case of Asstt. Collector of C.Ex. & Cus & Ors v Shri J.C. Shah &Ors – 1978 ELT (J317).

19. Now we deal with the demand of duty confirmed by the Commissioner annexure-wise:

(a) Duty Demand in terms of Annexure -5 is based on the sales invoices of customers/dealers. The Commissioner has relied upon the statements of 22 dealers wherein they have admitted that they have purchased goods clandestinely from the various companies/firms of Shri B.M.Garg including the appellant herein. Relying upon statements of these dealers and the sale invoices produced by the said customers during the course of recording of the statements, it has been held by Commissioner against the appellant that they have made unaccounted sales of finished goods to the said customers and on such

unaccounted sales, duty has been confirmed on the basis of sale invoices of the customers, quantified against each company/firm on the basis of statement dated 29.08.13 of Shri K.D.Shukla.

We note that though reliance has been placed on 22 dealers statements, but duty has been demanded only on the sales invoices of 12 customers. Nothing has been stated either in the SCN or in the OiO regarding the remaining 10 dealers. We further note that the customers/dealers in their respective replies had clearly stated that they are dealing with the goods of other manufacturers also and during the period covered under the SCN, they had sold goods manufactured by other manufacturers as well. In fact, the said dealers have specifically given the names and addresses of manufacturers whose goods they were dealing in during the relevant period. However, no inquiry was conducted from any of the named manufactures. Nothing has been brought on record by the department to establish that during the relevant period, the said dealers were dealing only with the goods of the appellants and no other goods. In the absence of any such evidence, we hold that the demand based on Annexure '5' cannot be confirmed merely on assumption and presumption.

(b) Duty Demand in terms of Annexure '4' is calculated on the basis of clearances made by M/s D.P. Garg & Sons. The basis of Annexure'4' is File No. 12 – private record, recovered from the Harola premises (office) during the course of search proceedings recorded in Panchnama dated 03/04.07.13. The Commissioner held that File No. 12 contained invoices of M/s D.P. Garg & Sons on which clearances were shown to have been done, whereas actually the goods were manufactured and cleared by the named companies/firms including the appellant. Quantification of each company/firm including the appellant has been done relying upon statement of Shri K.D. Shukla.

However, it is admitted position that goods relating to Annexure 4 were cleared on the invoices which is a statutory document. We find that the said invoices clearly bore the name of the buyers. However, no inquiries were conducted with any of the buyers stated in the said invoices. When the person stated to have received the goods, were not examined, we are surprised as to how the private records could be relevant when compared with the statutory invoices. The Commissioner has not stated anything on this vital aspect. In the absence of any inquiry with the buyers, we hold that the demand is not sustainable.

(c) Duty Demand in terms of Annexure '3'which is calculated on the basis of clearances made by M/s Convieneo Sales.

This demand also, admittedly, is on the basis of statutory invoices issued by M/s Convieneo Sales which clearly reflected the name of the buyers. In the absence of any inquiry with the buyers, we hold that the demand is not sustainable. Further, M/s Convieneo Sales is engaged in the manufacture and sale of hinges etc. which is clear from their balance sheets wherein they have shown sales of hinges and also shown the balance stock at the end of the respective year. Thus, the finding of the Commissioner that the said firm is not engaged in the manufacture of hinges and, therefore, hinges cleared on the invoices of M/s Convieneo Sales were the clearance of these firm/companies is unsustainable in law.

(d) Duty Demand in terms of Annexure '2' calculated on the basis of entries shown in File Nos. 10 & 11i.e private record. The Commissioner has held that File Nos. 10 & 11 is gate register of the appellant, maintained at the factory gate, which contained entries relating to receipt of raw material and clearances of

finished goods from appellant's factory by relying upon the statement dated of Sunil Kumar – Security Guard.

We have already held that no duty could be demanded and confirmed upon the appellant on the alleged File Nos. 10 & 11 due to serious infirmities pointed out in the panchnama dated 03/04.07.13. We have also perused File No. 11, at page no. 372 it is stated that UP16T5570 was used to transport 261 Boxes of Hinges from the appellant. Now as per the Commissioner, relying upon the statement of Sunil Kumar (employee-security guard), the boxes must be treated as cartons. To test the authenticity of the said document vis a vis the case of the department, we find that as per department's case, through Truck No. UP16-T-5570, 261 cartons of hinges were transported from the appellant which would mean a total of 10,440 kgs of Hinges were transported. However, the appellant has placed on record 'Form 47' of the Transport department of UP, as per which the Gross Vehicle Weight i.e. the maximum weight the said vehicle can carry is 7490 kgs only. Thus, it was not even possible to transport 10,440 kgs of hinges. This further gives strength to the stand of the appellant that the private records are not genuine and do not show clearances as alleged.

(e) Duty Demand in terms of Annexure '1' has been calculated on the basis of entries shown in File No.

1.Even though the Annexure 1 of the SCN had taken the entries relating to appellant as 'nil', however, still demand was proposed and confirmed against the appellant which, therefore, is not sustainable.

20. We find that all the units are entitled to get benefit of SSI notification in view of the discussions made in preceding paragraphs, therefore, there is no requirement to maintain statutory records. Once, they are not entitled to maintain statutory records, the allegation that goods were found in short and/or excess, is legally not sustainable and liable to be set aside. We further find that learned Commissioner (Appeals) has also relied upon various statements, but no opportunity of cross-examine has been given to the appellant. Therefore, we hold that the Commissioner (Appeals) has committed error in law in relying upon the statements. Therefore, consequently, Order-in-appeal passed by the learned Commissioner (Appeals) upholding duty, redemption fine and penalty on appellants are set aside.

21. In view of the above, all appeals are allowed with consequential relief to the appellants.

(Pronounced in Court on-07/08/2018)

(Anil G. Shakkarwar)
Member (Technical)

(Anil Choudhary)
Member (Judicial)

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