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

APPEAL Nos.E/70151-70154/2015-EX[DB]

(Arising out of Order-in-Original No. 17-COMMR-NOIDA-I-2015-16 dated 28/07/2015 passed by Commissioner, Central Excise, Noida-I)

M/s Jjk Zarda Pan Products
(In Appeal No.E/70151/2015-EX[DB])

***M/s* Prabhat Zarda International**
(In Appeal No.E/70152/2015-EX[DB])

***M/s* Mehra Transport Company**
(In Appeal No.E/70153/2015-EX[DB])

***Shri* Jai Kumar Arya** **Appellants**
(In Appeal No.E/70154/2015-EX[DB])

Vs.

Commissioner, Central Excise, Noida-I **Respondent**

Appearance:

Shri G.K. Sarkar (Adv.) & Shri Prashant Srivastava (Adv.) for Appellant
Shri Pawan Kumar Singh, Superintendent (AR), for Respondent

CORAM:

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

Date of Hearing : 03/10/2018
Date of Decision : 03/10/2018

FINAL ORDER NO.**72497-72500 / 2018**

Per: Archana Wadhwa

All the four appeals are being disposed of by a common order as they arise against the same impugned order passed by the Commissioner of Central Excise, Noida vide which he has confirmed the demand of duty of Rs.2,58,13,713/- against M/s Jjk Zarda Pan Products along with confirmation of interest and imposition of penalty of identical amount under Section 11 AC of the Central Excise Act, on the findings of clandestine removal of their final products. In addition the goods seized from the truck as also from the Transporter's premises stand confiscated with imposition of redemption fine and penalties etc. as also of confirmation of demand. The Adjudicating Authority also seized vehicles with an option to the appellant to redeem the same on payment of redemption fine. Further, penalty of Rs.10 lakhs each stand imposed upon M/s Prabhat Zarda International and M/s Mehra Transport Company and of Rs.20 lakhs stand imposed upon Shri Jai Kumar Arya, partner of M/s Jjk Zarda Pan Products. The said penalties have been imposed under Rule 26 of Central Excise Rules, 2002.

2. As per facts on record, M/s Jjk Zarda Pan Products is engaged in the manufacture of 'Chewing Tobacco & Pan Chatani' and were duly registered with the Central Excise Department. On 24.08.2012, a truck was intercepted by the officers outside the factory premises of the said appellant and it was found that the same was carrying 20 cartons of chewing tobacco and was not accompanied by any duty paid documents. Accordingly, the same was seized by the officers. Simultaneous searches were made in the premises of the transporter,

M/s Mehra Transport Company, which resulted in presence of 25 cartons lying in the premises. Another 50 cartons were found loaded in the truck located outside the transporter's premises. All the said goods were without the cover of any Central Excise documents evidencing payment of duty of Excise, though the 50 cartons were covered by the sale invoice of the appellant's depot.

3. Investigations were conducted by the Revenue and statements of Shri Suresh Kumar Dubey, employee of the Transport Company was recorded, wherein he deposed that the 25 cartons found in the premises of the transporter were received from the appellant under the cover of invoices issued by one M/s S.K. Traders. From the above, Revenue entertained a view that all the goods booked by the said transporter M/s Mehra Transport Company, under the name of M/s S.K. Traders was the clandestinely removed goods from the appellant's factory.

4. It is seen that during the course of further investigations, the appellant's factory was put to search on the same date itself by the officers who conducted various checks and verifications. It may be noted here that no discrepancies could be detected by the visiting officers either in the stock of the finished final products

or in the books of accounts of the assessee or in the CPU maintained by the appellants. Further, a quantity of 1151 kg of raw tobacco leaves was found in excess which was explained by the appellants that on account of the rainy season and the hygroscopic nature of the products, the leaves have gained weight thus resulting in excess stock weight. They also explained that no Cenvat credit is being availed by them in respect of the said raw material as the same is not duty paid and hence not cenvatable. Statements of the partner, Shri Ravi Nandan Kumar, Production Manager and Authorized Signatory were recorded on the said date of visit as also on subsequent various dates. Statements of either the partners or the production manager were not incriminating and they deposed that all the goods were being cleared on payment of duty. It may be noted here that the said two deponents were never put to question about the S.K. Traders or their existence or the invoices being issued by said S.K. Traders.

5. During the subsequent investigations, the sale depots of appellants were also visited and the statements of Authorized Representatives of the sale depots were recorded on various dates. The said statements are also non-incriminating statements and further, no inquiries

were made from the said deponents about the existence of M/s S.K. Traders. The searches were also conducted at the places of raw material suppliers, dealers and other transporters and Courier agencies etc. as also in the sale depots of M/s Prabhat Zarda International and M/s Diamond Flakes which are factories of assessee's relatives but nothing incriminating was recovered either from the dealer's premises or the raw material suppliers or transporter's premises or from the CPU data maintained by M/s Prabhat Zarda Factory International.

6. As the Revenue found that the address of M/s S.K. Traders was fake and fictitious and based upon the statement of one Shir Suresh Kumar Dubey, a view was entertained that all the GR issued by M/s Mehra Transport Company under the name of S.K. Traders was in fact in relation to M/s JJK Zarda Pan Products. Accordingly, proceedings were initiated against them by way of issuance of Show Cause Notice dated 23.02.2013, raising the demand of duty for the period 01.04.2012 to 02.04.2012, to the extent of around Rs.1,21,85,196/- along with proposal to confirm the demand in respect of seized goods. Subsequently, a corrigendum was issued on 28.03.2014 raising the duty demanded to the extent of Rs.2,53,31,825/-. The said Show Cause Notice

culminated into the present impugned order passed by the Adjudicating Authority confirming the demands, confiscating the goods and imposing penalties as detailed in the precedent para graph.

7. We have heard Learned Advocate Shri G.K. Sarkar (Adv.) & Shri Prashant Srivastava (Adv.) appearing for the appellants and Shri Pawan Kumar Singh, Superintendent A.R. appearing for the Revenue.

8. After appreciating the submissions made by both the sides and after going through the impugned order, we note that the appellant is not disputing his liability to pay duty in respect of the chewing tobacco which was found loaded in the truck intercepted outside their factory as also in respect of goods found from the transporter's premises. His explanation as regards non-payment of duty on the said goods is to the effect that since they are also exporting the majority of their product, the Central Excise documents could not be prepared as the entire staff was busy in respect of huge export consignment. Learned Advocate's contention is that the goods were cleared to the Transporter's Premises and he was informed telephonically that the excise documents would follow. The same were not as yet loaded in truck and no GR was prepared in respect of the same.

In any case and in view of the matter the appellant is not contesting the demand in respect of the said seized goods. We uphold the confirmation of demand to the extent of Rs.4,81,892/- along with imposition of penalty of identical amount in terms of Section 11 AC, inasmuch as admittedly the goods were cleared from the appellant's factory without payment of duty. We also uphold the confiscation of the goods with redemption fine of Rs.1,69,727/- as we do not find the same on the higher side.

8. As regards the demand of duty on the allegations of clandestine removal to the extent of Rs.2,53,31,825/-, we note that the entire case of the Revenue is based upon the statement of one Shri Suresh Kumar Dubey, an employee of the Transport Company. As per his statement, the 25 cartons found lying in the transporter's premises were covered by the invoice of M/s S.K. Traders. The owner of the Transport company, in his subsequent correspondence to the appellant had clarified that M/s S.K. Traders had also sent 25 cartons of chewing tobacco which were in fact covered by the invoices issued by him. He clarified that there was a mistake on the part of his employee in stating that the 25 cartons received from the appellant's were in fact covered

by invoices of M/s S.K. Traders. As such it is the appellant's contention that his product is not covered by the invoice of S.K. Trader and it was S.K. Traders own goods which were covered by the invoices issued by him.

9. In any case and in any view of the matter, we note that apart from the said statements of Shri Dubey there is virtually no evidence on record to show that all the goods booked in the name of M/s S.K. Traders for the period in question were in fact cleared by the appellant from their factory without payment of duty. The Revenue has made investigations/inquiries and had also recorded statements of concerned persons. No incriminating evidences stand produced by Revenue to establish, beyond doubt that the S.K. Trader's GRs issued by the transporters were in fact, in respect of the goods cleared from the assessee's factory. Surprisingly, while recording the statement of various persons including the statement of partners, production manager, their authorized representatives, as well as depots authorized representatives, no question as regards the S.K. Traders was put to them. No statement of the owner of the transport company, so as to seek clarification from them, was recorded. Not only that the names of the consignee of the goods as shown in the invoices of S.K. Traders and

G.R. of the transport company were available with the Revenue. Only a meager attempt to contact them by writing letters to their counterpart Central Excise Officers having jurisdiction over the premises of the said consignee was made, which was never responded by them. The statement of the buyers was never recorded.

10. Apart from the above, the Revenue also made investigation at the end of raw material suppliers, but no incriminating material was recovered. The appellant also took a categorical stand during the course of investigation that the electricity consumption as reflected by the electricity bill, is in accordance with the manufacture of their final products as recorded in their books of account. As such they contended that the allegations of clandestine removal cannot be uphold against them merely on the basis of statement of transporters, employee which was never corroborated by any other evidence on record.

11. We find that as per the settled law the allegations of clandestine removal are required to be upheld on the basis of positive and tangible evidences indicating such activities on the part of the manufacturing unit. As already observed the entire case of the Revenue is based upon the sole statement of Shri Suresh Kumar Dubey

and there is no corroborative evidence on record to establish that the clearances made under the name of Shri. S.K. Traders was made by the present manufacturer.

12. The Tribunal in the case of M/s Tejwal Dyestuff Industries V/s Commissioner of Central Excise, Ahmedabad, reported as 2007 (216) E.L.T. 310 (Tri. – Ahmd.) has held that even the confessional statement of the concerned persons cannot be adopted as an evidence to establish clandestine removal in the absence of any corroborative evidences to the contrary. It may be noted that initially there was difference of opinion between two members of the Bench and the matter being referred to the then Hon'ble President of the Tribunal as 3rd Member, it was observed as under:-

"*It appears that, having obtained confessional statements the Revenue Officers did not carry out the detailed investigation into the relevant aspects of the case, particularly, the Bank accounts of Bhimanis and the working of the assessee's factory. Recording of the confessional statement would not put an end to the investigation and the Revenue Officers should be careful to ensure that they are not tricked out of a regular and detailed investigation by making strategic confessions* *which are retracted by preparing affidavits soon after they are made and which affidavits are again strategically withheld from the Revenue Officers, so that they become complacent and do not carry out a fuller investigation. It appears that the Revenue Officers in the present case have fallen victim to this type of strategic confessional statements which have been retracted soon after they were made in the affidavits which were withheld by the deponents till the proceedings came up before the Commissioner, by which time the damage of not a making fuller investigation, thinking that the confessional statements are made and not retracted, was already done. The Revenue Officers have not even cared to investigate into the types of final products manufactured by the appellants despite detailed declarations which were on record with them, which showed that all these inputs, particularly LAB and Soda Ash were being used by them for their final products.* ”

After observing as above, it was further observed that lethargy of the Revenue officials in not verifying the use of the inputs in the final product creates a doubt as to the correctness of the contentions of the statements of the deponents. The said majority decision of the Tribunal stand upheld by the Hon’ble Gujarat High Court when the appeal filled by the Revenue was rejected reported as Commissioner of Central Excise, Ahmedabad V/s M/s Tejal Dyestuff Industries reported as 2009 (234) E.L.T. 242 (Guj.).

13. Admittedly, onus to prove and establish clandestine removal is on the Revenue, which is required to be discharged by effectively investigating the matter and by producing relevant sufficient evidences so as to tilt the weight of the same in favour of the Revenue. In the present case, we note that there is virtually no evidence on record to show any clandestine activity on the part of the assessee. The Revenue is required to discharge such onus by showing the clandestine receipts of various raw materials, consumption of the same in the assessee's factory resulting in un-accounting clearances of the same, the transportation by various vehicles, identification of the buyers and receipt of consideration from the buyers. In the present case none of the above circumstances stand verified and established by the Revenue. The Hon'ble Gujarat High Court in the case of Commissioner of Central Excise, Ahmedabad-II V/s Chhajusingh S. Kanwal Reported as 2011 (272) E.L.T. 202 (Guj.) has observed that even the statement of the traders/brokers were not admissible evidence, as they

had not been tested by cross-examination. The Court further observed that no Director or employees of the assessee has admitted clandestine manufacture/removal of the goods and no investigations are carried out to ascertain factors which could indicate that assessee actually manufactured large quantity of goods in its factory viz. Discrepancies in stock of raw material or final products, extra working hours of factory, electricity consumption, payment of charges, transportation Bills, etc. It was held that as the Revenue was unable to establish clandestine manufacture and clearances of goods by them, the Revenue's appeal has to be rejected.

14. Though the learned advocate places reliance on number of decisions of the Tribunal laying down to that effect but suffice is to say that clandestine charges are to be proved by Revenue and in the absence of any evidence to reflect upon the same such charges cannot be upheld. In the present case, we note that even the evidences relied upon by the Revenue is not sufficient to upheld in their favour on the principal of preponderance of probabilities. The only evidence is statement of Shri Suresh Kumar Dubey which also stands explained by the owner of the transport company as incorrect, is insufficient. We are surprised that the Revenue has not

even bothered to find out as to who paid for the transportation of the goods made under the cover of documents issued by S.K. Traders. No such question was ever put to transporter and his account books was never scrutinized.

15. In view of the forgoing decision, we held that the findings of clandestine removal resulting in confirmation of demand of duty of Rs.2,53,31,825/- are unsustainable. The same are accordingly set aside along with setting aside of penalties of identical amount on M/s Jjk Zarda Pan Products.

16. Further, penalty of Rs.20 lakhs stand imposed upon Shri Jai Kumar Arya, partner of the manufacturing unit. Inasmuch as we have set aside the confirmation of demand, such penalty is required to be set aside. Similarly, penalty of Rs.10 lakhs imposed upon M/s Mehra Transport Company, the same is required to be set aside. We also do not feel any justification for imposition of penalty on the said transporter in respect of the goods on which the duty stand confirmed by us inasmuch as the said non duty paid goods were only received by him in his premises, expecting excise documents to be received subsequently and no GR was prepared by him and the same were not in the process of

being transported. Accordingly, the penalty imposed upon him is also set aside.

17. As regards penalty of Rs.10 lakhs on M/s Prabhat Zarda International the same stand imposed on the ground that the truck intercepted outside the assessee's factory was belonging to M/s Prabhat Zarda International. Further, there is no evidence on record to show that M/s Prabhat Zarda International was aware of the fact that the said truck lended by them to the appellant would be used by them for clearances of the goods without payment of duty. The Truck has already been confiscated with an option to redeem the same on payment of redemption fine and in the absence of any evidence to reflect clearance of goods without payment of duty by M/s s Prabhat Zarda International, imposition of penalty upon them is not justified. We, accordingly set aside the same.

18. All the appeals are disposed of in above manner.

(Pronounced & Dictated in Court)

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

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