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: 14/11/2017

Appellant as per address in table below

Respondent as per address in table below

Final Order No. A/71338-71344/2017-SM[BR] dated 21/07/2017

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/CROSS/55669/2014	E/54027/2014	**Commissioner of Customs, Central Excise and Service Tax-Allahabad** 38...M G MARG... CIVIL LINES, ALLAHABAD, UTTAR PRADESH 211001
2	E/CROSS/55670/2014	E/54028/2014	**Commissioner of Customs, Central Excise and Service Tax-Allahabad** 38...M G MARG... CIVIL LINES, ALLAHABAD, UTTAR PRADESH 211001
3	E/CROSS/55671/2014	E/54029/2014	**Commissioner of Customs, Central Excise and Service Tax-Allahabad** 38...M G MARG... CIVIL LINES, ALLAHABAD, UTTAR PRADESH 211001
4	E/CROSS/56207/2014	E/54030/2014	**Commissioner of Customs, Central Excise and Service Tax-Allahabad** 38...M G MARG... CIVIL LINES, ALLAHABAD, UTTAR PRADESH 211001
5	E/CROSS/55672/2014	E/54031/2014	**Commissioner of Customs, Central Excise and Service Tax-Allahabad** 38...M G MARG... CIVIL LINES, ALLAHABAD, UTTAR PRADESH 211001
6	E/CROSS/55673/2014	E/54032/2014	**Commissioner of Customs, Central Excise and Service Tax-Allahabad** 38...M G MARG... CIVIL LINES, ALLAHABAD, UTTAR PRADESH 211001

7 E/CROSS/55674/2014 E/54033/2014 **Commissioner of Customs, Central Excise and Service Tax-Allahabad**
38...M G MARG...
CIVIL LINES,
ALLAHABAD,
UTTAR PRADESH
211001

Name and Address of Respondent

8 Mohd Arshad
34, Chaitham Lines,,
ALLAHABAD
,UP

9 Mohd Azmal Noorani
34, Chaitham Lines,,
ALLAHABAD
,UP

10 Shri Shadab Jamal
S/o Mohd. Azmal Noorani, 34, Chaitham Lines,,
ALLAHABAD
,UP

11 Asad Jamal
34, Chaitham Lines,,
ALLAHABAD
,UP

12 Rashida Parveen
34, Chaitham Lines,,
ALLAHABAD
,UP

13 Mohd Ahsan
34, Chaitham Lines,,
ALLAHABAD
,UP

14 Rahat Industries
34, Industrial Colony, Naini,,
ALLAHABAD
,UP

Other Appellants and Respondents as per Annexure
Copy To
15Advocate(s) / Consultant(s):

Prabhat Kumar
B-51(BASEMENT),
SARVODAYA ENCLAVE
NEAR MOTHER
INTERNATIONAL SCHOOL
NEW DELHI
DELHI

16 Bar Association, CESTAT, Allahabad

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

18 M/s Centax Publications Pvt. Ltd., 1512-B, Bhishm Pitamah Marg, Opp ICICI Bank of Defence Colony New Delhi-3

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

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

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

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

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

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

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

26 C.D.R. 27 Office Copy 28 Second Folder Copy 29 Guard File

Asstt. Registrar

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

CROSS Application Nos. E/CROSS/55669-55671, 56207, 55672-55674/2014 with APPEAL Nos. E/54027-54033/2014-EX[SM]

(Arising out of Order-in-Appeal No. 12-18/CE/ALLD/2014 dated 30/01/2014 passed by Commissioner of Central Excise, Service Tax & Customs (Appeals), Allahabad)

C.C & C.E. & S.T. - Allahabad **Appellant(s)**

Vs.

Mohd Azmal Noorani (in Appeal No. E/54027/2014)

Mohd Arshad, (in Appeal No. E/54028/2014)

Mohd Ahsan, (in Appeal No. E/54029/2014)

Rahat Industries, (in Appeal No. E/54030/2014)

Rashida Parveen, (in Appeal No. E/54031/2014)

Shadab Jamal (in Appeal No. E/54032/2014) &

Asad Jamal (in Appeal No. E/54033/2014) **Respondent(s)**

Appearance:

Shri Sandeep Kumar Singh (Dy. Commissioner) AR for Appellant(s)
Shri Prbhat Kumar (Advocate) for Respondent(s)

CORAM:

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

Date of Hearing : 21/07/2017
Date of Decision : 21/07/2017

FINAL ORDER NO. 71330-71344/2017

Per: Anil Choudhary

The Revenue is in appeal against common Order-in-Appeal No. 12-18/CE/ALLD/2014 dated 30 January, 2014. Wherein the learned Commissioner (Appeals) have held that the demand raised jointly and severally is not tenable and is in the teeth of the ruling of this Tribunal in ENAR Cements

Private Ltd v/s CCE 2013 (292) ELT 245 and have also been pleased to hold that the actual manufacturer in the instant case are M/s Indian Chemicals, Naini and M/s Rahat Industries, Naini therefore, Central Excise Duty if evaded, it should have been demanded from them instead of the respondents herein who are partners in these firms. These firms were separately registered under the Central Excise, having four partners in common in each and paying Central Excise Duty separately. The goods manufactured by them were also different to each other. As per Section 11A of the Central Excise Act, 1944, the duty was to be demanded separately from them because even if it is presumed that the duty was evaded, these two firms were the legal persons who had evaded the alleged duty. It was further held that the allegation of clandestine removal is also not established because the print out taken from the floppies upon which the case is based were not taken before the appellants (respondents herein). Apart from that the Department did not conduct any enquiry from the persons who had or were alleged to have purchased the said goods (clandestinely removed goods). Accordingly, allowing the appeals it was held that the Order-in-Original by the Joint Commissioner is not sustainable and liable to be set aside.

2. The brief facts are:-

2.1. **A SCN dated 18/19.05.98** was issued by Assistant Commissioner, Central Excise, Division II, Allahabad against above 07 respondents and (8) M/s Indian Chemical Co., 10, Daud Nagar, Allahabad after the search of their residential premises at 34, Chaitham Lines, Allahabad on 20.11.97, resulting in seizure of the stock of Noorani Tel, Himlok Tel, Rahat Lal Tel, Janamghutti and Borosil as per Panchnama dated 20.11.1997. Accordingly, (a) M/s Indian Chemical, Mohmd. Azmal Noorani, Mohd. Ahsan, Mohd. Arshad, Shadab Jamal and Asad Jamal and Smt. Rasida Parveen were required to show cause for proposed confiscation of "Noorani Tel"valued at Rs. 5,41,319/- involving Central Excise Duty of Rs. 43,321.52/-, (b) M/s Rahat Industries were required to show cause for proposed confiscation of cartons of Himlok Tel, Rahat Lal Tel, Janamghutti, Nurament Ointment and Nurament Oil seized on 20.11.1997 valued at Rs. 65,141/- involving C.Ex. Duty of Rs. 5,211.30/-. Penalty was also proposed under relevant rules, and (c) penalty was proposed against Mohmd. Azmal Noorani, Mohd. Ahsan, Mohd. Arshad, Shadab Jamal and Asad jamal and Smt. Rasida Parveen separately under Rule 209 A of Central Excise Rules, 1944

2.2. **Another SCN dated 12.05.1999** was issued by Additional Commissioner, Central Excise, Allahabad against above 07 respondents and (8) M/s Indian Chemical Co., 10, Daud Nagar, Allahabad, in their individual capacity as well as in their capacity as partners in M/s Rahat Industries and M/s Indian Chemical Co., for demand of duty of Rs. 11,46,479.78/- involved in the illicit sale of "Noorani Tel" clandestinely manufactured at 34, Chaitham Lines, Allahabad and other products manufactured and removed clandestinely, without payment of duty, by "M/s Rahat Industries" valued at Rs. 11,46,497.83/- during the period 12.10.1994 to 13.02.1997 as per the secret accounts (ledger folios). Penalty was also proposed against the said persons in their individual capacity as well as in their capacity as partners in M/s Rahat

Au?

Industries and M/s Indian Chemical Co., under relevant rules and interest was also proposed to be realized.

2.3. The two SCN's were adjudicated vide OIO dated 30.03.2013 passed by Joint Commissioner, C.Ex., Allahabad whereby-

(i) Noorani Tel valued at Rs. 5,41,319/- involving central excise duty of Rs. 43,321.52/- was confiscated with option given to Mohmd. Azmal Noorani, Smt. Rashida Parveen and their sons Mohd. Ahsan, Mohd. Arshad, Shadab Jamal and Asad Jamal to redeem the same on redemption fine of Rs. 50000/- and a combined penalty of Rs. 43,521.52/- was also imposed upon them.

(ii) The cartons of Himlok Tel, Rahat Lal Tel, Janamghutti, Nurament ointment and Nurament Oil seized on 20.11.1997 valued at Rs. 65,141/- involving C.Ex. Duty of Rs. 5,211.30/- was confiscated with option given to the manufacturer i.e. M/s Rahat Industries to redeem the same on redemption fine of Rs. 6000/-. Duty amount of Rs. 5211.30/- was also confirmed on M/s Rahat Industries and penalty of Rs. 5211.30/- was also imposed.

(iii) The demand of Rs. 11,46,479.78/- (as per SCN dated 12.05.99) was confirmed against Mohmd. Azmal Noorani, Smt. Rashida Parveen and their sons Mohd. Ahsan, Mohd. Arshad, Shadab Jamal and Asad Jamal in their individual capacity as well as in their capacity as partners in M/s Rahat Industries and M/s Indian Chemical along with interest and a penalty of equal amount was also imposed upon them under Section 11 AC of the Act.

(iv) A penalty of Rs. 2,00,000/- was also imposed upon each partner i.e. Mohmd. Azmal Noorani, Smt. Rashida Parveen, Mohd. Ahsan, Mohd. Arshad, Shadab Jamal and Asad Jamal under Rule 209 A of Central Excise Rules, 1944.

2.4. M/s Rahat Industries, 34, Industrial Colony, Naini, Allahabad (herein after referred to as 'Rahat'), having partners Viz. S/Shri Mohd. Ahsan, Mohd. Arshad, Asad Jamal, Shadab Jamal, all sons of Shri Mohd. Azmal Noorani and Smt. Rashida Parveen w/o Shri Mohd. Azmal Noorani are engaged in the manufacture of Nurament, Borosil, Lal Tel, Nurament Tel, Janamghutti, Himlok Tel & Himdhara etc. classifiable under Chapter Sub-heading 3003.39 of the schedule to the Central Excise Tariff Act, 1985, M/s Indian Chemical Company, 10 Daud Nagar, Naini, Allahabad (herein after referred as the 'Indian Chemical') having partners viz. Shri Mohd. Azmal Noorani S/o Late Shri Mohd. Umer, Mohd. Ahsan S/o Shri Mohd. Azmal Noorani, Mohd. Arshad S/o Shri Mohd. Azamal Noorani, Asad Jamal S/o Shri Mohd. Azmal Noorani and Shadab Jamal S/o Shri Mohd Azmal Noorani are engaged in the manufacture of 'Noorani Tel' classifiable under Chapter sub-heading 3003.39 of the schedule to the Central Excise Tariff Act, 1985.

3. Being aggrieved the Revenue is in appeal on the ground among others that the learned Commissioner (Appeals) have erred in holding that the actual manufacturers in the instant case are the two firms namely Indian Chemicals and Rahat Industries. During the material time (period in dispute being 1993-94 to 1997-98) Section 2(f) of the Central Excise Act, 1944 defines manufacture and manufacturer as under:

(f) manufacturer includes any process –

(i) incidental or ancillary to the completion of a manufactured product, and

(ii) which is specified in relation to any goods in the Section or Chapter notes of the Schedule to CETA as amounting to manufacture and the words manufacturer shall be construed accordingly, and shall include not only a person who employs, hired labour in the production or manufacture of excisable goods, but also any person who engages in the production or manufacture on his own account.

4. It is an admitted fact on record that the goods namely Noorani Tel, Himlok Tel, Rahat Tel etc. were being manufactured under the supervision of the respondents at the premises at 34, Chaitham Lines, Allahabad (residential premises of the respondents). Therefore, the said persons were clearly the actual manufacturers of the goods as per Section 2(f) of the Act. There is no evidence on record to indicate that the aforementioned goods which have been manufactured at the residential premises of the respondents, where so manufactured as per directions of Rahat Industries or Indian Chemical Industries and thereafter being clandestinely removed. The common residential premises at 34 Chaitham Lines, Allahabad was the premises were independent manufacturing activity of the goods having brand name of goods manufactured by Rahat Industries or Indian Chemical Industries was being carried out by the respondents. Placing reliance on the ruling in the case of P.M.

Ale

Abdulf Latif v/s CCE 1985(22) ELT 758 (Mad.) wherein it is held that the person actually manufacturing the part will be manufacturer. Further, reliance is placed on the ruling in the case of Philips India Ltd v/s Union of India, 1996(86) ELT 263 (Allahabad High Court), wherein it was held that brand name owner will not be manufacturer even if he supplied raw material. Therefore, the Commissioner (Appeals) has erred in holding that the respondents were not the manufacturers in this case.

5. In view of the definition of person as per Section 3(42) of the General Clauses Act, 1897, which reads as under. -

"(42) 'Person shall include any company or association or body of individuals, whether incorporated or not'.

Thus, the learned Commissioner have erred in holding that the demand of a combined amount and imposition of combined penalty on many persons is not sustainable under law. The learned Commissioner (Appeals) has failed to appreciate that an association of persons is also to be considered as a legal person in terms of the definition of person. In the present case as the respondent joined together for the illicit manufacture and clandestine removal of goods with an intention to produce income, thus the said persons are squarely covered under the definition of 'Association of person' and is liable to be considered as person under the definition as noticed herein above.

6. So far penalty is concerned, the learned Commissioner

(Appeals) have erred in holding that the respondents have been treated as manufacturer and combined penalty has already been imposed upon them, then penalty of Rs. 2 lakhs each under Rule 209 A of the Central Excise Rules, separately, is not maintainable. Rule 209A of the Rules provides – 'Any person who acquires possession of, or in any way concerned in transporting, removing, depositing, keeping, concealing, selling or purchasing, or in any other manner deals with, any excisable goods which he knows or has reason to believe are liable to confiscation under the Act or these rules, shall be liable to a penalty not exceeding three times of the value of such goods or Rs. 5000/-, whichever is greater.' In the facts of the present case, respondents were involved in illicit manufacture of the goods in the unregistered premises in the capacity of association of persons. However, they were also involved in their individual capacities in various works related to clandestine removal of these goods. Thus, in addition to being held as a 'person' in a combined form and being penalised combinedly, they are also liable to suffer punishment of penalty in their individual capacities for the contravention of the law.

7. It has also alleged that on the date of search on 20 November, 1997 in the common residential of premises of the respondents who were also the partners of Indian Chemical Industries and Rahat Industries, situated at 34 Chaitham Lines, Allahabad, it was found that 'Noorani Tel' the brand

owned by 'Indian Chemical Industry' was being illicitly manufactured and also products manufactured by 'Rahat Industries' were found illegally stored in the said registered promises. During the search of the premises some computer floppy and documents were recovered containing details of illicit manufacture and clandestine removal of Noorani Tel, attracting excise duty during the period October, 1994 to 16 May 1996. Further facts on record are that the Department never alleged clandestine removal on the part of the two firms namely Rahat Industries and Indian Chemical Industries. The illicit manufacture of the goods having brand name of these firms and that clandestine removal of the same is alleged to have taken place, from the unregistered premises (residential premises of the respondents).

8. The learned counsel for the respondents Mr. Prabhat Kumar (Advocate) draws my attention to the cross objections filed by the respondents wherein they have categorically stated that there was no allegation in the show cause notices that the respondents were an association of persons. In the absence of such allegation, contention of Revenue is beyond the scope of the show was notice and as such not admissible at this stage. The learned counsel further relies on the findings of the learned Commissioner (Appeals) and states that it have been rightly held that the demand of a combined amount and also the imposition of combined penalty is not sustainable. The learned counsel further points out that it is

A97

admitted fact that the goods seized on the date of search/inspections were released to as many persons, is not sustainable under law. Had the Revenue believed the claim of the respondents, as an Association of persons, the demand should have been imposed upon them at the AOP and not jointly and severally. Every person should know the exact amount for which he is liable to pay. Such an order is liable to be set aside and the learned Commissioner have rightly done so. Similarly, the joint and several penalty imposed have also been set aside.

9. The learned counsel further states that it is an admitted fact that the seized goods on the day of search/inspection were released. The learned counsel further states that it is an admitted facts that the seized goods from the premises – common residential of premises of the respondents, show cause notice was issued to the two firms namely Rahat Industries and Indian Chemical Industries and thereafter the seized goods were subsequently ordered to be released to them. Thus, the provisional release of seized Noorani Tel was allowed in favour of Indian Chemical Industries by treating them the manufacturer of the goods. Further, the provisional release of seized Noorani Tel, Himlok Tel etc. was allowed in favour of Rahat Industries. The learned counsel have further pointed out that so far the demand relating to or based on the floppy disk recovered from the premises, there is no ground by the Revenue in their appeal. The learned counsel also

Ar

urges that it have been held by Hon'ble Allahabad High Court in the case of Continental Cement Company v/s Union of India, 2014 309 ELT 411 wherein on the issue of proof in respect of clandestine removal it have been held – clinching evidence is required of purchase of raw material, use of extra electricity, sale of final products, clandestine removal, transportation, payment, realization of sale proceeds, mode and flow back of funds, etc. Demand cannot be confirmed based on presumptions and assumptions as it is a serious charge and the same is required to be proved by Revenue by tangible and sufficient evidence. Further held that mere statements of buyers, based on their memories, was insufficient without support of any documentary evidence. Accordingly, the learned counsel prays for dismissing the appeal filed by Revenue.

10. The learned counsel further urged that as 'Indian Chemical Company' has been accepted by the Revenue as manufacturer of Noorani Tel and Rahat Industries have been accepted the manufacturer in respect of the other goods found at the residential premises, on the date of search, subsequent determination of liability towards duty on the individuals jointly and severally is not sustainable. It is further urged that the learned Commissioner have rightly held that no clandestine removal is established mainly on the basis of print outs from the floppy disks recovered at the time of search in absence of any further enquiry from the

concerned persons or the persons whose names are figuring in the transactions allegedly in the print outs. Accordingly, the learned counsel for the respondent prays for dismissing the appeals by the Revenue.

10. Having considered the rival contentions I find that no attempt have been made to find out the actual manufacturer of the goods seized on the date of search from the residential promises. From the facts on record and the findings of the Adjudicating Authority, I find that he have taken contrary stands. On the one hand, the two firms have been deemed to be the manufacturers as noticed herein above and the seized goods have been ordered to be released to them. Whereas duty have been demanded from the individuals/respondents and also the firm Rahat Industries jointly and severally, which is against the very stand of the Revenue that the respondent individuals herein form an 'Association of persons'. I further hold that under the facts and circumstances, the two firms namely Indian Chemicals Industries and M/s Rahat Industries are the actual manufacturers instead of the respondent individuals, who are admittedly partners either in both or one of these two firms. I also find that no reason have been assigned by the learned Joint Commissioner for not treating these two firms to be manufacturer of the goods found and seized on the date of search. I also agree with the findings of the learned Commissioner (Appeals) that the allegation of clandestine

removal is not established which are simply based on print outs from floppy disks, without there any further enquiry with respect to the transactions and the persons involved in the transactions therein. Accordingly, I find no merits in these appeals and the same are dismissed. The respondents shall be entitled for the consequential benefits in accordance with law.

(Dictated and pronounced in Court)

-Sd/-
(ANIL CHOUDHARY)
Member(JUDICIAL)

Ankit

प्रमाणित प्रति/Certified True Copy
05/12/17
सहायक पंजीकार/Asstt. Registrar
सीमाशुल्क, उत्पादशुल्क एवं सेवा कर
अपील अधिकरण/(C.E.S.T.A.T.)
38, एम.जी.मार्ग, इलाहाबाद-211001
38, M. G. MARG, ALLAHABAD-211001