CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH - COURT No. I

Excise Appeal No.70121 of 2019-[DB]

(Arising out of Order-in-Original No.LKO/EXCUS/000/COM/EX/040/16-17 dated 06/02/2017 passed by Commissioner of Central Excise & Service Tax, Lucknow)

M/s Shyam Traders, ...Appellant

(255/62, Kundri, Rakabganj, Shitla Prasad Road, Lucknow)

VERSUS

Commissioner of CGST, Central Excise & Service Tax,

Respondent

(Lucknow)

APPEARANCE:

Shri Anurag Mishra & Ms Pragya Pandey, Advocates for the Appellant
Shri Rajeev Ranjan, Authorised Representative for the Respondent

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

FINAL ORDER NO-71846 / 2019

DATE OF HEARING : 03 September, 2019
DATE OF PRONOUNCEMENT : 05 November, 2019

PER: ANIL G. SHAKKARWAR

The present appeal is directed against Order-in-Original No.LKO/EXCUS/000/COM/EX/040/16-17 dated 06/02/2017 passed by Commissioner of Central Excise & Service Tax, Lucknow.

2. Brief facts of the case are that appellants, during the relevant time, were engaged in the manufacture of Pan Masala Gutkha bearing the brand name "Shyam Bahar" falling under Chapter Heading No.24.04 of first schedule to Central Excise Tariff Act, 1985. Officers of DGCEI conducted simultaneous searches at various premises including the factory premises of the appellant on 20.10.2003. During the search of the factory premises officers seized 'Shyam Bahar' Gutkha valued at Rs.85,008/-. Further, the officers also seized Indian Currency amounting to Rs.4,38,80,530/- from the residence-cum-factory premises of Shri Sanjiv Mishra, Proprietor of the appellant. Simultaneously, various offices of transporters were also searched. 'Shyam Bahar' Gutkha was also seized at various premises of M/s Sitapur Kanpur Transport Company. Besides these, officers also searched various premises including premises of suppliers of raw materials. Further, investigations were carried out by recording of submissions and recovery of GRs from the premises of the transporters wherein the description of the goods stated on GRs were Zarda, Masala and Shyam Bahar. Some samples were also drawn and sent for testing to Shri Ram Institute for Industrial Research, Delhi (SIIR). On test, the average content of laminated plastic packing in each 2 gm Gutkha pouch was found to contain 2.1 to 2.2 % by weight of tobacco. On the basis of said test report and consumption of tobacco and as a result of various statements and documentary evidences collected from the transporters such as GRs and also on the basis of waste generated during the processing of Supari,

appellants were issued with a show cause notice dated 20.10.2004 demanding Central Excise duty of around Rs.7.17 crores for the period from 01.01.2001 to 19.10.2003 with a proposal to appropriate an amount of Rs.55,60,612/- deposited by the appellant during the course of investigation. There was further proposal to confiscate currency of Rs.4,38,80,530/- under the provisions of Customs Act made applicable to Central Excise as sale proceeds of clandestinely removed goods. Through the said show cause notice other noticees were also called upon to show cause, as to why penalties should not be imposed on them. The said show cause notice was adjudicated through Order-in-Original No.10/Commr/LKO/2006-07 dated 23.03.2007 passed by Commissioner of Central Excise, Lucknow. Through the said order, the demand was confirmed and the seized currency of around Rs.4.38 crores was confiscated. Other noticees of the said show cause notice were imposed with penalties. The present appellant and other five co-appellants preferred the appeals against the said order dated 23.03.2007 before this Tribunal. The said six appeals were disposed of through a common Final Order No.769-774/2011-EX dated 12.08.2011. It was submitted before this Tribunal that the entire case was based on some details regarding booking of consignments in the records of 3 transport companies i.e. M/s Sitapur-Kanpur Transport Company (SKTC), M/s Haji Transport Goods Carrier (HTGC) and M/s Narain Transport Freight Carrier (NTFC), that all the sales of appellant were at factory gate and the consignment in respect of which the duty was demanded had been booked by the customers of the appellant to whom the goods were sold at the factory gate on payment of duty, that there is no evidence that the consignments declared to be of 'Shyam Bahar', Zarda and Masala etc. whose details are mentioned in the GRs issued by the said 3 transport companies had been booked by the appellant, that at the time of search of factory premises of appellant except for excess stock of Gutkha valued at Rs.85,008/- no other discrepancy in the account of raw material has been deducted, that as regards the cash of Rs.4,38,80,530/- seized from the factory-cum-residential premises of Shri Sanjiv Mishra, it cannot be presumed that the same was sale proceed of clandestinely removed Gutkha and the burden is on revenue to prove that the same was sale proceed of such clandestine sale without payment of duty, that the cash seized in fact belonged to M/s Shyam Vanaspati Oils Ltd. A company promoted by Shri Sanjiv Mishra a few days before the date of search of the residential premises and the said money had been raised by M/s Shaym Vanaspati Oils Ltd. from the investors as certified by their Chartered Accountant Shri V.K. Tulsian that the name of appellant did not figure anywhere in the challans or GRs issued by transport companies or in the records maintained by them that duty demand based on such documents recovered from third party is without basis, that GRs and Challans issued by transport companies mentioned the goods as Zarda, Masala and Shyam Bahar and it cannot be presumed that the goods described as Shyam Bahar was Shyam Bahar Gutkha because the brand name Shyam Bahar was also being used by

M/s Spatial Commercial Ltd., M/s Satish Trading and M/s SS Trading, as is clear from the copy of Civil Suit No.28/03 filed by them against the appellant before District Judge, Kanpur in November, 2003, that request of the appellant vide their letter dated 05.02.2006 for cross examination of 25 persons which included the proprietors, partners and employees of transport companies, proprietors of dealer's firm, Shri Dhirendra Shukla, Proprietor of M/s DC and Chemical Examiner of SIIR who had tested the samples of gutkha pouches but the same has not been allowed. It was further submitted before this Tribunal on behalf of the appellant that the major portion of duty demanded is based on the testimony of the said 25 persons and not permitting their cross examination vitiated the entire proceedings and in that regard the appellant had relied on the judgment of Hon'ble Allahabad High Court in the case of Commissioner of Central Excise, Meerut-I Vs M/s Permarth Iron Pvt. Ltd. reported at 2010 (260) ELT 514 (All.). This Tribunal through the said Final Order dated 12.08.2011 has observed as follows:-

> *"**7.4** In this case, the Appellant vide their letter dated 5-2-2006 to the Commissioner had sought cross examination of 25 persons which included Shri Praveen Rastogi, Partner, M/s. SKTC, Shri Anjani Kumar Shukla, employee of M/s. SKTC, Shri Mithlesh Kumar of M/s. HTGC, Shri Dhirendra Shukla of M/s. DG, the concerned person of SIIR, New Delhi and some traders - Shri Mahesh Chaurasia of M/s. Shanker Traders, Lakhimpur and Shri Shiv Kumar Jaiswal of M/s. Jaiswal Stores, Sitapur. However, perusal of the impugned order does not indicate that their cross examination has been allowed. The request for cross examination has been rejected on the ground that the person*

sought to be cross examined are co-noticees who can not be compelled to appear for cross examination, which is incorrect as partners and employees of M/s. SKTC, employees of M/s. HTGC, and Chemical Examiner of SIIR whose cross examination had been sought along with others, are not co-noticees. The cross examination of the proprietors/partners and employees of the transport companies is necessary to ascertain as to on what basis they have stated that all the consignments where the description of goods in the GRs/Lorry challans was mentioned as "Zarda", "Masala", or "Shyam Bahar" were of Shyam bahar gutka manufactured by M/s. ST and received directly from the factory of M/s. ST. Cross examination of Shri Dhirendra Shukla of M/s. DG is necessary for ascertaining as to on what basis he had stated that waste in form of Burada/dust and chhilan generated in processing of supari is 4%, as the quantity of supari processed by M/s. DG for M/s. ST during December, 2002 to 19-10-2003 period has been estimated on the basis of the quantity of waste found in the premises of M/s. DG. Similarly, the cross examination of the Chemical Examiner of SIIR, who tested the samples of Shyam Bahar gutka for ascertaining its tobacco content is necessary for ascertaining as to by which method the test had been conducted. The report of the Chemical Examiner of SIIR is important as -

(a) While SIIR has reported the tobacco content of Shyam Bahar Gutka as 2.1% to 2.2%, by weight, as per the formula intimated by M/s. ST to the Department, the tobacco content of the gutka is supposed to be about 13% to 16% by weight and if the SIIR report is correct, it would be a clinching evidence of a clever modus operandi for under-reporting the production of Gutka by showing inflated figure of consumption of tobacco; and

(b) the exact figure of consumption of tobacco for the entire period of dispute i.e. 2000-2001, 2001-2002, 2002-2003 and 1-4-2003 to 16-10-2003 period of 2003-04 are available and if the SIIR report about tobacco content of Shyam Bahar Gutka being 2.1% to 2.2% by weight is correct, this report coupled with the consumption of PP Outers and Supari, would be a conclusive evidence of gross under reporting of the production of gutka. Since actual tobacco content is a crucial point, if the seized

goods are still available, a fresh sample may be drawn in presence of the Appellant and got tested through Central Revenue Central Laboratory (CRCL).

7.5 *In view of the above discussion, the order confirming duty demand against M/s. ST and imposing penalty on them under Section 11AC has to be set aside and the matter has to be remanded to the adjudicating authority for de novo adjudication after permitting the cross objection of Proprietors/Partners and employees of transport companies, Shri Dhirendra Shukla of M/s. DG, Chemical Examiners of SIIR and of any other witnesses whose statements have been relied upon by the adjudicating authority and their cross examination has been requested by the Appellant giving justification for the same, and also as mentioned above, getting a fresh sample of gutka from the seized goods, if still available, tested through CRCL and taking that test report also into account after permitting the cross examination of the Chemical Examiner; if requested. If, however, the witnesses whose statements have been recorded under Section 14 of the Central Excise Act, 1944 by a Gazetted Officer and the same are relied upon by the Department, and due to the circumstances enumerated in Section 9D(l)(a), their cross-examination is not possible, in terms of the provisions of Section 9D(i) read with Section 9D(2), the same can be admitted as evidence provided the procedure and the principles laid down in this regard by Hon'ble Delhi High Court in its judgment dated 18-8-2009 in case of M/s. J & K Cigarettes Ltd., 2009 (242) E.L.T. 189 (Del.) = 2011 (22) S.T.R. 225 (Del.) M/s. GTC Industries Ltd. & Others v. C.C.E. [2009 (242) E.L.T. 189 (Del.)] are followed.*

8. *As discussed above, the question of confiscation of currency of Rs. 4,38,80,530/- seized from the residential-cum-factory premises of M/s. ST under Section 121 of the Customs Act, 1962 read with notification No. 68/03-C.E., dated 4-5-1963 issued under Section 12 of the Central Excise Act, 1944, the question of confiscation of 85008 pouches of Gutka seized from the factory of M/s. ST for non-accountal and penalty on M/s. ST on this count and the question of imposition of penalty on the transporter, M/s. SKTC under Rule 26 of the Central Excise*

Rules, 2002 are linked with the question of sustainability of the duty demand from M/s. ST in respect of consignments of Shyam Bahar Gutka alleged to have been booked through M/s. SKTC, M/s. HTGC and M/s. NTFC. Therefore, the order of confiscation of currency, confiscation of 85008 pouches of gutka for non-accountal and penalty on M/s. ST on this count and imposition of penalty on M/s. SKTC under Rule 26 of Central Excise Rules has also to be set aside and these matters have also to be remanded for de novo adjudication. Since at the time of seizure of the currency of Rs. 4,38,80,530/- Shri Sanjiv Mishra could not give any explanation for the same and his subsequent explanation, based on the certificate of their Chartered Accountant, Shri V.K. Tulsian that this currency is the share application money received for his new venture, M/s. SVOL, from some investors - three main investors being M/s. Sunshine Capital Ltd., M/s. Betsy Growth Finance and M/s. Stellar Investment, has been found to be false, in case the duty demand of Rs. 7,17,16,580/- is upheld against M/s. ST, the currency of Rs. 4,38,80,530/- would have to be treated as sale proceeds of goods cleared without payments of duty and would be liable for confiscation under Section 121 of the Customs Act, 1962 read with Section 12 of the Central Excise Act, 1944. However, in the event of confiscation of the currency and 85008 pouches of gutka, in accordance with the provisions of Section 34 of the Central Excise Act, 1944, an option to redeem the same on payment of redemption fine would have to be given.

9. *In view of our above discussions -*

(a) the duty demand against M/s. ST along with interest and the penalty on them under Section 11AC is set aside and the matter is remanded to the Commissioner for de novo adjudication keeping in view our observations in para 7.5 of this order;

(b) Penalty under Rule 26 of the Central Excise Rules, 2002 on M/s. SKTC, confiscation of Indian currency of Rs. 4,38,80,530/- seized from the residential-cum-factory premises of Shri Sanjiv Mishra and confiscation of 85008 pouches of gutka seized from factory premises of M/s. ST for non-accountal

and penalty on them on this count is set aside and the matter is remanded to Commissioner for de novo adjudication keeping in view our observation in para-8 of this order;

(c) confiscation of supari seized from M/s. DG and penalty on M/s. ST under Rule 25 for non-accountal of supari and penalty under Rule 26 of Central Excise Rules, 2002 on Shri Dhirendra Shukla, Proprietor, M/s. DG is set aside; and

(d) Penalty under Rule 26 of the Central Excise Rules, 2002 on M/s. SVOL, Shri Sanjiv Mishra & Shri Pratyoosh Mishra, Directors of M/s. SVOL is set aside.

9.1 *Since the matter is about eight years old and huge revenue stakes are involved, the Commissioner is directed to complete the de novo adjudication proceedings as early as possible. The Appellants are also directed to fully co-operate with the Department in this regard.*

3. The said Final Order dated 12.08.2011 was challenged by revenue before Hon'ble Allahabad High Court at Lucknow Bench. The said appeal filed by revenue was dismissed by Hon'ble Allahabad High Court in Central Excise Appeal No.14 of 2012 through their order dated 21.01.2016. Relevant part of the said order is reproduced bellow:-

"2. *This Central Excise Appeal under Section 35G of the Central Excise Act, 1944 arises out of an order dated 12th August, 2011 passed by Customs, Excise & Service Tax Appellate Tribunal [2012 (278) E.L.T. 468 (Tribunal)], whereby, the matter has been remanded back to the adjudicating authority for allowing the respondent to cross-examine the witnesses. From a perusal of the impugned judgment, we find that such a requirement of law being imperative as was held by this Court in a judgment reported in 2010 (260) E.L.T. 514 (All.), CCE, Meerut-I v. Parmarth Iron Pvt. Ltd. was appreciated and applied by the Tribunal in the facts and circumstances of the present case.*

3. *Learned counsel for the appellant does not dispute the position that the law laid down by this Court in the judgment mentioned above remains unsettled and the opportunity of cross-examining witnesses is available to the assessee.*

4. *In support of the contention based on the judgment referred to above, learned counsel for the respondent has further placed before us a judgment rendered by Hon'ble Apex Court in the case of Andaman Timber Industries v. Commissioner of Central Excise, Kolkata-II reported in 2015 (324) E.L.T. 641 (S.C).*

5. *Referring to para 6 of the Apex Court judgment, it is submitted that the law laid down by this Court in the judgment already referred to hereinabove stands further fortified under the Apex Court judgment.*

6. *Learned counsel for the appellant is unable to place any judgment holding a contrary view on the proposition of law as has been relied by the learned counsel for the respondent as well as the law relied upon by the Appellate Tribunal in its judgment, sought to be impugned in the present appeal.*

7. *Once the position of law is settled and a contrary view is not put forth by learned counsel for the appellant in the present case, we are of the considered opinion that the judgment rendered by the Appellate Tribunal does not suffer from any illegality which may call for an interference under the appellate jurisdiction of this Court by virtue of Section 35G of the Central Excise Act, 1944.*

8. *In the result, the appeal fails and the impugned order passed by the Appellate Tribunal is hereby confirmed. It is open to the parties to appear before the adjudicating authority who shall proceed in accordance with law.*

9. *With the aforesaid observations, the appeal is dismissed."*

4. The impugned order was passed as a consequence of the said directions through the order dated 12.08.2011 passed by this Tribunal merged in the order dated 21.01.2016 passed by

Hon'ble Allahabad High Court. The relevant parts of the finding of impugned order are reproduced bellow:-

> "**6.1** I have carefully gone through the Show Cause Notice dated 20.10.2004, Order-In-Original dated 15.02.2007, the observations and findings of the Hon'ble Tribunal in their order dated 12.08.2011 and the order of the Hon'ble High Court as narrated above.
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> In view of the judgment of the Hon'ble High Court, the Final Order dated 12.08.2011 has achieved finality and consequently, as per the directions of the Hon'ble Tribunal the issues relating to confiscation of seized goods, confirmation of demand of duty on the finished goods removed clandestinely from the factory and confiscation of sale proceeds alongwith penalty on various persons are to be decided in these denovo proceedings.
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> As per the observations contained in para 7.5 of the Final Order, The Hon'ble Tribunal has directed for allowing filing of cross-objections by various persons i.e. proprietor/partners and employees of transport companies, proprietor of Supari grinding unit, Chemical Examiner or any other witness whose statement has been relied and for permitting the cross-examination of such persons by the appellant. Hon'ble Tribunal also directed for drawl of fresh samples of seized stock and its testing through CRCL, if the goods are available.
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> **6.2** In order to comply with the above directions, all the six appellants mentioned above were given fresh opportunity to present their case before the adjudicating authority. In the regard, letter dated 22.11.2016 issued to all six appellant was send to them separately asking them to attend the hearing before the adjudicating authority on 08.10.2016, but none of the noticee appeared for hearing. All these letters were sent by speed post but returned by the postal authorities with different remarks. It appears that the appellants are not inclined to co-operate in the denovo adjudication proceedings. I also notice from the perusal of the case records that after passing of the Final Order by the Hon'ble Tribunal way back in 2011, they never approached the adjudicating authority with any request for cross-examination or for any request/clarification thought

the terms of remand were notified to them also under the said Final order and they were also required to comply with the directions therein being appellant in the matter before the Hon'ble Tribunal. Although such absence from the proceedings is detrimental to their own interest but it appears that they are deliberately not extending co-operation in the matter. Since the matter is long delayed therefore, procrastination needs to be avoided. In these circumstances, I have left with no other option to take up the matter on its merits and pass the order in the light of facts, evidences and submissions already on record and complying with the directions of the Hon'ble Tribunal. I proceed accordingly."

The Original Adjudicating Authority through the impugned order confirmed the demand of Central Excise duty of Rs.7,17,16,580/- and appropriated the amount of Rs.55,60,612/-. Further, equal penalty was imposed on the appellant. The seized cash of Rs.4,38,80,530/- was confiscated by the Original Adjudicating Authority. Aggrieved by the said order, appellant is before this Tribunal.

5. Heard Shri Anurag Mishra and Ms Pragya Pandey both learned Advocates on behalf of the appellant. They made following submissions:-

a) The present remand proceedings were under the directions that the appellant will be provided the opportunity to cross-examine the proprietors, partners and employees of transport companies, Shri Dharmendra Shukla of Ms Dharmendra Grinding, Chemical Examiner of SIIR. It was also provided that the cross-examination of any other witness shall also be provided if their statements were relied upon by the department and the request in this regard has been made by the appellant. Therefore, it is apparent from the order of the Appellate

Tribunal that the appellant was not required to make any request in respect of proprietor, partners and employees of transport companies including the Chemical Examiner of SIIR. It was also not required for the reason that the appellant has already requested for their cross-examination during the adjudication. The liberty was also granted to the appellant to the extent that if the department wants to rely upon any statement then the cross-examination of the said persons shall also be granted if the request were made in this regard. In the present case the learned Commissioner has not followed the specific direction given by the Appellate Tribunal and affirmed by the Hon'ble Allahabad High Court. The learned Commissioner has not made any efforts to issue summons to produce proprietor, partner and employee of transport company, Shri Dharmendra Shukla, M/s Dharmendra Grinding or the Chemical Examiner of SIIR. The entire demand is based upon the statements of various proprietors of raw material suppliers, partner and employee of Transport Company and of Shri Dharmendra Shukla supplier of Betel Nut to the appellant. The learned Commissioner has fixed only one date for personal hearing and came to the conclusion that the appellant is not co-operating in the adjudication proceedings. Such a conclusion defies the order of the Hon'ble Tribunal and Hon'ble High Court; and is against the principles of natural justice. The order of the learned Commissioner is against the specific direction and hence liable to be set aside alone on this ground.

b) The Appellate Tribunal in its order dated 12.08.2011 has clearly stated that if the cross-examination of the witnesses is not possible in terms of provision of Section 9D (1) read with Section 9D(2) the same cannot be admitted as evidence. No evidence whatsoever has been brought on record to prove that notices or summons were issued to such persons for their cross-examination. The

Hon'ble Allahabad High Court vide order dated 21.01.2016 by relying upon Apex Court judgment in the case of M/s Andaman Timber Industries Vs Commissioner of Central Excise, Kolkata-II, reported at 2015 (324) ELT 641 (SC) has already held that the cross-examination is a valuable right of the assessee and cannot be denied.

c) Without prejudice to the aforesaid it is further submitted that the learned Commissioner has held that opportunity of personal hearing has been given to all the 6 appellants who approached the Appellate Tribunal against the order of the Commissioner dated 15.02.2007. As a matter fact the Appellate Tribunal has already dropped the proceedings against 4 of the appellants namely M/s Shyam Vanaspati Oil, Shri Sanjiv Mishra and Shri Devendra Shukla. The denovo proceedings were only in respect of M/s Shyam Traders and M/s Sitapur Kanpur Transport Company. The Act of the learned Commissioner clearly proves that the learned Commissioner has failed to appreciate the order of the Appellate Tribunal and Hon'ble Allahabad High Court. More importantly the learned Commissioner has admitted the fact that the letters of personal hearing were sent through Speed Post which were returned back with different remarks by the postal authorities.. The learned Commissioner has not made any other effort to serve the letter to the appellant especially when the case was remanded back with a specific direction. The learned Commissioner has also failed to appreciate that the appellant was not required to give any request for cross-examination in respect of the persons whose cross-examination has already been allowed by the Appellate Tribunal. The request for the cross-examination of the other persons could have been provided if the letter of personal hearing was served to the appellant.

d) The learned Commissioner has admitted that allegation of clandestine removal is based on the incriminating records seized from Transport companies and on the basis of the statements of raw material suppliers, employees of the company, proprietors and partners of the transport companies. The Appellate Tribunal while considering this fact has allowed the cross-examination of proprietor, partner and employee of transport companies, Shri Dhrmendra Shukla and Chemical Examiner. It was further directed that the appellant has liberty to cross examine those persons whose statement is ought to be relied upon by the department. The learned Commissioner ought to have given a list of persons whose statements were relied upon and then only the request should have come from the appellant's side for their cross-examination. The learned Commissioner has totally disobeyed the remand proceedings and, therefore, the order of the learned Commissioner confirming the demand of duty and penalty is bad in law and hence liable to be set aside.

e) The charges of clandestine removal are based on third party documents and based on the oral statements who were not cross-examined, therefore, the said third party documents and statements cannot be relied upon to prove the charges of clandestine removal. It is a well settled principle of law that the third party documents cannot be relied upon to prove the charges of clandestine removal in view of the following judgments:-

(i) Kuber Tobacco Products Pvt. Ltd. Vs C.C. Ex. Reported at 2013 (290) ELT 545 (Trib).
(ii) Rhino Rubbers Ltd. Vs Collector reported at 1996 (85) ELT 260 (Trib)
(iii) CCEx Vs Rajratan Synthetics Ltd. reported at 2013 297 ELT 63 (Trib)
(iv) Savitri Concast Ltd. Vs CCEx reported at 2015 (329) ELT 213 (Trib)

f) The learned Commissioner has also failed to appreciate that the Order-in-Original passed by the then Commissioner dated 15.02.2007 was based on incorrect findings and was set aside by the Appellate Tribunal vide order dated 12.08.2011. The Appellate Tribunal while setting aside the said order specifically directed the Original Adjudicating Authority for denovo proceedings. The direction was to the extent that the statements can be relied upon by following the mandate as provided in the case of M/s Jindal Drugs Pvt. Ltd. Vs U.O.I. reported at 2016 (340) ELT 67 (P & H), M/s G-Tech Industries Vs Union of India report at 2016 (339) ELT 209. The learned Commissioner has not given any consideration to the said specific direction and the statements were not testified by doing cross examination in chief which has to be done. The learned Commissioner has made a grave mistake by reiterating the submission and the findings made by the earlier Commissioner in his order dated 15.02.2007 which was set aside by the Hon’ble Triubnal.

g) In the present case the charges of clandestine removal were based on third party documents and on the statements which were recorded at the back of the appellant. The said statements were not only contrary; but based on incorrect facts. The appellant in their earlier submission requested for the cross examination because the statements were obtained under pressure and duress and based on incorrect facts. The said submissions were appreciated by the Appellate Tribunal and the appellant were allowed for cross examination of such witnesses. The learned Commissioner has not conceded with the said direction of Hon’ble Tribunal and High Court and, therefore, in absence of cross examination and cross examination in chief as directed by the Hon’ble Tribunal the charges of clandestine removal has wrongly upheld by the learned Commissioner.

h) Even otherwise the charges of clandestine removal against the appellant are based on GR's which were recovered from the possession of the transport agency and on the statement of the owners, employees of the said transport companies. The cross examination of said transporter were not conducted by the learned Commissioner, therefore, in view of the judgment of M/s. Santosh Tobacco Vs. C.C.Ex. reported at 2014 (311) E.L.T. 465 (Trib) affirmed by Delhi High Court reported at 2016 (332) E.L.T. 793. M/s Chandan Tobacco Company Vs. C.C.Ex. Vapi reported at 2014 (311) E.L.T. 593 wherein the Appellate Tribunal has held that the charges of clandestine removal shall be proved by putting evidence as regard to the receipt and consumption of raw material, movement of goods along with freight payment, unauthorized payment were procurement of raw material and packing material, misappropriate consumption of power and labour force etc. In the present case all these evidences are totally missing and the charges of clandestine removal are based on un-authentic GR's and oral statements.

i) The Appellate Tribunal has specifically directed that if the charges of clandestine removal are proved against the appellant then the amount of cash currency amounting to Rs.4,38,80,530/- should have been appropriated against the said demand. The learned Commissioner without allowing the request of the cross examination and based on the earlier finding of the then Commissioner has concluded that the appellant has clandestinely removed the goods from their factory premises and confirmed the demand of duty and amounting of Rs.7,17,16,580/- along with equivalent penalty against the appellant. The charges of clandestine removal has not proved against the appellant and the learned Commissioner has totally ignored the specific direction made by the Appellate Tribunal and by the Hon'ble High Court and passed the present order which is bad in law. Once the charges of clandestine removal have not proved against the appellant the amount which is the share capital of some different company for which C.A. certificate was also produced cannot be confiscated as sale proceeds. The confiscation of seized currency which was the share capital of some other company is liable to be set aside and the said seized currency should be returned back to the appellant along with interest thereon. The currency was seized in the year 2003 and was lying with the department since then and the department is enjoying the benefits of the said seized currency. The said currency ought to be returned back to the appellant along with interest from the date of its seizure till the date of return.

j) It is further submitted that the entire demand is based on third party document i.e. transport receipt and GR's. In view of the cited precedents the charges of clandestine removal cannot be based solely upon oral statements and third party documents. The other corroborative evidences in the form of consumption of raw material, transportation of raw material, its actual use in the manufacturing of goods, production capacity, extra labour force, extra consumption of electricity and evidence of removal of finished goods from the factory of the assessee and the receipt of payment has to be adduced to prove the charges of clandestine removal. In the present case no document relating to clandestine removal has been recovered from the factory premises of the Appellant, the entire demand is based on transport documents only. Considering this fact the Tribunal has directed the Commissioner to conduct the cross-examination which was not done in the present case. The Hon'ble Tribunal has also directed the Learned Commissioner that the currency can only be seized as sale proceeds, if the charges of clandestine removal are established. In the present case the charges of clandestine removal are not established by any other corroborative evidence and in such a scenario, seizure of currency is highly illegal and unsustainable. It is further submitted that the Hon'ble Tribunal has directed the Commissioner to give an option of redemption of currency and goods in case of their seizure. The Learned Commissioner has recorded no finding in respect of redemption of seized currency which is a violation of Hon'ble Tribunal's order dated 12.08.2011. Hence, the order of the Commissioner suffers from illegality.

k) The Shyam Bahar Gutkha seized at the factory premises of the appellant has not attained the RG-1 stage as same was not packed in poly pouches and subsequently in boras. The said pouches were lying in semi finished condition and not liable for confiscation. Similarly the Shyam Bahar Gutkha seized at the transport premises were not cleared from the appellant factory premises and appears to be booked by different buyers who have purchased the said Gutkha from the open market. The Shyam Bahar Gutkha seized at the transport premises were not cleared from the appellant's premises without payment of duty and hence not liable for confiscation. The order of the learned Commissioner upholding the demand of duty alongwith interest and penalty is unsustainable, unlawful and liable to be set aside. Similarly the seizure of the seized currency as sale proceeds of clandestine removed goods is not maintainable in absence of any evidence of clandestine removal. The seizure of the currency and goods not maintainable in law and hence order of the learned Commissioner confiscating the goods and seized currency is also liable to be set aside.

6. Heard the learned Authorised Representative appearing on behalf of the revenue. He has supported the impugned order.

7. Having considered the submissions made by both the sides and on perusal of said Final Order dated 12.08.2011, judgment

dated 21.01.2016 passed by Hon'ble Allahabad High Court and case records, we note that as directed by Hon'ble Allahabad High Court it was responsibility of the Original Adjudicating Authority i.e. Commissioner to insure that the 25 persons whose cross examination was sought through the letter dated 05.02.2006 were presented for cross examination by the appellant. The said requirement was dealt with by the Original Adjudicating Authority through para 6.2 of the impugned Order-in-Original wherein he has sent a letter dated 22.11.2016 to 6 appellants and informed them that the case was posted for hearing on 08.12.2016. The impugned order does not indicate that the Original Adjudicating Authority has put in any efforts to present 25 prosecution witnesses before the appellants for cross examination. We, therefore, hold that directions of the Hon'ble Allahabad High Court through their judgment dated 21.01.2016 were not followed by the Original Adjudicating Authority. It was clearly observed in the said Final Order dated 12.08.2011 that the cross examination of partners and employees of M/s SKTC, M/s HTGC & M/s NTFC which was the transport companies were necessary to ascertain as to on what basis they had stated that all the consignments where descriptions of the goods in the GRs and Lorry Challans was mentioned as Zarda, Masala or Shyam Bahar were of the Gutkha clandestinely removed by the appellants. It was also observed that cross examination of Shri Dhirendra Shukla of M/s DG was necessary for ascertaining as to on what basis he had stated that waste in the form of dust generated in the processing of supari was 4% as the quantity of supari processed by M/s DG for the appellant during December, 2002 to 19.10.2003 had been estimated on the basis of quantity of waste found in the premises of M/s DG. Similarly, it was observed that cross examination of the Chemical Examiner of SIIR, who tested the samples of Shyam Bahar Gutkha for ascertaining its tobacco content was necessary for ascertaining as to by which method the test has been conducted since the percent content of tobacco by weight of gutkha sample had bearing on conclusion of total gutkha manufactured on the basis of consumption of tobacco since the appellant had declared to the Department that tobacco content of gutkha was supposed to be around 13 to 15% by weight. Since the said cross examinations were not conducted, the basis for conclusion of total quantity of Gutkha alleged to be clandestinely cleared has not been established. Further, wherever Zarda, Masala and Shyam Bahar was stated in the GRs and lorry challans the same was clandestinely removed Shyam Bahar Gutkha without payment of duty by the appellant has also not been established because the cross examination of the representatives of transporters was not allowed. We, therefore, hold that the clandestine manufacture and clearance of alleged quantity of gutkha is not established. We, therefore, hold that seized currency of about Rs.4.38 crores cannot be held to be sale proceeds of clandestinely removed gutkha. We, therefore, hold that demand of Central Excise duty of about Rs.7.17 crore is not sustainable. We also hold that confiscation of currency of Rs.4.38

crores approximate is not sustainable. Therefore, penalties are also not imposable & interest is not recoverable.

8. We, therefore, set aside the impugned order and allow the appeal with consequential relief to the appellant.

(Pronounced in open court on-05 November, 2019)

(Archana Wadhwa)
Member (Judicial)

(Anil G. Shakkarwar)
Member (Technical)

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