CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH
BANGALORE

Appeal(s) Involved:

Sl. No.	Appeal No.	Appellant	Respondent	Order-in-Appeal
1	E/491/2007	M/s. AK Woods Industries Kumbala Padavu Kurnad, Bantwal Taluk, Mangalore – 574 153	The Commissioner of Central Excise, V Floor, Trade Centre, Bunts Hostel Road, Mangalore.	OIA No.177/2007-CE dt.4.4.2007
2	E/493/2007	M/s. Nafeesa Frameworks Kumbala Padavu, Kurnad, Bantwal Taluk, Mangalore – 574 153.	-do-	OIA No.176/2007-CE dt.4.4.2007
3	E/592/2009	M/s. A.K. Boards & Doors Kumbala Padavu, Kurnad, Bantwal Taluk, Mangalore – 574 153.	-do-	OIA No.99/2009 dt.18.3.2009
4	E/593/2009	Shri Niyaz Ahmed AK Compound, Pandeshwar, Mangalore.	-do-	-do-
5	E/594/2009	Smt. Seeliya Simmith, Partner M/s. A.K. Boards Kumbala Padavu, Kurnad, Bantwal Taluk, Mangalore – 574 153.	-do-	-do-
6	E/595/2009	M/s. A.K. Panels Kumbala Padavu, Kurnad, Bantwal Taluk, Mangalore – 574 153.	-do-	OIA No.100/2009 dt.18.3.2009
7	E/596/2009	Shri Niyaz Ahmed AK Compound, Pandeshwar, Mangalore.	-do	-do-
8	E/597/2009	Shri Naushad Ahmed, Partner Kumbala Padavu, Kurnad, Bantwal Taluk, Mangalore – 574 153.		-do-

(Arising out of: as shown in the table above and all the Orders-in-Appeal were passed by the Commissioner of Central Excise (Appeals), Mangalore.)

<u>Appearance:</u>

Mr. G. Natarajan, Advocate
Swamy Associates
G-8, Fortuna Icon Apartments,
Jodidar Ashwathappa Farm
Sahakara Nagar,
Bangalore -

For the Appellant

Dr. J. Harish, AR

For the Respondent

Date of Hearing: 06/07/2018
Date of Decision: 03/08/2018

FINAL ORDER No. 21084 – 21091 / 2018

ORDER PER: P. ANJANI KUMAR

Officers of the Directorate General of Central Excise Intelligence (DGCEI), Bangalore, on 28.4.2004, have visited the premises of M/s. A.K. Boards & Doors, M/s. A. K. Panels, M/s. A. K. Wood Industries and M/s. Nafeesa Frameworks, who are engaged in the manufacture of plywood, block boards, etc. It was alleged that all the four units are located in adjacent sheds at Kambla Padavu, Kurnad, Mangalore and that all the units are managed by Shri Naushad Ahmed and partners and that all the firms are commonly known as M/s. A.K. Group Firms. It appeared to the Department that these four groups have been clearing their goods to the customers/dealers under the cover of invoices which are raised from their factories and the invoices showed only a part of selling prices of the goods cleared.

2. It was alleged that the actual prices used to be circulated or informed to the customers separately; the value/prices shown in the invoices were only 50% of the actual price and amounts over and above the bill were normally paid by the customers in cash to the representative of the firms. The Department, *inter alia,* relied upon the following:

(i) E-mail message dated 12.11.2002 supposed to be sent by One Shri Manilal P. Suther, Partner of M/s. Vishnu Sales to M/s. A. K. Group firms which reads as under:

> *"Now keep the above mentioned material ready, I am sending you the total amount mentioned above. As talked to you over phone I want at least 50% to 65% bill and now give me the details on which name I should send the DD."*

(ii) A handwritten slip recovered from the premises of M/s. Plywood Associates, Coimbatore in respect of the sale of plywood to M/s. Ganesh Plywood and Hardware, Erode under the Bill No.1630 dated 30.3.2004 wherein it appeared that the actual price was Rs.22,132/- whereas invoice was showing only Rs.17,125/-.

(iii) A notebook seized from M/s. Plywood Associates, Coimbatore on 28.4.2004 detailed at page 39 and 44 shows actual amount and invoice amount collected in respect of Invoice No.1601 dated 3.3.2004; Invoice No.1630 dated 30.3.2004; Invoice No.1364 dated 12.7.2003 and Invoice No.1580 dated 16.2.2004.

(iv) From the documents seized from M/s. Forbwoods, Bangalore, the main distributor of M/s. A. K. Group Firms in the State of Karnataka, it appeared that the price of the goods as appearing from the pricelist issued by the distributor of M/s. A. K. Group Firms are much higher than the invoiced price of the said goods.

(v) Bank counterfoils of Karnataka Bank Ltd. in respect of payments of Rs.3,00,000/- by Mr. Fiyaz Ahmed of M/s. Woodworth, Hubli to M/s. A.K. Boards, were recovered.

(vi) Book indicated as ledger No.1 seized from the premises of Plywood Associates on 28.4.2004.

2.1 On conclusion of the investigations, show-cause notices were issued proposing to recover duty along with interest and imposed penalties on different firms. The show-cause notices also proposed penalties on the partners of the different firms. The original adjudicating authority has confirmed the various demands as proposed in the show-cause notices. All the firms and the Partners, thereof, respectively have filed appeals before the Commissioner (A) who has issued the impugned orders upholding or modifying or remanding back the cases. The details of show-cause notices and the impugned orders are as shown below:

Sl. No.	Appeal Before Tribunal	Party Name	Order-in-Original		Order-in-Appeal	
			Duty	Penalty	Duty	Penalty
1	E/491/2007	**M/s. AK Woods Industries**	Rs.6,36,494/-	Rs.6,36,494/- u/s 11AC Rs.6,36,494/- u/R 25	Remanded to Original Authority	
	(No appeal is filed)	Mrs. Mariyamma Ahmed		Rs.2,00,000/-		
	(No appeal is filed)	Mr. Niyaz Ahmed		Rs.2,00,000/-		
			SCN No.46/05-06 OIO No.45/05-06 dt.27.11.2006		OIA No.177/2007 dt.4.4.2007	
2	E/493/2007	**M/s. Nafeesa Frameworks**	Rs.15,07,556/-	Rs.15,07,556/- u/s 11AC Rs.5,00,000/- u/Rule 25	Remanded to Original Authority	
	(No appeal is filed)	Mr. Nazeem Ahmed		Rs.2,00,000/-		
	(No appeal is filed)	Mr. Niyam Ahmed		Rs.2,00,000/-		
			SCN 47/05-06 OIO No.35/2006 dt.11.12.2006		OIA No.176/2007 dt.4.4.2007	
3	E/592/2009	**A.K. Boards & Doors**	Rs.28,10,357/-	Rs.28,10,357/- u/s 11AC Rs.10,00,000/- u/R 25	Rs.6,61,769/-	Rs.6,61,769/-
4	E/593/2009	**Mr. Niyaz Ahmed**		Rs.5,00,000/-		Rs.50,000/-
5	E/594/2009	**Mr. Seeliya Simmith**		Rs.5,00,000/-		Rs.50,000/-
			SCN 47/05-06 OIO No.10/2007 dt.28.2.007		OIA No.99/2009 dt.18.3.2009	
6	E/595/2009	**A.K. Panels**	Rs.31,42,477/-	Rs.31,42,477/- u/s 11AC Rs.12,00,000/- u/R 25	Rs.3,88,500/-	Rs.3,88,500/-
7	E/596/2009	**Mr. Niyaz Ahmed**		Rs.6,00,000/-		Rs.25,000/-
8	E/597/2009	**Mr. Naushad Ahmed**		Rs.6,00,000/-		Rs.25,000/-
			SCN 46/05-06 OIO No.11/2007 dt.28.02.2007		OIA No.100/2009 dt.18.3.2009	

2.2 In all, there are eight appeals, and as the subject matter in all the appeals is same, there are taken up together for discussion and decision.

3. The learned counsel for the appellants submitted that the department alleged undervaluation to the extent of 40% in a very generalized manner. The statements recorded were retracted by the concerned persons during cross examination. Cross-examination has the same analogy of examination of a Court of Law. Following the principles of justice, the adjudicating authority and the appellate authority should have noted that the statements having been retracted have no relevance and they cannot be relied upon. The Department relied upon one e-mail from M/s. Vishnu Sales Corporation situated in Vadodara. However, as there are no sales to that unit, it has no evidential value. Regarding the recovery of slips from M/s. Plywood Associates, Coimbatore, it can well be an undervaluation made by the dealer and not necessarily be understood as undervaluation by the appellants.

3.1 The learned counsel relied upon the ratio of ***Jindal Drugs Pvt. Ltd. vs. UOI: 2016 (340) ELT 67 (P & H)***. They also relied upon ***G-Tech Industries: 2010 (339) ELT 209 (P &***

H), wherein it was held that the statutory procedure provided in Section 9D has to be followed for admitting any statement recorded before a gazetted officer. The retraction of these witnesses before the adjudicating authority stands invalid. There should corroborative evidence in support of the charge of undervaluation. From the slips recovered from the dealers, the goods have presumably been sold for a lesser value and collected the balance amount in cash. At best, it suggests that undervaluation was only done by the dealers and not by the appellants. The same can only be applied to a particular transaction but cannot be generalized. They relied upon ***Goyal Tobacco Co. Pvt. Ltd.: 2017 (348) ELT 720 (Tri.-Del.)***. They also relied upon CESTAT's decision in the case of ***CERA Boards and Doors: 2010 (249) ELT 550 (Bang.)*** wherein it was held that post 1.7.2000, the allegation of undervaluation under transaction value regime has to be proved with evidence in respect of each and every removal.

3.2 The learned counsel submitted that all the firms involved are partnership firms and therefore, penalty cannot be separately imposed on them. They placed reliance on the following decisions:

- ***Pravin N. Shah vs. CESTAT: 2014 (305) ELT 480 (Guj.)***

- ***Jaybee Industries vs. CCE: 2004 (168) ELT 316 (Tri.-Del.)***
- ***Kedarnath Silks Mills vs. CCE: 2006 (195) ELT 58 (Tri.-Bang.)***

4. The learned DR has reiterated the findings in Orders-in-Original and Orders-in-Appeal and stated that learned Commissioner (A) has addressed all the concerns expressed by the appellants and the case laws quoted by them has been duly differentiated. The learned Commissioner (A) has given a fair order and has confirmed the demands only to the extent of particular evidence being available. It can be seen that the Commissioner (A) has given a clear finding that *"By following the Order-in-Appeal already passed by my predecessors and by following my above findings and by following the principles laid down by various decisions cited above, I hold that Department's quantification of evasion on the basis of evidence available on record is required to be restricted with reference to actual evidence available and cannot be extended to those transactions which relates to other dealers/ customers where no evidence is available."*

5. Heard both sides and perused the records. The brief issues to be decided in these cases are:

(i) Whether the allegations leveled by the department on the basis of few chits/slips/documents recovered during searches can be sustained.

(ii) Whether disowning of statements during the cross-examination is a valid ground for not taking the statements into consideration.

(iii) Whether penalty can be leveled separately on the partners of the firms invariably.

5.1 In the instant cases, the Department has made certain allegations against the appellants on the conclusion of the investigation conducted by the officers of DGCEI. The department has alleged undervaluation of excisable goods manufactured by the appellants to the extent of 40% i.e., it was alleged that the actual price was suppressed and only 60% of the price was declared on the invoices. This was corroborated by the evidences recovered during the course of investigation and the statements of personnel/dealers of the appellants. We find that in all these cases the learned Commissioner (A) has found that the adjudicator has recorded detailed analysis of relied upon evidences and its subsequent negation at the time of cross examination and has come to a conclusion that there are good evidences for *prima facie* establishing a case of undervaluation against the appellants. There was no proof whatsoever that the statements were recorded under force or duress especially no one has retracted the same immediately afterwards. The appellants have not challenged this finding. The statements recorded at different locations from different persons on different dates giving the same conclusion is amply proof that the statements are reliable documents. The learned Commissioner (A) has either remanded back the cases with a direction that the quantification of evasion on the basis of evidence available on record is required to be restricted with reference to the actual evidence available and cannot be extended to those transactions which relate to other dealers/customers where no evidence is available. In respect of two cases, the learned Commissioner (A) has obtained a report from the jurisdictional Commissioner on quantification of duty to be demanded in adherence to the principles enumerated above. On the basis of the reports given by the jurisdictional Commissioner, the learned Commissioner (A) in the case of M/s. A.K. Boards (E/592/2009) and M/s. A.K. Panels (E/595/2009) has set aside the penalties imposed on the firms under Rule 25 holding that an equivalent penalty has already been imposed under Section 11AC of the Central Excise Act, 1944. In view of the decision of Rajasthan High Court in the case of ***CCE vs. Banswara Syntex Ltd.: 2007 (212) ELT 171 (Raj.)***. He has reduced the penalties on the partners and however, did not agree with the appellant's contention that no separate penalty is imposable on the partners in view of the cases cited by them in their defence. The learned Commissioner (A) held that the persons had a definitive role in the clear case of undervaluation with an intention to evade payment of duty and held that the partners of the firm were involved in day-to-day management of the unit. We find that the learned Commissioner (A) has remanded the case back to the original adjudicating authority in respect of M/s. A.K. Wood Industries (E/491/2007) and M/s. Nafeesa Frameworks (E/493/2007) with similar directions and the cases are reported to be pending before the adjudicating authority.

5.2 Therefore, we find that the Commissioner (A) has taken a fairly judicious view of the case of the appellant and has given directions to restrict the duty liability to the extent of documents, statements which corroborate the actual transactions whereas the show-cause notices were issued with a generalized principle extrapolating one instance to the entire set of clearances by the appellants. Therefore, we find that the question (i) as framed above is answered in the affirmative by the forgoing discussions. As observed by the original adjudicating authority as well as the learned Commissioner (A) looking into the general undervaluation in the product it would be very difficult for any investigating agency to adduce evidence for each and every transaction. We find that it is sufficient if logical cause is shown and is corroborated by evidence. We find that in the instant case, the same has been done by the investigations. Therefore, the findings of the investigations cannot be brushed aside totally.

5.3 We find that the learned AR has rightly relied on the decision of this Bench in the case of ***M/s. Mysore Chipboards Ltd. vs. CCE: 2012 (282) ELT 112 (Tri.-Bang.)*** wherein it was held that the statements of employees of assessee before the Excise Officers were admissible as they were voluntary. Their retractions did not affect the evidentiary value; therefore, the demand was upheld. We find that he has also rightly relied on another case of this Bench in the case of ***Fathima Panels vs. CCE, Mangalore reported in 2014 (313) ELT 641 (Tri.-Bang.)*** wherein it was held that the *"We find that statements were obtained from the dealers and employees of the assessee who narrated the modus operandi followed by BA Group of Companies to invoice a lower value for the purpose of payment of duty and collecting similar amount in excess in cash. We find that as per the statements of the dealers, they had purchased excisable goods* *knowingly paying a lower amount on which duty was paid and paying the balance in cash. We find that these statements are incriminating the dealers themselves because they had connived with the assessee in evading excise duty. This was also for their gain. They could be penalized under the Act and Rules made thereunder. If such incriminating statements were obtained by the coercion, it was expected of them to retract the same as early as possible. None of them had admitted any such retraction. Retractions came a couple of years later when the assessee-appellant arranged their cross-examination before the adjudicating authority. The statements recorded are all under Section 14 of the Central Excise Act. The Central Excise officers are not police officers and the statements recorded by them are valid evidence. Moreover the statements find corroboration in the documents recovered by the authorities. In the absence of retraction or allegation of coercion to give an involuntary statement, we were inclined to accept their initial statements as voluntary and valid evidence."* We find that the in the case cited above, the ingredients of the present issue are found, therefore, we find it to be squarely applicable. The only point that remains is that instead of a generalization, quantification of duty evasion needs to be restricted to the only evidence available or made available in respect of the transactions entered into by the appellants. That having been done, we have no doubt that the issue answers the first question raised above in the affirmative.

6. Coming to the issue of reliability of statements, the learned counsel for the appellant submitted that the witnesses have retracted the statements during the cross-examination and in some cases, the adjudicating authority has posed some general questions to the witnesses. The retractions stand valid. The same cannot be relied upon evidence. The appellant relying on the ratio of the ***G-Tech Industries*** (supra) has stated that it is not open to any adjudicating authority to straightaway rely on the statements recorded during the investigation/enquiry before the Gazetted Central Excise Officer unless and until he can legitimately invoke Clause (a) of Section 9D(1). We find that in this case, the cross examination was not denied and the case was not only based on the statements of the persons it was corroborated by the evidence wherever it was available. As observed by the adjudicating authority, nothing has been brought on record by the appellants that the statements have been recorded under duress/coercion. It is not the case of the appellant that the said statements were retracted in reasonable time. We find that the adjudicating authority has rightly relied on

the decision of Hon'ble Supreme Court's decision in the case of ***Badaku Joti Svant vs. State of Mysore: 2007-TIOL-326-SC-CUS.*** and ***Surjeet Singh Chhabra vs. UOI: 1997 (89) ELT 646 (SC)***, wherein it was held that statements made before Customs Officer though retracted within 6 days is an admission and binding since Customs Officers are not Police Officers.

6.1 We find that the learned DR has also relied upon the decision of ***Abdul Aziz Reshamwala vs. CC, Jaipur: 2003 (158) ELT 692 (Tri.-Del.)*** and Division Bench decision in the case of ***D.R. Chakrapani Chettiar and Others: 1985 (21) ELT 836 (Tri.)*** wherein it was held that *"If the appellant did not controvert the confession immediately and did not make any grievance on remand before the Magistrate about any alleged act of extortion or coercion regarding the statement, confession cannot be said to have been extorted by coercion or was not voluntarily* and that *"Retraction of confessional statements after a period of more than six months from the date of its recording not attached any credence".* This answers the second question raised above.

7. Coming to the third question of applicability of penalty on the partners of the appellants. We find that learned Commissioner (A) opined that as penalty under 11AC is imposed

on the firms, penalty on firms under Sections 25/26 is not required. Learned Commissioner (A) has however, reduced the penalties imposed on partners. We find that in the case of ***Pravin N.Shah vs. CESTAT: 2017 (52) STR 217 (Guj.)*** it has been held that once firm is penalized, separate penalty is not imposable upon the partner of the firm because partner is not a separate legal entity and cannot be equated with employee of the firm if no specific role is attributed to partner. Similar views have been expressed in the following decisions:

- ***CCE vs. Jai Prakash Motwani: 2010 (258) ELT 204***
- ***Jaybee Industries vs. CCE: 2004 (168) ELT 316 (Tri.-Del.)***

By following the ratio of the above decisions, we set aside the penalties imposed on the partners of the firm. This answers the third issue.

7. In view of the above, all the eight appeals are disposed of as under:

Sl. No.	Appeal No.	Appellant	Decision
1	E/491/2007	M/s. AK Woods Industries	The order of the Commissioner (A) is upheld and the adjudicating authority is directed to quantify the duty as per principles enunciated by Commissioner (A) and this order.
2	E/493/2007	M/s. Nafeesa Frameworks	-do-
3	E/592/2009	M/s. A.K. Boards & Doors	The order of the Commissioner (A) is upheld. The appeal is rejected.
4	E/593/2009	Shri Niyaz Ahmed	Penalty is set aside and appeal is allowed.
5	E/594/2009	Smt. Seeliya Simmith, Partner	Penalty is set aside and appeal is allowed.
6	E/595/2009	M/s. A.K. Panels	The order of the Commissioner (A) is upheld. The appeal is rejected.
7	E/596/2009	Shri Niyaz Ahmed	Penalty is set aside and appeal is allowed.
8	E/597/2009	Shri Naushad Ahmed, Partner	Penalty is set aside and appeal is allowed.

(Order was pronounced in Open Court on **03.08.2018.)**

P. ANJANI KUMAR
TECHNICAL MEMBER

S.S GARG
JUDICIAL MEMBER

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