

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

APPEAL No. E/1809-1810 & 1837-1838/2011-EX[DB]

(Arising out of Order-in-Original No. 34/Commr/Noida/2010-11 dated 31/03/2011 passed by Commissioner of Central Excise Commissionerate, Noida)

M/s Bio Veda Research Lab Pvt. Ltd. (in Appeal No. E/1809/2011),

Smt Vineeta Jain (in Appeal No. E/1810/2011),

Shri R.K. Singh (in Appeal No. E/1837/2011) &

Shri Raghvendra Jha (in Appeal No. E/1838/2011)

Appellant(s)

Vs.

Commissioner of Central Excise, Noida

Respondent(s)

Appearance:

Shri A.K. Prasad (Advocate)

(in Appeal Nos. E/1809-1810/2011)

Shri Mohd Altaf (Assistant Commissioner) AR

for Appellant(s)

for Respondent(s)

CORAM:

Hon'ble Mrs. Archana Wadhwa, Member (Judicial)

Hon'ble Mr. Anil G. Shakkwar, Member (Technical)

Date of Hearing : 15/11/2018
Date of Pronouncement : 12/12/2018

FINAL ORDER NOs **72854-72857 / 2018**

Per: Archana Wadhwa

All the four appeals are being disposed of by a common order as they arise out of the same impugned order passed by Commissioner vide which he has confirmed the demand of Rs.74,27,637/- against the M/s Bio Veda Research Lab Private Limited along with imposition of penalty of identical amount. In addition penalty of Rs.5 lakhs has been imposed on Smt. Vineeta Jain, who is Director of M/s Bio Veda

Research Lab. Further penalty of Rs.30,000/- imposed on each Shri R.K. Singh, Office Assistant and Shri Raghvendra Jha, Store Assistant.

2. As per facts on record M/s Bio Veda Research Lab Private Limited, Noida was engaged in the manufacture of Medicaments, Toilet Preparations, Beauty Preparations, Shaving Preparations, Soaps and Oil Base etc., under the brand name of 'BIOTIQUE'. They were duly registered with the Central Excise Department and were clearing their goods on payment of duty. The brand name BIOTIQUE belongs to M/s IRL Marketing Pvt. Ltd. to whom royalty was being paid by the appellant.

3. Apart from having their factory at Noida, the appellants were also having other group companies under the name of M/s Bio Veda Company Private Ltd., which was operating from Guwahati. Identical goods were being manufactured at their Guwahati factory under the same brand name, which was availing the Area Based Exemption Notification. The Guwahati factory closed in October, 2003 and subsequently the appellant started another factory under the name of Bio Veda Action Research Pvt. Ltd. at Paonta Sahib, Himachal Pradesh, which was also engaged in the manufacture of same goods under the same brand name. The said factory in Himachal Pradesh was also availing Area Based Exemption Notifications.

4. The goods manufactured in all the three factories were being cleared by them to a common godown situated at Greater Kailash-1, New Delhi. The factories at Guwahati and Paonta Sahib were stock transferring their entire production to the said godown located in Delhi, whereas Noida factory of the appellant was also indulging in direct sales as also transfer of the part of goods to their Delhi godown and further use to sell a part of the goods produced in their factory to Guwahati and Paonta Sahib for further processing. The Head Office of the group companies was located at Jungpura Extension, New Delhi. Smt. Vineeta Jain is one of the Directors in all the three companies.

5. On 30.09.2004, all the three factories including the Delhi godown and Delhi Head Office was put to search by the Officers of DGCEI resulting in recovery of allegedly incriminating documents and records as also resulting in seizure of the goods. In respect of the seizure of the goods, the proceedings stands initiated by way of issuance of a separate show cause notice which is not a part of the present proceedings.

6. Based upon the recovery of the documents from various places, further investigations were carried out by the officers resulting in recording of statements of various persons. Based upon the result of the investigations, Revenue entertained a view that the appellant was indulging into clandestine

removal of their final product and has evaded duty to the tune of Rs.37,44,106/-

Further it was also found that the appellant was manufacturing Basil and Parsley soaps and were availing exemption in respect of the same on the ground that they were being manufactured without the aid of power. However, during visit of the officers it was found that the appellants were using power, in some of the process, thus making the said soaps as ineligible to the exemption. The demand of duty involved in respect of the said issue for the period from 01.05.2002 to 29.09.2004 was to the extent of Rs.36,83,531/-.

7. At this stage it is seen that the earlier order of the Commissioner was put to challenge by the appellant's before the Tribunal, who vide their Final Order dated 25.02.2009 remanded the matter back for *de-novo* adjudications after supply of the relied upon documents as also non relied upon documents. The present impugned order stands passed by the Commissioner in *de-novo* proceedings, after complying with the directions of the Tribunal.

8. We have heard Shri A.K. Prasad, learned Advocate appearing on behalf of the appellant and Shri Mohd Altaf, Assistant Commissioner, learned AR appearing on behalf of the Revenue.

9. After considering the submissions made by both the sides, and after going through the impugned order, we find that the demand of Rs. 37,44,106/- stands confirmed against the appellant on the allegations of clandestine removal of the goods, which in turn are based upon recovery of the alleged incriminating documents either from the appellant's factory or from the common godown located at Greater Kailash or their Head Office, read with the statements recorded during investigations. It is seen that during the adjudication process, appellant made a request for cross examinations of various deponents of the statements, which request was accepted by the Adjudicating Authority. Some of the deponents appeared and were cross examined whereas the others did not cause any appearance and as such could not be cross examined. The appellants have made a prayer for not taking the said statements into account, which prayer stands rejected by the Adjudicating Authority.

10. However, we find that for confirming the demand on the allegations of clandestine activities, the Adjudicating Authority has relied upon the various documents, so recovered by the Officers during search operations, which documents stands tabulated by him in Para 4 of the impugned order. The said table is being reproduced below:-

| S. No. | Evidences, in brief/minor heading | Assessable value (in Rs.) | Amount of duty demanded (in Rs.) |
|---------------|--|----------------------------------|---|
| 1. | Bulk issue registers, packing material issue registers, material issue registers, Direct Marketing Register, Statements etc. | 34,97,019/- + 72,88,344/- | 5,59,532/- + 11,66,136/- |
| 2. | Outward Register, loose papers, Statements etc. | 5,39,475/- | 86,316.00/- |
| 3. | Inward Register, parallel invoices, Statements etc. | 19,64,035/- | 3,14,246.00/- |
| 4. | MRNs, Statements etc | 7,79,169/- | 1,27,547.00/- |
| 5. | Bin Card Register, Statements etc. | 75,02,945/- | 12,00,471/- |
| 6. | Non returnable gate passes, hand written notes/letters Statements etc. | 18,03,206/- | 2,88,512/- |
| 7. | Education Cess on assessable value of Rs.1,98,231/- on clearances effected after 9.9.2004 | | 6.35/- |

11. As is seen from above the major part of the demand to the extent of around Rs.11.66 lakhs is based upon the Bulk Issue Registers. The same were recovered from the assessee's factory located at Noida. As per the appellant the said register contains details of bulk material issued for further packing in their packing section. The appellant during the course of Adjudication before Commissioner pleaded that the said register contained goods in a semi-finished condition which were further cleared either to Paonta Sahib factory on payment of duty or to their packing section for further packing of the goods. The various statements are also to that effect that on the basis of requisition of bulk product by production staff they issued requisition of requisitioned quantity of bulk to the packing section. The Adjudicating Authority has observed that the said register, even if sent the goods for further packing, has to be considered as the production by the appellant and should have been entered in RG-1 Register. Inasmuch as there is a difference in the said Bulk Issue Detail Register with the RG-1 entries, the demand stands confirmed by him.

The appellants have submitted that separate demands stands raised and confirmed by the relying upon entries made in Bulk Issue Detail Register as also in another register named Material Issued Register. The goods sent for packing detailed in the Bulk Issue Detail Register were subsequently

entered in another register i.e., Material Issued Register and as such both the two registers overlapped.

12. Similarly in respect of Outward Register, lose papers, Inward Register etc., the appellants have strongly assailed the demand on the ground that all these registers are private registers maintained for movement of the goods in their three factories. It is on record that packing material for all the three group companies were being received in Noida factory and thereafter supplied to each company as per their requirement. The Adjudicating Authority has not taken the said fact into consideration.

Similarly demands raised on the basis of Bin-Card Register and Direct Marketing Register found from Delhi godown are not sustainable as the said godown received the goods manufactured in all the three factories and any mismatching in the register maintained at Delhi godown cannot be solely attributed to their Noida factory. Similarly parallel invoices found in Delhi godown cannot be attributed to the unaccounted clearances from the appellant's Noida factory. The Adjudicating Authority has confirmed demands on the basis of the entries made in separate registers separately without appreciating the fact that even if clandestine removal is upheld against them, it is the same very goods which would be unaccounted in all the registers.

They have strongly contested that the clandestine clearances have to be established on the basis of clinching evidences and not on the basis of some private records read with the statements. Revenue has not identified any buyer of the goods alleged to have received the goods clandestinely cleared and no enquiries or investigations stands made as regards unaccounted procurement of raw material, no transporters or drivers stands identified by the Revenue and there is no attempt to find out as to whether the Noida factory of the appellant had the capacity to manufacture the alleged unaccounted production. The value of the alleged clandestinely removed goods would involve dealing of around Rs.6 crores, for which there is no evidence produced by the Revenue.

13. After hearing both the sides and after appreciating the submissions, we find that though the Adjudicating Authority has discussed each and every document separately but has confirmed the demands by observing that once the said documents are seized by the Revenue, then it is the appellant's turn to rebut the same by production of sufficient evidences. Though we find that the appellant has given explanation in respect of each and every document but the Adjudicating Authority has observed that they have not produced any evidence on record to show that the entries in

the said registers which are private documents were not entries of clandestinely removed goods.

We find that the law on the said issue is settled by umpteen numbers of decisions. It is the Department, who is alleging clandestine removal on the part of the manufacturer and as such the onus to prove so lies upon them. Recovery of the registers/documents/lose papers maintained in the assessee's factory for internal movement of the goods from one section to another, by itself, are not sufficient to establish the clandestine activities. Further, it is seen, that the Revenue has upheld the charges against the appellants based upon certain documents recovered from a common godown of all the group companies. It is a fact on record that the clearances from Paonta Sahib, under the claim of exemption, were also being stock transferred to their Delhi godown. In the absence of any evidence to the contrary, it is beyond appreciation that the Revenue has sought to attribute the documents recovered from the godown to the appellant's Noida factory's clandestine production. Apart from the said documents as detailed above, Revenue has made no further efforts to find out the source of the procurement of raw material, the actual production in the appellant's factory or transportation of the same or the identity of the buyers and the cash receipt of the consideration for the goods in

question. In the absence of these evidences, it is not justifiable to uphold the clandestine removal charges.

14. At this stage we may refer to certain decisions of the Tribunal, though it is not possible to refer to all of them as there are plethora of such decisions laying down that clandestine removal activities have to be upheld by production of positive evidence. Reference can be made to Tribunal's decisions in the case of Sakeen Alloys Pvt. Ltd. vs. Commissioner of Central Excise, Ahmedabad reported at 2013 (296) E.L.T. 392 (Tri.-Ahmd.), Commissioner of Central Excise vs. Saakkeen Alloys Pvt. Ltd. reported at 2014 (308) E.L.T. 655 (Guj.), which stands upheld by the Hon'ble Supreme Court in the case of Commissioner vs. Saakeen Alloys Pvt. Ltd. reported as 2015 (319) E.L.T. A117 (S.C.). Reference can also be made to Hon'ble Allahabad High Court's decision in the case of Continental Cement Company vs. Union of India reported as 2014 (309) E.L.T. 411 (All.) and Triveni Engineering & Industries Ltd. vs. Commissioner of Central Excise, Allahabad reported as 2016 (334) E.L.T. 595 (All.). Tribunal in the case of M/s Popular Paint & Chemicals & Others vide its Final Order No. A/52716-52718/2018-EX[DB] dated 06.08.2018 and in the case of M/s Shiva Polyplast Pvt Ltd. & Others vide its Final Order No. A/71931-71938/2018-EX[DB] dated 01.08.2018 have taken into account all the precedent decisions and have held in favour of

the assessee on the allegations of clandestine removal. As such we are of the view that the demand of duty to the extent of Rs.37,44,106/- is required to be set aside along with setting aside of penalty on M/s Bio Veda Research Lab Pvt. Ltd. Further the penalties imposed upon Smt. Vineeta Jain, Shri R.K. Singh and Shri Raghvendra Jha are also required to be set aside we order accordingly.

15. As regards the confirmation of demand to the extent of Rs.36,83,531/-, the same stands confirmed on the ground that Basil and Parsley soap being manufactured in the appellants factory were not entitled to exemption inasmuch as the same were manufactured with the aid of power and as such were classifiable under Heading 3401.19 instead of Heading 3401.12 as claimed by the appellant and attracted duty of excise. For arriving at the above findings that the said soaps were being manufactured with the aid of power, the Adjudicating Authority has referred to the excerpts from the Panchnama drawn at the factory regarding process of manufacture, which is reproduced below:-

“During inspection of the premises, it was observed that BVRLPL were manufacturing Basil and Parsley soap with the aid of power, using air conditioner for drying soap cakes and by using packing machines operated by power for inner packing of the said soap cakes and also using electric heater for boiling the sugar used in the

said soaps, although activities like preparation of soap base, cutting, punching, packing of said soap were done manually.”

16. As is seen from above the process adopted by the appellant for the manufacture of the said soaps the same includes using fans and air conditioner for drying soap cakes and packing machines operated by power for inner packing of the soap cakes as also electric heater for boiling the sugar used in the soaps. He has also referred to the statement of Shri Ambrish Saxena, Manager of the appellant wherein he has accepted the above manufacturing process. The appellant had nowhere reflected upon the correct process, neither have produced or detailed any alternative process of manufacture, which according to them is the correct process. Their only contention is that the Panchas as also Shri Ambrish Saxena has not being cross examined and as such their statements have to be kept out of consideration.

17. We find that there is a clear cut finding by the Adjudicating Authority as regards use of power at different manufacturing stages. The appellant have not strongly rebutted the same and has not also detailed the process of manufacture adopted by them for the manufacture of the said type of soaps. In their written submissions they have simplicitor submitted that the fans were being used for the benefit of labourers/workers as required under the Factories

Act, 1948. However, we note that it is not only the use of fans or air conditioner for the process of drying the soap cakes but there is reference to use of packing machines operated with the aid of power. Admittedly the packing of the soap is a process resulting in the final manufacture of the soap inasmuch as the soap cakes, without packing cannot be marketed. In fact the appellants have themselves taken a stand, while arguing on clandestine activities that the Bulk Register entries were for unfinished goods sent further for packing. Inasmuch as packing is an essential process leading to complete manufacture of the soaps, use of power in packing machines would admittedly amount to use of power in the manufacture of soaps.

Further the appellant is also using electric heaters for boiling sugar, which is starting point of the manufacture of soap. The issue as to whether the use of power at any stage would amount to use of power for the manufacture of the final products stands considered by the Hon'ble Supreme Court in the case of *M/s Impressions Prints vs. CCE, Delhi* reported at 2005 (187) E.L.T. 170 (S.C.) laying down that use of power in the colour mixing machines for further manufacture of printed Bed Sheets and bed sheets would amount to use of power in the manufacture of the final product, Tribunal in the case of *M/s Sonarome Chemicals (P) Ltd. vs. CCE Bangalore* reported at 1999 (106) E.L.T.

(Tribunal) have observed that the electrically operated machines for incoming of raw material and packing of finished goods would amount to use of power and the final products have to be held as final manufactured with the aid of power. Further the Hon'ble Supreme Court in the case of Collector of Central Excise vs. Rajasthan State Chemical Works reported at 1991 (55) E.L.T. 444 (S.C.) has held that handling of raw material with the aid of power prior to commencement of actual production/processing is covered as manufactured with the aid of power.

18. Inasmuch as the appellant have not rebutted the use of power at various stages of manufacture of the said soaps, we are of the view that they were not entitled to exemption and were required to pay duty.

19. As regards limitation, appellants have contended that they have filed duty declarations claiming clearance of the soap without the aid of power by classifying the same under heading 3401.12 and they were filing monthly returns in which the clearance of the said soaps was being at 'Nil' rate of duty and as such the longer period of limitation would not be available. The Adjudicating Authority has not accepted the said plea of the appellant by observing that they were making a wrong declaration inasmuch as they were using the power but were claiming non use of the same. As such the said

declaration amounts to mis-statement thus justifying the invocation of longer period of limitation.

20. We fully agree with the Adjudicating Authority on the said count. The appellant have not placed any declaration on record to show that the manufacturing process was being detailed by them in the said declaration. Even if the appellant's claims that they had declared the goods as having not been manufactured with the aid the power and have filed monthly returns showing the same to be as falling under Heading 3401.12 is accepted, the question is as to whether the said fact would be sufficient to limit the demand within the normal period of limitation. As already held, the appellants were using the power for the manufacture of the said soaps. The fact of use of power at the boiling sugar stage or packing stage was not being disclosed to the Revenue and the claim of classification under Heading 3401.12 was being made without disclosing the above fact. As such the declarations have to be treated as mis-statement with an intent to evade payment of duty. The use of power was found by the Revenue only subsequently, during the visit of the factory and subsequent investigations. As such filing of declarations, by itself, when the facts have been mis-stated in said declarations cannot come to the aid of the appellant justifying to limit the demand to the normal period of time.

21. Accordingly, by rejecting the pleas on merits as also on limitation, we uphold the demand of Rs.36,86,531/- on the said count along with imposition of penalty of identical amount imposed under Section 11AC of the Central Excise Act, 1944.

22. All the appeals are, accordingly, disposed of in above manner.

(Pronounced in Court on **12.12.2018**)

Sd/-
(Anil G. Shakkwar)
Member (Technical)

Sd/-
(Archana Wadhwa)
Member (Judicial)