FAX : 0532-2400149

REGISTERED / AD

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
38,MG Marg Civil Lines,Old Red Building,Allahabad-211001
Regional Branch, Allahabad

To

Dated: 20/09/2017

Appellant as per address in table below
Respondent as per address in table below

Final Order No. A/71122-71123/2017-SM[BR] dated 04/09/2017

I am directed to transmit herewith a certified copy of order passed by the Tribunal under section 35-C(1) of the Central Excise and Salt Act, 1944.

Asstt. Registrar

Application	Appeal	Name and Address of Appellant
1	E/1434/2008	C.C.E, KANPUR 117/7, Sarvodaya Nagar, Kanpur 208005.
2	E/1435/2008	C.C.E, KANPUR 117/7, Sarvodaya Nagar, Kanpur 208005.
		Name and Address of Respondent
3		SHRI A.N.TRIPATHI, DIRECTOR OF M/S BAKUL POLY PACK PVT. LTD. D-50, SITE-V, DADANAGAR, UDYOGKUNJ, PANKI, KANPUR-22 (U.P.)
4		BAKUL POLY PACK PVT. LTD. D-50, SITE-V,DADANAGAR, UDYOGKUNJ,PANKI, KANPUR-22.(U.P.)

Other Appellants and Respondents as per Annexure

Copy To

5 Bar Association, CESTAT, Allahabad

6 Director Publications, Customs, Excise. I.P. Estate, Delhi

7 M/s Centax Publications Pvt. Ltd., 1512-B, Bhishm Pitamah Marg, New Delhi-3

8 Company Law Institute of India Pvt. Ltd., No.2 (old no.36), Vaithyaram Street, T. Nagar, Chennai-17

9 Taxmann Allied Service Pvt. Ltd., 59/32, New Rohtak Road, New Delhi-110005

10 LAWCRUX Advisors Pvt. Ltd., LAW House, 1-8, Sector-10, Faridabad 121003 (Haryana)

11 TaxIndiaOnline.com Pvt. Ltd., 2nd Floor, Vasant Arcade, Vasant Kunj, New Delhi - 110070

12 Mark Professional Services Pvt. Ltd., 108, Everest Block, Aditya Enclave, Hyderabad – 38

13 The ICFAI society, 52, Nagarjuna Hill,Punjagutta Hyderabad.-500082

14 M/S Knowledge Processing Pvt. ltd.(taxmanagementindia.com),FF-19,1st Floor,Cross River Mall,CBD Ground,Near Karkardooma Court,Delhi-110032

15 C.D.R. 16 Office Copy 17 Guard File

Asstt. Registrar

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

REGIONAL BENCH : ALLAHABAD

COURT No. I

APPEAL No. E/1434 & 1435/2008-EX[SM]

(Arising out of Order-in-Appeal No. 151-152-CE/APPLKNP//2008 dated 31/03/2008 passed by Commissioner of Central Excise & Customs (Appeals), Kanpur)

Commissioner of Central Excise, Kanpur **Appellant**

Vs.

M/s Bakul Poly Pack Pvt. Ltd. (In Appeal No. E/1434/2008) &

Shri A. N. Tripathi, Director (In Appeal No. E/1435/2008) Respondent

Appearance:

Shri Pawan Kumar Singh, Superintendent (AR), for Appellants
Absent for Respondent

CORAM:

Hon'ble Mr. Anil Choudhary, Member (Judicial)

Date of Hearing & Date of Decision: 16/12/2016

FINAL ORDER NO. 71122-71123/2017

Per: Anil Choudhary

The Revenue is in appeal against Order-in-Appeal No. 151-152-CE/APPLKNP//2008 dated 31/03/2008 passed by Commissioner of Central Excise & Customs (Appeals), Kanpur, wherein at the time of inspection of the finished products/physical verification of stocks shortage of 5955 Kgs. in stock of Polyester Film (input) and excess of 6378 Kgs. and 4229 Kgs. was noticed in the stock of other inputs namely Metalized Polyfilm & Co-extruded Poly Film respectively. Further, an excess of 8217.980 Kgs. was noticed in the stock of finished products namely Printed Plastic Article & Flexible Printed Laminated Rolls. The learned Commissioner (Appeals) held that in the facts and circumstances, confiscation of seized goods is not proper as the goods were still lying in the factory premises, and there is no evidence of clandestine removal. Further, the Department have failed to provide cross-examination of witness even after deciding the issue thrice. Accordingly, penalty imposed were also set aside.

2. The respondent - M/s Bakul Poly Pack Pvt. Ltd. were engaged in manufacturing and clearance of Printed Plastic Article & Flexible Printed Laminated Rolls. They are registered with the Department and availing SSI exemption. On intelligence that one M/s Shyam Traders, Lucknow, manufacturer of 'Shyam Bahar' brand Gutkha, were indulging in large scale evasion of Central Excise duty by suppressing the actual production and clandestine clearance of their products without payment of duty. There was also intelligence that the respondent was associated with the said M/s Shyam Traders, Lucknow, by supplying unaccounted packing material to them. During search at the factory premises of M/s Bakul Poly Pack Pvt. Ltd., and during the physical verification of stock conducted in presence of Panch witnesses as well as Shri Arun Kumar Verma, Accountant & Shri Mohan Mishra, Production In-charge of the Company, one of the raw material 'Polyester Film', etc. was found short as aforementioned, whereas other raw material, namely

Metalized Poly Film & Co-extruded Poly Film were found in excess to recorded balance, and the same was accordingly put under seizure as follows:-

Details of seizure effected from factory premises of M/s BPPL

Table – A (Raw Material)

Sl. No.	Description of goods	Quantity	Value
01	Metalized Film	6378 Kg.	Rs.8,29,140/- @ Rs.130/- Kg.
02	Co-extruded Multilayer Poly Film	4229 Kg.	Rs.2,46,450/- @Rs.50/- Kg.
Total		**10,607 Kg.**	**Rs.10,75,590/-**

Table – B (Finished Goods)

Sr.	Description of goods	Brand	Quantity (Kg)	Assessable Value @ Rs.138/-Kg
01	Plastic Articles	Natkhat Supari	102.050	Rs.14,082.90
02	--do--	Swad Gutkha	329.400	Rs.45,457.20
03	--do--	Shyam Bahar Gutkha	277.100	Rs.38,239.80
04	--do--	PM BP Seeds	139.300	Rs.19,223.40
05	--do--	Gagan Gutkha	489.550	Rs.67,557.90
06	--do--	Bhatia Gutkha	66.050	Rs.9,114.90
07	--do--	Chetak Washing Powder	34.440	Rs.4,747.20
08	--do--	Mysore Gutkha	37.050	Rs.5,112.90
09	--do--	Kumar Gutkha	34.150	Rs.4,712.70
10	Flexible Lamination Rolls	Shyam Bahar Gutkha	537.750	Rs.74,209.50
11	--do--	Swad Gutkha	700.730	Rs.96,700.74
12	--do--	Nimbus Shampoo	90.450	Rs.12,482.10
13	--do--	Shyam Bahar Gutkha	750.000	Rs.1,03,500.00
14	--do--	Madhav Tambaku	180.000	Rs.24,840.00
15	--do--	Shyam Bahar	950.00	Rs.1,31,100.00
16	--do— Uunslited)	Shyam Bahar Gutkha	500.000	Rs.69,000.00
17	--do— Uunslited)	Miscellaneous	3000.00	Rs.4,14,000.00
	Total		**8217.980**	**Rs.11,34,081.00**

3. The stock register was found maintained only up to 17/10/2003 and opening balance of the stock of finished goods on 18/10/2003 was shown as NIL. There was no

plausible explanation from Shri A. N. Tripathi, Director or Mr. Ajay Kumar Verma, Accountant of the Company, for such unaccounted stock of raw material/finished goods found in the factory premises. As such all aforesaid unaccounted/excess raw materials and finished goods collectively valued at Rs.22,09,671/- were seized under Panchnama with reason to believe that the same were kept unaccounted with intention to remove the finished products clandestinely and were, thus liable to confiscation. The Show Cause Notice dated 02/04/2004 was issued proposing to confiscate excess goods i.e. Metalized Film 6378 Kg., Co-extruded Poly Film 4229 Kg. & manufactured Flexible Printed Laminated Rolls of various brands weighing 8217.98 Kg. collectively valued at Rs.22,09,671/- seized under Panchnama on 20/10/2003, under Rule 25 of Central Excise Rules, 2002 and further penalty was proposed under Rule 25 of Central Excise Rules, 2002 read with Section 11AC of the Central Excise Act, 1944. Further, penalty was proposed on Shri A. N. Tripathi, Director. The Show Cause Notice was adjudicated on contest vide Order-in-Original dated 14/02/2006, whereby proposed confiscation of seized goods was upheld with option to redeem the confiscated goods on payment of redemption fine of Rs.11 lakhs and penalty of Rs. 1,08,872 under Rule 25 & Rs.1 lakh under Rule 26 was imposed on Shri A. N. Tripathi respectively. Being aggrieved, the respondent had preferred appeal before Commissioner

(Appeals), Kanpur, who vide OIA dated 19/10/2006 was pleased to set aside the OIO without going into the details of the case and only after considering the legality of the Panch witness and observed that making the outstation persons accompanying the officers create doubt about the genuineness of witnesses and the natural Justice is not extended to the appellants. Accordingly, Commissioner (Appeals) was pleased to remand the matter back to the Adjudicating Authority to decide the issue afresh after allowing cross-examination of Panch and granting personal hearing. Thereafter, the second OIO dated 21/03/2007 was passed by the Additional Commissioner, Kanpur, wherein the seized goods were confiscated with option to redeem on payment of fine Rs.11 lakhs and further penalty were confirmed as in past. Again being aggrieved, the respondent preferred appeal before Commissioner (Appeals), Kanpur, who vide OIA dated 24th July, 2007 was pleased to set aside the OIO by way of remand with the direction to decide the issue after granting fresh personal hearing and providing cross-examination, as ordered earlier.

4. As per the directions, the Adjudicating Authority issued summons under Section 14 of the Central Excise Act, 1944. Both the Panchas (public witnesses) were summoned to appear in person for hearing on 25th October, 2007, before him and for cross-examination, which were sent to the Panchs at their home address through registered speed post.

However, the said summons were received back from the Postal Authority with the remark that the addressee have left the said address, without any whereabouts of the new address. Another attempt was made to deliver the summons through the office of Additional Director General, DGCEI, New Delhi to the said Panchs/witnesses to appear before the Additional Commissioner on 25/10/2007 for the examination/cross-examination. However, the Deputy Commissioner, DGCEI also returned the said summons in original stating therein that the said punch witnesses were not available at the given addresses and their new addresses are not known to the present resident of the said premises. According, the summons could not be served. Thereafter, date of personal hearing was fixed. The ld. Counsel for the appellant reiterated that the Panchnama itself is *void-ab-initio* as the Panch witnesses were in fact persons brought by the officials of the inspecting team/DGCEI, and who had not presented themselves for cross-examination. Accordingly, he prays to drop the proceedings. It is further urged that the inspection/search proceedings were violation of the provisions of the Criminal Procedure Code and the Officers made their own persons witness and such persons were accompanying the Officers. Thus, Panchnamas are not a true piece of evidence. Thus, by the third OIO dated 27th November, 2007, the Additional Commissioner was pleased to confirm the demands along with confiscation and penalty is in past.

5. Being aggrieved the appellant preferred appeal before the ld. Commissioner (Appeals) on the ground among others that the alleged physical verification dated 20/10/2003 was incorrect and on eye estimation basis and there were actually no discrepancies in the stock. Seizure of goods in the factory of the appellants, based on eye estimation and not actual measurements was illegal and thus confiscation was not justified. It was also stated that it is settled law that the entire burden of proving its case lies on the Revenue, who is bound to produce cogent and tangible evidence in support of its case. The Department relied upon the Panchnama dated 20/10/2003 which is highly questionable document and the case is not proved beyond doubt. Further, the Adjudicating Authority have violated the Principles of Natural Justice and has failed to give effect to the orders of the Commissioner (Appeals), wherein the learned Commissioner (Appeals) had remanded the matter with the clear direction to extend opportunity of cross-examination of the Panch witnesses, which was not complied by the Adjudicating Authority. Reliance was placed on Section 18 of the Central Excise Act, 1944 which makes specific provisions with regard to the searches made under the Act, which has to be carried out in accordance with the Criminal Procedure Code, 1998.

6. The ld. Commissioner (Appeals) have observed that it is well settled law by the Larger Bench of this Tribunal in the

case of Bhillai Conductors Pvt. Ltd, reported at 2000 (125) E.L.T. 781 (3 Member Bench) wherein held that the entire burden of proving its case lies on the Revenue, who is bound to produce cogent and tangible evidence in support of its case. The Department relied upon the Panchnama dated 20/10/2003 which is highly questionable document and the case is not proved beyond doubt. Further, the Adjudicating Authority have violated the Principles of Natural Justice and has failed to give effect to the orders of the Commissioner (Appeals), wherein the learned Commissioner (Appeals) had remanded the matter with the clear direction to extend opportunity of cross-examination of the Panch witnesses, which was not complied by the Adjudicating Authority. Thus, the entire Panchnama proceedings are infructuous and in fact *void-ab-initio*. They, further held that the Adjudicating Authority should have appreciated that Section 18 of the Central Excise Act, 1944 which makes specific provisions with regard to the searches made under the Act, which has to be carried out in accordance with the Criminal Procedure Code, 1998. There is no room for resumption and presumption in cases of alleged clandestine removal; the standard of proof in cases of clandestine removal is proved beyond doubt and not that of the preponderance of probabilities and positive evidence is necessary to sustain the charge of clandestine removal. Under the facts and circumstance it was also held that no case is made out against the Director Shri Awadhesh Narain Tripathi has no evidence has been lead in the Show Cause Notice to prove that he was in any way concerned in acquiring the possession of or was in any way concerned in transporting, removing, depositing, keeping, concealing, selling or purchasing, or in any other manner dealing with the impugned goods. The learned Commissioner (Appeals) have, further, observed that even assuming that the stock verification was correct as per the Panchnama and, there is no evidence that there was any attempt to clandestinely remove the goods found in excess as the same were lying within the factory premises. Accordingly, the ld. Commissioner (Appeals) further held that the confiscation of seized goods is not proper as the goods are still lying in the factory premises and there is no evidence of clandestine removal as well as on the ground that the Department has failed to provide cross-examination of witnesses. Accordingly, the appeals of the respondents are allowed.

7. Being aggrieved the Revenue is in appeal on the grounds among others that according to Rule 25(1)(b) of Central Excise Rules, 2002, which makes it very clear that even if an assessee does not account for any excisable goods produced or manufactured or stored by him, even without any intention to clear the same clandestinely, the goods in question will be liable to confiscation. Thus, the excess raw material and finished goods found in the factory of the

respondents was liable to confiscation and the ld. Commissioner (Appeals) have erred in setting aside the confiscation. The next ground of contention is that the ld. Commissioner (Appeals) have erred in holding the punch witness as bad and illegal. Under the fact that there is no evidence at all that the punch witnesses were accompanying the Department officials right from the time they entered the promises of the appellants and that they were not independent and disinterested witnesses. The punch witnesses were as per records, called later on. Even, if they were not called from the locality. When seizure took place, they could be very well called from another locality as per the Cr.P.C. provisions, 1998.

8. The respondents are absent in spite of notice. It is seen that the notices sent have been returned by the Postal Department with the remark left without address. In the circumstances, it is decided to dispose of these appeals, ex-parte.

9. Having considered rival contentions, and after going through the records, I find that the ld. Commissioner (Appeals) have rightly held that there has been failure on the part of the Additional Commissioner to comply with the directions given by the ld. Commissioner (Appeals) in the earlier gound of litigation. I also find that Revenue have not been able to controvert that the witnesses were not the persons brought along with the search team. Under the

provisions of the Criminal Procedure Code, such witnesses have to be persons of repute staying in the near vicinity or the locality where the search or seizure takes place. Such provisions have been admittedly not followed. Accordingly, I hold that the proceedings are vitiated and the adverse conclusions drawn by the Additional Commissioner have been rightly held to be unsustainable by the ld. Commissioner (Appeals). In this view of the matter, I dismiss the appeals filed by the Revenue and uphold the impugned Order-in-Appeal. The respondents shall be entitled to consequential benefits, if any, in accordance with law..

(Dictated and pronounced in Court)

Sd/-

(ANIL CHOUDHARY)
MEMBER (JUDICIAL)

Ansari

प्रमाणित प्रति/Certified True Copy
03/10/17
सहायक पंजीकार/Asstt. Registrar
सीमाशुल्क, उत्पादशुल्क एवं सेवा कर अपील अधिकरण(C.E.S.T.A.T.)
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