CUSTOMS, EXCISE & SERVICE TAX APPELLATETRIBUNAL ALLAHABAD

REGIONAL BENCH -COURT No. I

Excise Appeal Nos. 70139 of 2019 & 71250, 71210, 71211, 71251 of 2018-EX[DB]

[In Excise Appeal No. 70139 of 2019]

(Arising out of Order-in-Original No. 04/VNS/Commr/2018 dated 30.05.2018 passed by Commissioner of Central Excise & Central GST, Varanasi)

Shri Srikant Chaurasia, **.....Appellant**

(D-57/58, B-32A,

Kasturba Nagar, Varanasi)

VERSUS

Commissioner of Central Excise & CGST, **....Respondent**

(9, Maqbool Alam Road, Varanasi)

WITH

(i) Excise Appeal No.71210 of 2018 (M/s Anmol Pacakaging)
(ii) Excise Appeal No.71211 of 2018 (M/s Ambey Engineering)
(iii) Excise Appeal No.71251 of 2018 (M/s Naveen Tobacco Co.)
(iv) Excise Appeal No.71250 of 2018 (M/s Saran Roadways Company)

(Arising out of Order-in-Original No. 04/Commr/VNS/2018 dated 30.05.2018 passed by Commissioner of Central Excise & Central GST, Varanasi)

APPEARANCE:

Smt Sudarshan Srivastava, Advocate
Shri Kamlesh Singh, Advocate &
Shri Anant Vijay, Advocate for the Appellants
Shri Gyanendra Kumar Tripathi & Shri Shiv Pratap Singh,
Authorised Representatives for the Respondent

CORAM:

HON'BLE SMT. ARCHANA WADHWA, MEMBER (JUDICIAL)
HON'BLE MR. ANIL G. SHAKKARWAR, MEMBER(TECHNICAL)

FINAL ORDER NOs. 71016-71020 / 2019

Date of Hearing : 23/04/2019
Date of Pronouncement : 21/05/2019

PER: ANIL G. SHAKKARWAR

The above stated 5 appeals are taken together for disposal since all of them are arising out of impugned Order-in-Original No.04/VNS/Commr/2018 dated 30.05.2018 passed by Commissioner of Central GST and Central Excise Commissionerate, Varanasi.

2. Brief facts of the case are that the premises located at 328 Ka, Churamanpur, Varanasi was searched by Oficers of Central Excise on 12.09.2014. During the search operation four electriccally operated FFS machines were found installed, out of which three were found running. The oficers of Central Excise found that production of chewing Tobacco and packing was going on. The oficers recovered four bags each containing 19440 plain pouches (without any print) of chewing tobacco and 48 medium size packets each containing 360 small tobacco pouches. Further 470 Kg of loose tobacco and 35 roll packing material (each roll weighing 5.5 Kg) and 200 Kg BOPP film bags were found in the said premises. It appeared to revenue that said quantity of packed chewing tobacco had been clandestinely manufactured and was intended to be removed clandestinely. Therefore, the said material was seized. The value of the seized material was Rs.2,43,240/-. The seizer was done through panchnama dated 12.09.2014. It appeared to revenue that the said goods were manufactured in violation of provisions of Chewing Tobacco and Unmanufactured Tobacco Packing Machines (Capacity Determination and Collection of Duty) Rules, 2010 (hereinafter

shall be referred to as '2010 Rules'). The seized goods and as well as said FFS machines were kept in the room where the machines were installed and the room was sealed and the said seized goods were handed over to Shri Srikant Chaurasia who was the owner of the said premises. Further, investigations were carried out and statement of Shri Srikant Chaurasia was recorded on 12.09.2014 wherein he stated that he installed two machines in the month of December, 2013 and another two machines in the month of January, 2014. Shri Dinesh Tiwari through his statement dated 12.09.2014 stated that packing of Tobacco was carried out since August, 2013. Shri Yadvendra Singh in his statement dated 12.09.2014 stated that he was security guard since June, 2014. Shri Shiv Kumar through his statement dated 12.09.2014 stated that he was working in the factory for the last one and half year. The oficers further carried out the investigations and sought opinion on packed chewing tobacco from Shri Krishna Kumar Jaiswal and M/s India Trading Company who vide their opinion dated 13.09.2014 stated that the product was scented chewing tobacco and value could be 50 paisa per pouch or less. The representative of Shri Srikant Chaurasia on 05.01.2015 appeared before the oficers of Central Excise and submitted a letter dated 05.01.2015 along with the said letter copies of invoices evidencing the purchase of 4 FFS machines from Kanpur, papers of their transportation, sales copy of the bill showing purchase of raw tobacco, laminated paper rolls and BOPP were produced. The details of the document produced before the Central Excise oficers are as follows:-

"i) Photocopy of Invoice No.1 dated 07.09.2014 issued from Book No.1 of M/s Ambey Engineering, Kanpur regarding sale of 02 pouch packing machines (old) in total valued at Rs.21,660/- and GR no.24130 dated 07.09.2014 of M/s Saran Roadways Company, Kanpur evidencing their transportation to Sri Srikant Chaurasia on freight of Rs.650/-, as well as receipt no.34963 dated 10.09.2014 evidencing its delivery.

ii) Photocopy of certificate dated 30.12.2014 of Shri Ramakant proprietor of M/s Ambey Engineering, Kanpur stating therein that they are engaged in sale and purchase of old machines. The old machines after repair, are sold to customers.

iii) Photocopy of affidavit dated 30.12.2014 of Shri Ramakant, Proprietor of M/s Ambey Engineering, Kanpur stating therein under oath that they have sold the aforesaid two pouch packing machines to Sri Srikant Chaurasia and handed over to M/s Saran Roadways Company and installed and commissioned by the operator/mechanic of the firm on 10.09.2014 at the premises of Sri Srikant Chaurasia located at Churamanpur, who was satisfied with the operation of machines.

iv) Photocopy of Invoice no.3 dated 02.09.2014 & invoice no.4 dated 04.09.2014 issued from Book no.1 of M/s Anmol Packaging, Kanpur regarding sale of one pouch packing machines (old) through each invoice, at value of Rs.12,540/- and Rs.15,960/-, respectively and GRs No.73499 dated 02.09.2014 and 74166 dated 04.09.2014 of M/s Sarn Roadways Company and receipt no.34782 dated 04.09.2014 and 34384 dated 07.09.2014, evidencing the transportation of these machines from Kanpur to Varanasi.

(v) Photocopy of certificate dated 30.12.2014 of Shri Dharmendra, proprietor of M/s Anmol Packaging, Kanpur (similar to M/s Ambey Engineering mentioned at (ii) above) stating therein that they are engaged in sale and purchase of old machines. The old machines, after repair, are sold to customers.

vi) Photocopy of affidavit dated 30.12.2014 of Shri Dharmendra, proprietor of M/s Anmol Packaging, Kanpur (similar to M/s Ambey Engineering mentioned at (iii) above) stating therein under oath that they have sold the aforesaid two pouch packing machines to Shri Srikant Chaurasia and handed over to M/s Saran Roadways Company. The machines have been installed and commissioned by him on 10.09.2014 and 11.09.2014 at the premises of Sri Srikant Chaurasia located at Churamanpur. The machines were inspected by the mechanics of the firm and the customer was satisfied with the operation of machines.

vii) Photocopy of Cash Memo no.35 issued from book no.1 by M/s Navin Tobacco Company, Pandeypur Varanasi regarding sale of 480 Kg raw tobacco valued at Rs.20,640/- to Sri Srikant Chaurasia, 328 KA, Churamanpur, Varanasi along with Form 9 bearing Sl. No.129988 of Krishi Utpadan Mandi Samiti, Varanasi.

viii) Photocopy of sale invoice no.0315 dated 08.09.2014 of M/s R.M. Poly pack Pvt. Ltd., Ganeshpur, Tarna, Shivpur, Varanasi regarding sale of 239.500 Kg of Plain Coloured laminated paper rolls to Shri Srikant Chaurasia, Churamanpur, Varanasi.

ix) Photocopy of sale invoice no.245 dated 09.09.2014 of M/s Varanasi Packaging, Bhelupur, Varanasi regarding sale of 200 Kg of BOPP Film bags to Sri Srikant Chaurasia, Churamanpur, Varanasi.”

3. Further, investigations were carried out with M/s Anmol Pakaging, Kanpur, M/s Ambey Engineering, Kanpur, M/s Saran Roadways Company situated at Piplani, Katra, Varanasi. M/s Naveen Tobacco Company Varanasi, M/s Varanasi Packaging,

Varanasi, M/s R.M. Poly Pack Pvt. Ltd. Varanasi, and statements of relevant persons associated with the said Business concerns were recorded. On the basis of said investigations, show cause notice dated 15.07.2016 issued to all the appellant. Through the said show cause notice by invoking the extended period of limitation, Shri Srikant Chaurasia was called upon to show cause as to why Central Excise duty amounting to Rs.9,13,97,000/- should not be demanded from him on the clandestine manufacture and clearance of unbranded chewing Tobacco using four FFS machines under the provisions of proviso to Section 11 A (4) read with Rule 19 of said 2010 Rules. Further, there were proposals for imposition of penalties on Shri Srikant Chaurasia. Further, there were proposals for imposition of penalties under Rule 26 of Central Excise Rules, 2002 read with Rule 19 of said 2010 Rules on the remaining appellants. For the clarity on allegations, we reproduced para 31 of the said show cause notice as follows:-

> "31. Whereas, during the search carried out on 12.09.2014, Sri Srikant Chaurasia was found engaged in clandestine manufacture and clearance of unbranded chewing tobacco, by using four automatic FFS machines at unregistered premises located at 328 Ka, Churamanpur, Near Jansewa Hospital, Varanasi. No documents whatsoever in relation to date of installation of seized four machines and seized raw materials were either recovered at the time of seizure or produced by Sri Srikant Chaurasia. At the time of search and seizure, on 12.09.2014, Sri Srrikant Chaurasia in his statement dated 12.09.2014 admitted to the production and clearance of unbranded chewing tobacco without obtaining central

excise registration and without following the CTUTPM Rules, 2010. He further disclosed that the said four FFS machines, purchased from local scarp dealers, were brought and installed during the month of December, 2013 and Jan, 2014. The various persons present on the spot, whose statement was also recorded admitted the production of unbranded chewing tobacco, in the aforesaid premises, by using the seized four FFS machines. However, Sri Srikant Chaurasia after approx four monts of seizure, retracted from his statement dated 12.09.2014 and vide letter dated 05.01.2015 submitted various documents in an attempt to somehow establish that the seized four FFS machines were brought and installed only on 11.09.2014 i.e. just before the day of search. However, the documents submitted by him appear to be fabricated, as discussed very elaborately in the preceding paras. The retraction from statement, on later dates, by various persons, labourers and security guard, present on spot at the time of search, who at the time of search had admitted to the manufacture and clearance of unbranded chewing tobacco, also appears to be an afterthought. On the basis of above it appears that the 04 FFS machines installed at aforesaid premises were used for clandestine manufacture and clearance of unbranded chewing tobacco by the party, in the unregistered premises at Churamanpur even prior to Dec, 2014. It appears that the party has failed to produce any evidence to prove that the machines were not in operation at churamanpur, prior to Dec, 2014. It appears that the party has failed to produce any evidence to prove that the machines were not in operation at Churamanpur, prior to Dec, 2014. Thus, in terms of provisions of rule 18 (2) of the CTUTPM Rules, all the four FFS machines are liable to be treated as deemed to be in operation since 1st April of financial year i.e. from April, 2013."

4. Further, the price of each pouch was taken to be Rs.1.00 per pouch on the basis of market survey as reflected in para 35 of the said show cause notice. Under para 38 of said show cause notice duty payable under the said 2010 Rules was calculated to be Rs.9,13,97,000/-. All the appellants filed their independent replies to the said show cause notice. Shri Srikant Chaurasia through his letter dated 08.09.2015 submitted reply to the said show cause notice. The said submissions recorded in impugned order are as follows:-

> "55. Shri Srikant Chaurasia, s/o Lt. Harvansh Chaurasia, r/o D/57/58-B-32A, Kastoorba Nagar, Varanasi vide his letter dated 08.09.2016, submitted the reply to show cause notice. The main points of reply are as under:-
>
> 55.1 that be purchased an old pouch packing machine on 02.09.2014 from M/s Anmol Packaging, Kanpur on payment of Rs.12,540/- in cash. He purchased another old pouch packing machine on 04.09.2014 from M/s Anmol Packaging, Kanpur on payment of Rs.15,960/-, in cash. Both these old machines were received by him in Varanasi through M/s Saran Roadways Company and he kept these machines in his semi finished house at Churamanpur. He purchased two old pouch paching machines from M/s Ambey Engineering, Saketnagar, Kanpur on 07.09.2014 for Rs.21,660.00 in cash and got delivery of same in Varanasi on 10.09.2014 and trial was done on 11.09.2014, at his Churamanpur house.
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> 55.2 that before the trial run the mechanics demanded packaging material thereafter he purchased raw tobacco on payment of Rs.20,640.00 from Naveen Tobacco Co. on 11.09.2014, for the trial he purchased color laminated rolls on credit from M/s R. M. Polypack on 08.09.2014 and on 09th Sep, 2014 he purchased BOPP film bag from M/s Varanasi Packaging Shop and made payment of

Rs.18,000/- for same on 10.09.2014 and Rs.15,600/- on 18.09.2014. The above raw material was used during trial run by the worker and no commercial production was made by him.

55.3 that for the purpose of operation of above machines he was going to submit, on next day i.e. 12.09.2014, appropriate application as per provisions of Rule 6 (10) of Unmanufactured Tobacco Packaging Machine (Capacity Determination and Collection of duty) Rules, 2010 so that machines could be operated as per relevant rules but unfortunately raid was conducted by the department on 12.09.2014 and in his absence search was conducted, in this way so that operation of the machined was obstructed.

55.4 that he was seriously ill before the search itself was very weak due to diarrhea hypertension and cardiac problem inspite of his illness he was asked to be present at the spot of search accordingly he was reaching to the spon on his scooty and was met with an road accident. He was not well mentally as well as physically and was threatened by the oficers and facts were recorded in his handwriting. He was not given opportunity to put forth his case and documents whereas orally he stated all the facts related to machines but the same were ignored by the oficers on the ground that the documents presented by him were fabricated and the search was conducted for two continuous days.

55.5 that in order to protect himself fromj detention, he filed writ application before the Hon'ble Supreme Court case no.174/2014 Srikant Chaurasia Vs Union of India wherein the Hon'ble Court ordered for prevention of all the activities of harassment and ordered him to assist in investigation.

55.6 that the search team by pressure got recorded statements of his, as well as of Shri Dinesh Ttiwari s/o lt. Vishwanath Tiwari, Sh. Yadvendra Singh s/o harishankar Singh, Shri Shivkumar s/o Shri Bhaoyaa Lal, Sh. Mithilesh

Kuma S/o Sh. Ramsahai, Sh. Alok Sharma s/o Shreekant, Ravish Kumar s/o Shri Basdebram, Vishal Sahni s/o Ramkishan Sahni (copy of all these statements were not available to him).

55.7 that Shri Satish Kumar Srivastava whose residence was adjacent to his house has also submitted his affidavit before the Chief Commissioner as well as to this ofice wherein he had disclosed about the behavior of search party.

55.8 that he was disagreed with the para 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 22, 23, 24, 25, 26, 27."

5. Shri Srikant Chaurasia through his letter dated 30.05.2018 stated that statements of said co-noticees were relied upon for issue of said show cause notice dated 15.07.2016. Therefore, cross examination of said persons was demanded by him so as to comply with the principles of natural justice. Above stated show cause notice was adjudicated through the impugned Order-in-Original. Learned Original Authority has observed that the location of co-noticees is spread out to far corners of the state and if cross objection is provided the adjudication proceedings will get delayed to the extent of almost derailing it. He has further referred to provisions of Section 9D of Central Excise Act, 1944 and in para 66.3 he has observed that the request for cross examination is clearly a dilatory tactics and he has denied the request of the appellant for cross examination. He has further relied on the statements recorded on 12.09.2014 and opinion dated 13.09.2014 and agreed with the said show cause notice. He confirmed the demand of Central Excise duty of

Rs.9,13,97,000/- and imposed equal penalty on Shri Srikant Chaurasia. The Original Authority appropriated Rs.15 laksh paid by Shri Srikant Chaurasia. The Original Authority imposed a penalty of Rs.1 lakh on M/s Naveen Tobacco Company and Rs.50,000/- each on M/s Ambey Engineering, M/s Anmol Packaging, M/s Saran Roadways Company under Rule 26 of Central Excise Rules, 2002. Aggrieved by the said order, above stated appellants are before this Tribunal.

6.1 We have heard Shri Kamlesh Singh learned Advocate on behalf of M/s Saran Roadways Company. He has submitted as follows:-

a. That the appellant admittedly transported the old pouch packaging machine from Kanpur to Varanasi and regarding the transportation the transport company of the appellant issued valid document i.e. booking Voucher and delivery receipt to the party therefore penalty against the appellant on the ground of entry of delivery register is against the law.

b. That the allegation of connivance with the party whose goods has been transported is absolutely baseless, based on assumption and presumption. Which is against the law in the case of J.A. Naidu Vs State of Maharastra 1983 (13) ELT 161 (SC) Hon'ble Court pleased to held that suspicion however grave cannot place of proof.

c. That the allegation of attempt to fabricate docucments and confuse the departmental investigation is also without any basis. The documents of transportation during the investigation has been found correct and no act of fabrication of documents by oral and documentary is proved by the department therefore imposition of penalty is illegal in the case of Hindustan Steel Ltd. Vs State of Orisa AIR 1970 (SC) 253, AIR 1984 (SC) 1194 Hon'ble Court was pleased to hold that the discretion to imposed penalty must be exercised judicially. Penalty will ordinarily be imposed in a case where the party acts deliberately in defiance of law. In the case of the appellant machines were transported from Kanpur to Varanasi by the appellants firm in common business of the firm and there is no proof of fabrication of documents on record.

6.2 We have heard Smt. Sudarshan Srivastava learned Advocate on behalf of M/s Ambey Engineering. She has submitted as follows:-

a. That the appellant in his reply to show cause notice admitted the sale transaction to Shrikant Chaurasia and on demand issued sale certificate and affidavit with regard to sale, installation and trial of two machines but on 13/01/2016 during third statement by force it was got recorded that trial and installation was not done by the firm which can't be treated voluntarily given statement.

b. That the finding of adjudicating authority on the question of installation & trial of the machines are perverse and no reason has been assigned on Para No.5 of reply to the show cause notice which goes to establish that the statement recorded on 13/01/2016 is not voluntarily given statement and same is as a result of under influence, threatening and illegal pressure of oficers of department.

c. That the appellant in reply explained that Shrikant Chaurasia did not provide Tin No- hence he purchased his two machines on sale invoice. The adjudicating authority did not give any finding on Para No.16 of the reply to show cause notice therefore order impugned imposing penalty is not sustainable in the eye of law.

d. That the charge of evading of central excise duty in collusion with purchaser Shrikant and abating him for evading tax is baseless in the light of documentary evidence submitted by appellant.

e. That the sold two machines were found on spot and revenue failed to prove that these were purchased from elsewhere therefore transaction of appellant firm is proved on the spot therefore finding of adjudicating authority that the appellant has not effected the sale of machine is baseless against the evidence on record. The revenue suspected the bona fide sale on technical ground which is against the law.

f. That the appellants firm admitted the sale of machines to Shrikant and also admitted the installation and trial of machine after sale which is proved on record and record of sale are verified and examined by the investigating team therefore order impugned is not sustainable in the eye of law and penalty is liable to be quashed and appeal is liable to be allowed.

6.3 We have heard Smt. Sudarshan Srivastava learned Advocate on behalf of M/s Anmol Packaging. She has submitted as follows:-

a. That the appellant in his reply to show cause notice admitted the sale transaction to Shri Srikant Chaurasia and on demand issued sale certificate and affidavit with regard to sale, installation and trial of two machines but on 13/01/2016 during third statement by force it was got recorded that trial and installation was not done by the firm which can't be treated voluntarily given statement.

b. The ground taken by the revenue that the appellant in his statement dated 13/01/2016 the appellant has admitted that his firm has not installed the machine. The appellant in his reply to show cause notice retracted from the statement dated 13/01/2016 saying that it was recorded forceivly, under pressure and inflicting undue influence upon the appellant hence not reliable. The adjudicating authority did not record any finding on the reply of the appellant and accepted the case of revenue ignoring documentary and oral record.

c. That the charge of evading of central excise duty in collusion with purchaser Shrikant and abating him for evading tax is baseless in the light of documentary evidence submitted by appellant.

d. That the sold two machines were found on spot and revenue failed to prove that these were purchased from elsewhere therefore transaction of appellant firm is proved on the spot therefore finding of adjudicating authority that the appellant has not effected the sale of machine is baseless against the evidence on record. The revenue suspected the bona fide sale on technical ground which is against the law.

e. That the appellants firm admitted the sale of machines to Shrikant and also admitted the installation and trial of machine after sale which is proved on record and record of sale are verified and examined by the investigating team therefore order impugned is not sustainable in the eye of law and penalty is liable to be quashed and appeal is liable to be allowed.

6.4 We have heard Shri Kamlesh Singh learned Advocate on behalf of M/s Naveen Tobacco Company. He has submitted as follows:-

a. That the appellant firm admittedly effected sale on dated 11.09.2014 without any malice and in common business of the firm to Shri Srikant Chaurasia and it is baseless to say that the sold goods was not supplied to Shrikant Chaurasia which was seized during the search itself goes to establish that the appellants firm has already supplied raw tobacco and no such burden can be sifted upon the firm. The firm substantiated the fact of sale by filling transaction record of appellant sale before the adjudicating authority but finding has been recorded against the evidence on record.
b. That the appellant in his reply submitted that Shri Ganesh was the employee of the firm and he had issued several bills in favour of purchases including bill dated 11.09.2014 issued to Shrikant Chaurasia. The appellant annexed several bills along with the reply to the show cause notice but in the impugned order perverse finding has been recorded that the Ganesh Salesman has only issued bill dated 11.09.2014 to Shri Shrikant Chaurasia which is against the evidence on record therefore penalty imposed upon the appellant firm is unjustified and order of penalty against the appellant is liable to be quashed.

6.5 We have heard Shri Annant Vijay learned Advocate on behalf of Shri Srikant Chaurasia. He has submitted as follows:-

a. That all the machines were received by the appellant in his under-construction house situated at 328 Ka, Churamanpur (Near Jansewa Hospital), Varanasi on 04.09.2014 (purchased on 02.09.2014), 07.09.2014 (purchased on 04.09.2014) and 10.09.2014 (purchased on 07.09.2014) respectively through the transporter Saran Roadways Co.

b. That the mechanics send by the both machines seller for installation of machines on 10.09.2014 and machines were installed and took trail on 11.09.2014. For trail run there was a need of some raw materials demanded by the mechanic.

c. That for fulfillment of need of raw material for the trial run the appellant purchased raw tobacco from M/s Naveen tobacco Co. on 11.09.2014 of Rs.20,640/-, the appellant purchased color laminated roles from R.M. Polypack Pvt. Ltd. on 08.09.2014 on credit. The appellant purchased BOPP film bag from Varanasi packaging shop on 09.09.2014 of Rs.33,600/-

d. That the appellant was about to ready to intimate the department on 12.09.2014 for starting four pouch packing machines under rule 6 (10) of CTUTPM, 2010. But unfortunately the department made search operation on 12.09.2014 in the absence of the appellant.

e. That on 05.01.2015 the appellant presented before the department and submitted following documents:-

    - Photocopies of invoices regarding sale of pouch packing machines issued by M/s Ambey Engineering & M/s Anmol Packaging, Kanpur.
    - Photocopies of delivery receipt issued by M/s Saran Roadways Company, Kanpur.
    - Photocopies of affidavit issued by M/s Ambey Engineering & M/s Anmol Packaging, Kanpur.
    - Photocopy of Cash memo No.35 issued by M/s Naveen tobacco Company regarding sale of 480 Kg Raw tobacco with form 9 bearing Serial

No.129988 of Krishi Utpadan Mandi Samiti, Varanasi.

- Photocopy of Invoice No.0315 dated 08.09.2014 of M/s R.M. Polypack Pvt. Ltd. Regarding sale of 239.50 Kg of plane colored laminated paper role.
- Photocopy of sale invoice no.245 dated 09.09.2014 of M/s Varanasi Packaging for purchase of BOPP film bag.

f. That search and seizure conducted by the department is not proper in as much as the same has not been done in accordance with the provisions of the Central Excise Act. Section 12F and 18 of Central Excise Act, 1944 state that the provisions of CRPC, 1973 relating to search and seizure shall apply to the search and seizure proceedings under Central Excise Act, 1944. Sec.100 of CRPC, 1973 states that before making a search, the oficer or other person about to make it shall call upon two or more independent and respectable inhabitants of the locality in which the place to be searched is situated or of any other locality, if no such inhabitant of the said locality is available or willing to be a witness to the search. In present case no witness produced by the department from the locality of the seizure.

g. That the opportunity of Cross-examination was not given by adjudicating authority. The grounds for rejection of Cross-examination taken by the Commissioner was that after long time there was a chance that witness may change his mind or statement. That in the case of Commissioner of Central Excise, Meerut-I Vs Parmarth Iron Pvt. Ltd. reported in 2010 (260) ELT 514 (All.) Hon'ble Allahabad High Court has ruled as under:-

"We, therefore, have no hesitation in holding, that there is no requirement in the Act or Rules, nor do the principles of natural justice and fair play require that the witnesses whose statements were recorded and relied upon to issue the show cause notice, are liable to be examined at that stage. If the Revenue choose not to examine any witnesses in adjudication, their statements cannot be considered as evidence. However, if the Revenue choose to rely on the statements, then in that event, the persons whose statements are relied upon have to be made available for cross-examination for the evidence or statement to be considered."

h. Accordingly to said ruling the adjudicating authority is not liable to rely on statements of witnesses whose opportunity of cross-examination was not given to the appellant.

i. That the original authority relied on the statements given at the time of seizure on 12.09.2014 and all the statements which were recorded on 12.09.2014 were subsequently retracted. Therefore, the statements recorded on 12.09.2014 are not a piece of evidence to rely upon.

j. That the original authority is solely relying on statements which were subsequently retracted.

   Inspite of that there is no documentary evidence which establish that clandestine removal of goods ever been done such as proof of sale. The burden of proof is on revenue in case of allegation of clandestine manufacture and clearance.

k. The statement cannot be relied upon unless the statement is examined in chief before adjudicating authority. Statement is to be eschewed from evidence and should not be relied on as evidence as held by the Punjab & Haryana High Court in case of Jindal Drugs Pvt. Ltd. Vs U.O.I. reported as 2016 (340) ELT 67 (P & H).

l. That if the appellant's invoices and affidavit related to purchase of machines and the installation of machines appeared to be concocted, then the revenue also has not produced any evidence that the said machines were purchased & installed by the appellant in Dec, 13 & Jan, 14.

m. That in the case of Arya Fibres Pvt. Ltd. Vs Commissioner of Central Excise, Ahmedabad-II reported in 2014 (311) ELT 529 (Tri.-Ahmd.)

Criteria to establish clandestine removal are give as under:-

"There should be tangible evidence of clandestine manufacture and clearance and not merely inferences or unwarranted assumptions;

ii) Evidence in support thereof should be of:-

a) Raw materials, in excess of that contained as per the statutory records:-

b) Instances of actual removal of unaccounted finished goods (not inferential or assumed) from the factory without payment of duty;

c) Discovery of such finished goods outside the factory;

d) Instances of sale of such goods to identified parties;

e) Receipt of sale proceeds, whether by cheque or by cash, of such goods by the manufacturers or persons authorized by him;

f) Use of electricity far in excess of what is necessary for manufacture of goods otherwise manufactured and validly cleared on payment of duty;

g) Statements of buyers with some details of illicit manufacture and clearance;

h) Proof of actual transportation of goods, cleared without payment of duty;

i) Links between the documents recovered during the search and activities being carried on in the factory of production; etc."

None of the elements are present in this case. No evidence regarding discovery of goods outside the factory, receipt of sale, statements of buyers, proof of transportation of final product etc. was produced by the department.

n) That Revenue was not brought any evidence to prove any of the points stated above to prove clandestine manufacture & clearance, since the entire demand of excise duty is not sustainable on merit the appellant is not liable to pay penalties under section 11AC of CEA, 1944. Personal penalties on other appellants are also not sustainable.

7. We have Heard Shri Gyanendra Kumar Tripathi and Shri Shiv Pratrap Singh, learned Deputy Commissioners on behalf of revenue. They have reiterated the findings of the Original Adjudicating Authority.

8. We have carefully considered the submissions of all the appellants, submissions made by Departmental Representatives and we have perused the records. On perusal of impugned Order-in-Original, we note that the Original Adjudicating Authority did not allow the cross examination of any of the whiteness, whose statements were relied upon for issue of show cause notice. We note that Original Authority has relied upon statements recoded on 12.09.2014 which is date the search was conducted in the premises situated at 328 KA Churamanpur, Varanasi, premises belonging to Shri Srikant Chaurasia. Further, the original authority had denied authenticity of all the documents that were produced before the Departmental Authorities on 05.01.2015 which included invoices issued on 07.09.2014 in respect of sale of two pouch packing machines to Shri Srikant Chaurasia by M/s Ambey Engineering, Kanpur, affidavit dated 30.12.2014 was filed by Shri Ramakant Proprietor of M/s Ambey Engineering, Kanpur vide which he has stated that he has sold two pouch packing machines to Shri Shri Srikant

Chaurasia and handed over the same to M/s Saran Roadways Company and installation of the machines was done by Mechanic of firm on 10.09.2014 on the aforesaid premises, photocopy of invoice dated 02.09.2014 & dated 04.09.2014 issued by M/s Anmol Packaging, Kanpur regarding sale of one pouch packing machines each and JR nos.73499 and 74166 of M/s Saran Roadways Company and photocopy of cash memo no.35 issued by M/s Naveen Tobacco Company for sale of 480 Kg of raw tobacco to Shri Srikant Chaurasia, photocopy of sale invoice dated 08.09.2014 issued by M/s R.M. Poly Pack Pvt. Ltd. evidencing sale of 239.5 Kg of plane colored laminated paper roles to Shri Srikant Chaurasia and photocopy of invoice no.245 dated 09.09.2014 issued by M/s Varanasi Packaging evidencing sale of 200 Kg of BOPP film bags to Shri Srikant Chaurasia. The Original Authority has held the said documents to be fabricated and therefore by relying on all the statements dated 12.09.2014 and confirmed the demand and imposed penalties. We find that the transporter and seller of the FFS machines and seller of tobacco are also appellant before this Tribunal and they have during the hearing as recorded in the aforesaid paras confirmed the authenticity of all the documents which were produced by Shri Srikant Chaurasia on 05.01.2015. Further, as held by Hon'ble Allahabad High Court in the case of Parmarth Steel Iron Pvt. Ltd. reported at 2010 (26) ELT 541 (All.) wherein it was ruled to the effect that the statements which are not offered for cross examination cannot be considered as evidence. Since, Original Authority has not allowed cross examination of any of the persons none of the statements are admissible evidences for arriving at the decision. We also note that it was held in the case of Arya Fibers Pvt. Ltd. Vs Commissioner of Central Excise, Ahmedabad-II reported at 2014(311) ELT 529 (Tri.-All.) that clandestine removal by a manufacturer needs to be established by collecting evidence in relation of procurement of raw materials, actual removal of unaccounted finished goods, discovery of such goods outside the factory, instances of sale of such goods to identified parties, receipts of sale proceeds of such goods by the manufacturer, use of electricity which is necessary for manufacture of goods otherwise manufactured and cleared on payment of duty, statement of buyers with some details and illicit manufacture and clearance, proof of actual transportation of goods cleared without payment of duty. We note that revenue could not make out a case bringing no evidences as required for establishment of clandestine clearance as held in the above stated case of Arya Fiber Pvt. Ltd. Further, we note that the Original Authority has refused to accept the invoices issued by M/s Anmol Packaging and M/s Ambey Engineering even when revenue could not produce any positive evidence about the procurement of said FFS machines in the month of December, 2013 and January, 2014. Further, revenue did not find a single pouch of the finished goods in the market as per available record. Further, Revenue did not establish that the electric connection required for four FFS Machines was available with Shri Srikant Chaurasia since January, 2014 and he had paid electricity bill required for manufacture of goods involving duty of around Rs.9 crores. We therefore, come to a conclusion that the impugned order is not sustainable.

9. Therefore, we set aside the impugned order and allow all the appeals. All the appellants shall be entitled for consequential relief, as per law.

(Pronounced in Court on-25/05/2019)

(ArchanaWadhwa)
Member (Judicial)

(Anil G. Shakkarwar)
Member (Technical)

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