IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

REGIONAL BENCH : ALLAHABAD

COURT No. I

APPEAL Nos.E/139,305,306,307,308,309/2009-EX[DB]
& E/1631/1632/2008-EX[DB]

S.No	APPEAL No.	APPELLANT	RESPONDENT	IMPUGNED ORDER No. & DATE
1	E/139/2009	C.C.E. & S.T.-KANPUR	Shiva Poly Plast Pvt. Ltd.	350-354-CE-APPL-KNP-2008 Dated 30.09.2008 Passed by Commissioner (Appeals), Customs & Central Excise, Kanpur
2	E/305/2009	Shiva Poly Plast Pvt. Ltd.	C.C.E. & S.T.-KANPUR	350-354-CE-APPL-KNP-2008 Dated 30.09.2008 Passed by Commissioner (Appeals), Customs & Central Excise, Kanpur
3	E/306/2009	Grover Agency	C.C.E. & S.T.-KANPUR	350-354-CE-APPL-KNP-2008 Dated 30.09.2008 Passed by Commissioner (Appeals), Customs & Central Excise, Kanpur
4	E/307/2009	Jain Plastic Agency	C.C.E. & S.T.-KANPUR	350-354-CE-APPL-KNP-2008 Dated 30.09.2008 Passed by Commissioner

				(Appeals), Customs & Central Excise, Kanpur
5	E/308/2009	Shri Satya Prakash Gupta, Director	C.C.E. & S.T.-KANPUR	350-354-CE-APPL-KNP-2008 Dated 30.09.2008 Passed by Commissioner (Appeals), Customs & Central Excise, Kanpur
6	E/309/2009	Jain Furniture	C.C.E. & S.T.-KANPUR	350-354-CE-APPL-KNP-2008 Dated 30.09.2008 Passed by Commissioner (Appeals), Customs & Central Excise, Kanpur
7	E/1631/2008	Shiva Poly Plast Pvt. Ltd.	C.C.E. & S.T.-KANPUR	02-COMMR-2008 Dated 29.04.2008 Passed by Commissioner, Central Excise, Kanpur
8	E/1632/2008	Shri Satya Prakash Gupta, Director	C.C.E. & S.T.-KANPUR	02-COMMR-2008 Dated 29.04.2008 Passed by Commissioner, Central Excise, Kanpur

Appearance:

Shri A.K. Prasad (Adv) for Assessee
Shri Rajeev Ranjan, Additional Commissioner (AR), for Revenue

CORAM:

Hon'ble Mrs. Archana Wadhwa, Member (Judicial)
Hon'ble Mr. Anil G. Shakkarwar, Member (Technical)

Date of Hearing : 01/08/2018
Date of Decision : 01/08/2018

FINAL ORDER NO.71931-71938/2018

Per: Archana Wadhwa

All the appeals filed by the assesses including the appeal of the Revenue are being disposed of by a common order as they arise out of same set of facts and circumstances.

2. After hearing both the sides, we find that the appellant M/s Shiva Poly Plast Pvt. Ltd. is engaged in the manufacture of moulded plastic furniture, household goods falling under Chapter 39 of the 1st schedule to the Central Excise Tariff Act, 1985. Their factory was visited by the Central Excise officers on 17.06.2006, who conducted various searches and verifications. Simultaneous searches were also conducted at the dealer's premises, transporters, godown as also at the residential premises of the concerned persons.

3. As a result of searches, the Revenue found some stocks at the premises of the dealers being M/s Grover Agency, M/s Jain Furniture & M/s Jain Plastic Agency

for which the said dealers could not produce the Central Excise invoices. Revenue entertained a view that the said goods found at the dealers premises stand cleared by M/s Shiva Poly Plast Pvt. Ltd. without payment of duty and accordingly, the same were seized.

The searches conducted at the manufacturing premises resulted in excess of the finished goods as also in the excess of raw material. Further, certain shortages were also detected and two spiral notebooks were also recovered from their premises. By entertaining a view that the said appellant was indulging in clandestine activities, further investigations were made and statements of various persons including the appellant's Director, discharge clerk and various representatives of some of the dealers were recorded. Based upon the same a view was entertained that the appellant had indulged into clandestine removal during the period 2005-06 and 2006-07 to the extent of finished goods worth Rs.3.88 crores approx involving duty of around 60.38 lakhs.

4. In the above background, show cause notice dated 26.07.2007 was issued demanding duty of Rs.60,38,271/- from M/s Shiva Polyplast Pvt. Ltd. along with proposal to impose penalties on the said unit as also on their Director. A separate show cause notice dated

13.04.2007 was issued demanding duty of Rs.2,16,926/- in respect of goods seized from the dealer's premises along with proposal to confiscate the goods.

5. The said two show cause notices were contested by the appellants. It is seen that in respect of the main notice proposing confirmation of demand of duty of Rs.60.38 lakhs approx, the appellant made a request to cross-examine the number of witnesses including the deponent of various statements. During the course of cross-examination the deponents retracted from their statements and all the dealers denied having purchased any goods from the manufacturer without duty paid invoices. As regards the spiral notebook, the director of the company contented that the statement given by him was retracted at the first available opportunity by not only lodging Police complaint but also by sending affidavits to DGCEI, New Delhi by registered post. He also clarified that the said private record relates to sale projections and in most cases sales targets are to be met by the dealers. He denied that the figures in the said private records related to clandestine clearances. It was also deposed by him that in some cases the sales shown in the sales record is even less than the recorded clearances during the relevant years. Similarly, the

demand raised in respect of the loose slip was contented that if the goods mentioned there in were contested by submitting that the goods mentioned therein were either cleared under the invoices or the orders mentioned there in were subsequently withdrawn or not implemented or were modified.

6. The proposals made in the show cause notice stand confirmed by the Commissioner vide his impugned order and the duty demands in respect of the dealer's premises were confirmed by the Original Adjudicating Authority and upheld by Commissioner (Appeals) except to the extent of valuation adopted by him, with which Revenue is aggrieved and has filed the present appeal.

7. As regards the confirmation of demand of duty and the allegations of clandestine removal, we note that the same are solely based upon the entries made in the spiral diary recovered from the appellant's premises during the raid read with the statements recorded during the course of investigation. The statement of Shri Satya Prakash Gupta director of the manufacturing unit stands retracted by him immediately after the recording, by lodging police complain and as also by representing to the DGCEI, New Delhi. Even during the course of cross-examination the said deponent again retracted the

statement and submitted that no clandestine activity stands done by them.

As the entire case of the Revenue is based upon the entries made in the said diary as also the 18 loose slips without their being any other evidence on record, it is difficult for us to accept the findings of clandestine removal.

8. The appellants had disclosed the names of the raw material suppliers but the Revenue has not contacted any of them except one M/s P. P. Polyplast. The said supplier also did not support the Revenues case and stated during cross-examination that they did not know M/s Shiva Polyplast. The appellants have stated that the entries made in the said records were relating to sale projections and the targets required to be met by the dealers and there is virtually no evidence establishing that the difference between the projected figures shown in these private records and were cleared without payment of duty to the dealers resulting in clandestine clearance. Similarly, in respect of 18 loose slips recovered from the premises, they have contented that though the said slips contains name of the persons but nobody was contacted by the Revenue so as to confirm the receipt of the non-duty paid goods.

9. We find that the allegations are of clandestine removal in respect of huge quantum of the final products having been manufactured by the appellant to the extent of around 3.88 crores approx., which require a lot of raw material, their actual manufactured in the assessee's factory in a clandestine manner, transportation of the same, buyers who have purchased it and the receipt of consideration by the appellant from their buyers. There is virtually no evidence produced by the Revenue as regards procurement of such a huge raw material or identification of transporters or buyers. The entire case stand made out on the basis of the entries made in the said private notebook without their being any corroborative evidences. It is well settled law that the allegations of clandestine removal are required to be established by production of sufficient and positive evidences, the onus for which lies heavily upon the Revenue. Even though the names of the dealers or the buyers along with the names of the raw material suppliers were available in the said diary but no efforts have been made by the Revenue to approach them and record their statements. It is also noticed that the statement of only 3-4 dealers stand recorded out of 29 dealers and the result of the same stand applied in

respect of all the dealers. Even the said statements of the dealers stand retracted during the course of cross-examination conducted before the Adjudicating Authority, though no examination-in-chief was conducted thus making the said statements as inadmissible as held by the Hon'ble Punjab and Haryana High Court in the case of Jindal Drugs Pvt. Ltd. V/s Union of India reported as 2016 (340) E.L.T. 67 (P & H), as also in the case of Commissioner of Central Excise, Delhi-I V/s Kuber Tobacco India Ltd. Reported as 2016 (338) E.L.T. 113 (Tri.- Del.), upheld by the Hon'ble Punjab & Haryana High Court.

10. Otherwise also we note that the demand cannot be confirmed on the basis of the entries made in rough documents without there being any corroborative evidence. The Hon'ble Gujarat High Court in the case of Commissioner of Central Excise V/s Saakeen Alloys Pvt. Ltd. reported as 2014 (308) E.L.T. 655 (Guj.) has held that in case of clandestine removal of excisable goods there needs to be a positive evidence for establishing the evasion and in the absence of any evidence reflecting upon the purchase of excessive raw material, excess consumption of resources etc. and the confessional statement having been retracted, there cannot be any

cogent statement to sustain the allegation of clandestine removal. The Hon'ble High Court also observed that confessional statements cannot form foundation for levying for Excise duty, much less retracted statement. The said decision of the Hon'ble Gujarat High Court stands upheld by the Hon'ble Supreme Court when the appeal filed by the Revenue was rejected reported as Commissioner of Central Excise V/s Saakeen Alloys Pvt. Ltd. 2015 (319) E.L.T. A117 (S.C)

11. Further the Hon'ble Allahabad High Court in the case of Continental Cement Company V/s Union of India reported at 2014 (309) E.L.T. 411(All.) has held that clinching evidence is required as regards the purchase of raw material, use of extra electricity, sale of final products, transportation, payment, the mode and flow back of funds etc. and demands cannot be confirmed based on presumptions and assumptions. The Hon'ble High Court further observed that the charges of clandestine removal is a serious charge required to be proved by the Revenue by the tangible and sufficient evidences and mere statement of buyers based on their memories was insufficient without support of any corroborative documentary evidences. To the same effect is another decision of the Hon'ble Allahabad High Court

in the case of Triveni Engineering & Industries Ltd. V/s Commissioner of Central Excise, Allahabad reported at 2016 (334) E.L.T. 595 (All.)

Tribunal in the case of T.G.L Poshak Corporation V/s Commissioner of Central Excise, Hydrabad reported as 2002 (140) E.L.T. 187 (Tri.-Chennai) has held that charge of clandestine removal based on notebooks maintained by the employees or accountant is not sustainable unless supported by corroborative evidences with regard to purchase of raw material, manufacture of final goods, flow back of money etc. The list is unending and as the issue is settled, there is no further requirement to refer to more decisions.

By applying the ratio of the above decisions to the facts of the present case we note that the demand of Rs.59,83,693/- is based solely upon the entries made in the spiral notebook and 18 loose slips, without there being any corroborative evidences and is thus, unsustainable.

12. The appellants, in any case, have explained the said entries and have contested that there was no clandestine activity on their part. Inasmuch as there is no corroborative evidences produced by the Revenue, we find no reasons to uphold the impugned demand.

Accordingly, the order confirming the said demand along with imposition of penalty is set aside.

13 As regards the other appeal, we note that the same resulted in demand of duty in respect of the goods seized from the dealer's premises and confiscation of the same along with the imposition of penalties. It is well settled law that the goods found in the market are deemed to be duty paid unless established to be cleared without payment of duty by production of sufficient evidences. Inasmuch as we have already held that there is virtually no evidences on record to show clandestine removal on the part of the appellant, the confirmation of demand in respect of such goods found at the dealer's premises cannot be upheld. We accordingly, set aside the same along with setting aside the confiscations and penalties, if any.

14. Similarly, shortages and excesses found in the assessee's premises which is spread over a period of time being below the permissible tolerance limit as per the provisions of the Standard of Weight and Measures Rules, 1977 and being nominal percentage has to be considered as genuine and not requiring any payment of duty or confiscation. For the above proposition, reliance is placed on Tribunal's decision in the case of

Commissioner of Central Excise, Allahabad V/s IOC Ltd. reported at 2014 (300) ELT 153 (Tri-Del), as confirmed by the Hon'ble Allahabad High Court reported as 2014 (308) ELT A121 (All). Similarly, shortages by itself cannot lead to the conclusion of clandestine clearances as held by Punjab & Haryana High Court in the case of Commissioner of Customs, Excise & Service Tax, Ludhiana V/s Anand Founders & Engineers reported as 2016 (331) ELT 340 (P & H). As such we find no justification for demand of duty in respect of shortages or confiscation of extra found goods in the assessee's premises. The same is accordingly set aside.

15. Inasmuch as we have allowed the assessee's appeals, the Revenue's appeal which only relates to value of the finished goods, reduced by the Commissioner (Appeals), has become infractuous and the same is accordingly rejected.

16. All the appeals are disposed of in above manners

(Pronounced in Court)

Sd/-	Sd/-
(Anil G. Shakkarwar)	**(Archana Wadhwa)**
Member (Technical)	**Member (Judicial)**

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