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

Appeal(s) Involved:

E/1173 - 1176/2005-DB & E/1183/2005-DB

[Arising out of Order-in-Original No. 11/2005 dated 22/09/2005 passed by the Commissioner of Central Excise, Bangalore-III Commissionerate, Bangalore.]

M/s. Emcee Crowns (P) LTD
37, KUNIGAL INDUSTRIAL AREA,
KUNIGAL.

Shri Mahesh Hegde, Accounts Assistant
M/s. Metal Closures (P) Ltd.
No.39/4B, 12th KM
Kanakapura Road
Bangalore.

Shri K. S. Dilip, Director
M/s. Metal Closures (P) Ltd.
No.39/4B, 12th KM
Kanakapura Road
Bangalore.

Shri Prashanth Hegde, Chairman
M/s. Metal Closures (P) Ltd.
No.39/4B, 12th KM
Kanakapura Road
Bangalore.

M/s. Metal Closures (P) Ltd.
No.39/4B, 12th KM
Kanakapura Road
Bangalore.

Appellant(s)

Versus

Commissioner of Central Excise
C.C.E.-BANGALORE-III
PB.NO.5400, QUEENS ROAD,
CENTRAL REVENUES BUILDING,
BANGALORE – 560 001.
KARNATAKA

Respondent(s)

Appearance:

Mr. Raghavendra, Advocate
G. SAMPATH & S. RAGHU
543, 12TH CROSS, 8TH MAIN
J.P NAGARA, 2ND PAHASE,
BANGALORE – 560 078.
KARNATAKA

For the Appellant

Mr. K. Murali, AR

For the Respondent

Date of Hearing: 08/08/2018
Date of Decision: 26/09/2018

CORAM:

HON'BLE SHRI S.S GARG, JUDICIAL MEMBER
HON'BLE SHRI P. ANJANI KUMAR, TECHNICAL MEMBER

Final Order No. 21433 – 21437 / 2018

M/s. Metal Closures (P) Ltd. (MCPL) one of main the appellant (E/1183/2005-DB) have been visited by the Preventive Wing of Bangalore-II Division. The records of the unit and registers were verified. The Officers found that there was shortage of 2036 Nos. of certain variety of PP caps and excess stock of 1,91,809 PP caps valued at Rs.43,944/-. The same were seized. A show-cause notice dated 29.9.84 was issued proposing to confiscate the seized goods and proposed imposition of penalty.

2. Investigations further conducted allegedly revealed the following:

(i) Certain records pertaining to M/s. Weldon Closures (WC) and M/s. Emcee Crowns Pvt. Ltd. (ECPL) were found in the premises. M/s. Weldon Closures were shown to be functioning from 39/48, 12th KM, Kanakapura, Bangalore. M/s. Emcee Crowns was said to be functioning at Kunigal Industrial Area, Kunigal.

(ii) Mr. Prasanth Hegde was chair person of both M/s. MCPL and M/s. ECPL and Shri K. S. Dilip was the Director, who was attending to the work of both the companies. Shri Hedge in his statement dated 4.5.1994 admitted that excisable goods were moved from one unit to another unit for further operations without following any Central Excise procedures.

(iii) Enquiries revealed that M/s. ECPL were procuring tin from M/s. Tin Plate Company and the entire material were received at M/s. MCPL. However, M/s. ECPL have availed the MODVAT credit on the same.

(iv) Shri Anantha Rao in his statement dated 25.7.1994 stated that M/s. WC is a small unit having their factory at 307, Murugeshpalya, Bangalore 17; they were manufacturing crown corks for supply of manufacturers of aerated waters in Bangalore and Tamil Nadu; their turnover was less than Rs.30 lakhs; the sale bills carried the address 39/48, 12th KM, Kanakapura, Bangalore; he was using the premises of M/s. MCPL with the help of the employees without the knowledge of the management of the company.

(v) Enquiries revealed that one Mr. Ullas Hegde was the proprietor of M/s. WC. He did not appear for summons. It was gathered that he was the brother of Mr. Prasanth Hegde, Chairman of M/s. MCPL and M/s. ECPL. None of the statutory bodies like Sales Tax, KEB, Small Scale Industry and Central Excise Department could identify the existence of M/s. WC at Murugeshpalya, Bangalore. Therefore, it appeared that it is a fictitious unit. The customers of so-called M/s. WC like M/s. Kali Aerated Works, Madras and M/s. Balaji Bottlers, Madras stated that Shri K. R. Sridhar was also undertaking marketing / job orders for M/s. WC. Shri K. R. Sridhar is the Sales/Marketing Manager of M/s. MCPL. The job cards, details of stock, sales, status of different brands, and invoices of M/s. WC revealed that all such brands have been cleared from the premises of M/s. MCPL.

(vi) Mr. Roney D' Souza and Shri Renuka Prasad admitted that they have maintained such records of M/s. WC. A Kutcha paper found in File No.6 confirmed the transactions made by the personnel of M/s. MCPL but the sales were reflected in the sales register of M/s. WC.

(vii) In view of the above, it appeared that PP caps/crown corks were produced and have been cleared from the premises of M/s. MCPL under the invoices of M/s. WC, all with an intention to supress true production and to evade payment of duty.

(viii) Mr. Ullas Hegde in his statement dated 8.8.1995 stated that the premises at 307, Murugeshpalya is owned by Shri B. Santosh Hegde, his brother staying abroad. The account in Catholic Syrian Bank was opened by him when he was doing some engineering products. The said premise was leased to Mr. P. Anantha Rao in February 1991 with whom he entered into a partnership agreement which was dissolved in 1992.

(ix) Shri P. Anantha Rao in his statement dated 8.8.1995 stated that the partnership was dissolved in 31.3.1992 but he continued as Proprietor and the bank account in the name of M/s/. WC was continued in Catholic Syrian Bank; he started business of crown corks and purchased a punching machine, dye setting machine and tools; he had supplied mainly to M/s. Kali Aerated Water Works, Madras; M/s. Bangalore Soft Drinks, M/s. Karnataka Beverages, etc. He procured raw materials from M/s. Bharath Metal Printers, M/s. Encore Exports; payments were made by DDs; he had only used KEB power and rented generators from local people during February to June; he utilised the services of M/s. MCPL's employees; the records left over by him in the company were seized by the Central Excise.

(x) Tin sheets allegedly belonging to M/s. ECPL were also found. These materials were received at M/s. MCPL premises under subsidiary gate passes/endorsed gate passes to M/s. ECPL and the consignments were addressed directly to M/s. MCPL and latter, diverted to Kunigal. M/s. ECPL had availed MODVAT credits and the diversion of such goods was not disclosed to the Department either by M/s. MCPL or M/s. ECPL.

(xi) Shri Mahesh Hegde, Account Assistant has been handling the Central Excise records; he signed differently while handling correspondences of M/s. MCPL and M/s. WC, which was confirmed by the Government Examiner of Questioned Documents.

3. On completion of investigation, a show-cause notice was issued seeking -

(i) Central Excise duty of Rs.21,72,955.80 on the PP caps/ crown corks/scrap cleared without payment of duty and duty of Rs.299/- on 2036 Nos. of PP caps found short from M/s. MCPL;

(ii) Disallowing MODVAT credit of Rs.83,935.86 being credit irregularly availed on aluminium sheets used for manufacture of goods cleared in the name of M/s. WC to M/s. MCPL;

(iii) Denial of MODVAT credit of Rs.3,57,314.05 to M/s. ECPL;

(iv) Imposing of penalty on M/s. MCPL and M/s. ECPL under Rule 173Q.

(v) Imposing penalties on various persons under Rule 209A.

3.1. The show-cause notice (SCN) was adjudicated by the Commissioner of Central Excise vide Order No.75/1997 dated 6.11.1997. The appellants have preferred an appeal before this Bench on the plea that the department proceeded to club clearances of a private limited company and a proprietorship without even giving show-cause to the Proprietor; principles of natural justice were not followed and effective hearing was not given to the party; the plea taken by the party for allowing cross-examination was not allowed. On an appeal filed by the appellants, this Bench vide Final Order No.335 to 340/2003 dated 5.3.2003 have remanded back the case to the adjudicating authority to examine all the issues afresh and to pass an order in accordance with law on providing an effective hearing to the party. In the *de novo* proceedings against the CESTAT's Final Order dated 5.3.2003, the Commissioner vide Order-in-Original No.11/2005 dated 22.9.2005 has again confirmed the duty and penalty on the appellants. Aggrieved by this order, the appellants have filed the following appeals before this Bench.

Appeal No.	**Appellant**	**Duty**	**Penalty**
E/1173/2005	M/s. Emcee Crowns (P) Ltd.	Rs.3,57,314.05	Rs.1,00,000/-
E/1174/2005	Shri Mahesh Hegde, Accounts Assistant M/s. Metal Closures (P) Ltd.	-	Rs.50,000/-
E/1175/2005	Shri K. S. Dilip, Director M/s. Metal Closures (P) Ltd.		Rs.50,000/-
E/1176/2005	Shri Prashanth Hegde, Chairman M/s. Metal Closures (P) Ltd.		Rs.2,00,000/-
E/1183/2005	M/s. Metal Closures (P) Ltd.	Rs.21,72,956/- Rs.299/- Reversal of MODVAT credit Rs.83,935.86	Rs.5,00,000/-

4. The learned counsel for the appellant has submitted that clubbing of clearances of M/s. WC with that of M/s. MCPL cannot be sustained as no SCN was issued to the alleged dummy firm i.e., M/s. WC. There is no evidence produced by the department that M/s. WC was not in existence.

4.1 The Proprietor of M/s. WC Shri Anantha Rao clearly stated that he had the facility to manufacture crown corks and that he had punching machine, dye setting machine and tools necessary for manufacture of crown corks. He had supplied crown corks to M/s. Kali Aerated Water Works; M/s. Bangalore Soft Drinks and M/s. Karnataka Beverages. The buyers have confirmed that they have received goods from M/s. WC only. He submitted that as held by Tribunal in ***LD Industries: 2003 (59) RLT 154*** clearance of limited companies cannot be clubbed with other firms. It is now well settled law that in the absence of common funding, mutuality of interest and financial flow back clearances of an independent unit cannot be clubbed. They relied upon the following cases:

(i) Assistant Collector vs. Shri J. C. Shah: 1978 (2) ELT 317 (SC)

(ii) Satyanarayan Textiles vs. Collector: 1989 (43) ELT 729 (T)

(iii) CD Industrial Engineers vs. Collector: 1983 (14) ELT 1944-CEGAT

(iv) Prima Control (P) Ltd. vs. Collector : 1994 (72) ELT 62 (T)

(v) Padma Packages (P) Ltd. vs. Collector: 1997 (90) ELT 83 (T)

(vi) Binod Kumar Maheswari vs. Collector: 1997 (90) ELT 83 (T)

(vii) Renu Tandon vs. UOI: 1993 (66) ELT 375 (Raj.)

(viii) Standard Motors Products (I) Ltd. vs. collector:

(ix) LMP Precision Eng. Co. vs. Collector: 1994 (70) ELT 580 (T)

(x) Prabhat Dyes and Chemicals: 1992 (62) ELT 469 (T)

(xi) Jagjivandas & Co. vs. Collector: 1985 (19) ELT 441

(xii) Swastik Eng. Works vs. Collector: 1992 (62) ELT 313 (T)

(xiii) Vivomed Labs (P) Ltd. vs. Collector: 1991 (53) ELT (T)

(xiv) Pimpri Gases vs. Collector: 1990 (49) ELT (T)

(xv) Cardcure Eng. Co. vs. Collector: 1996 (86) ELT 35

(xvi) Rang Udyog : 1990 (83) ELT 648 (T)

(xvii) CCE Rajkot vs. Chandan Chicory Factory Industries: 1998 (103) ELT 670

(xviii) R. Venkatachalan vs. CCE, Chennai: 2000 (115) ELT 192

(xix) D.M. Gears Pvt. Ltd.: 2002 (48) RLT 768

(xx) CCE vs. Japan Mannequin Co.: 1999 (108) ELT 138

(xxi) CCE, Bombay vs. Libra Industries: 1999 (107) ELT 348

(xxii) Alpha Tayo Ltd.: 1994 (71) ELT 689 (T)

(xxiii) Swastik Engineering Works: 1992 (62) ELT 3113 (T)

(xxiv) Superstar & Another: 2003 (54) RLT 175 (Tri.-Bang.)
(xxv) Sri Andal & Co. : 2003 (56) RLT 77 (Tri.-Chennai)

4.2 Mr. N. Manivannan, Superintendent of Central Excise during cross-examination stated that there was no other factory existing in the premises of M/s. MCPL and that M/s. MCPL did not have facility to manufacture crown corks. Though, the Commissioner stated that only 3 of 10 personnel called for cross-examination have appeared and that in spite of their best efforts they could not procure the persons of others. The learned Commissioner has not considered the deposition of the three officers during the cross-examination. Shri Manivannan, Superintendent, Shri M.D. Mammoo, Superintendent and Shri Nagabhushanam, Inspector during their cross-examination have informed that they do not remember that M/s. MCPL had the facility to manufacture corks.

4.3 Shri K. R. Sridhar and his assistant Shri Ganeshan were in collusion with Shri Anantha Rao of M/s. WC and have maintained records and worked for him. Therefore, there were dismissed from M/s. MCPL. With that grudge in the mind, they have given unsubstantiated statements before the officers implicating M/s. MCPL.

4.4 Merely on the basis of records being found with another unit, clearances cannot be clubbed in view of the ratio of the case in ***Geeta Valves and Engg. Pvt. Ltd.: 1996 (87) ELT 672 (Tri.)***. There was no evidence shown that the money was transferred to MCPL accounts, therefore, in view of the following clearances cannot be clubbed.

(i) Ambica SCDE Manufacturing Works: 1996 (86) ELT 229 (T)
(ii) Renu Tandon: 1993 (66) ELT 375 (Raj.)
(iii) Sprint Fresh Drinks: 199 (54) ELT 333
(iv) ***International Dye Stuff Manufacturing Co.: 1991 (53) ELT 85***

4.5. It was alleged that goods supplied to M/s. Brooke Bond were manufactured in the name of M/s. WC, on the basis of a dairy maintained by Shri Armstrong. As a matter of fact, they were manufactured by M/s. WC and were sold to M/s. ECPL and eventually supplied to M/s. Brooke Bond. This was clear by the statement of Shri Dineshan the Assistant Manager of Brooke Bond.

4.6 The learned Commissioner erred in not considering the settled legal position that the goods lying in the factory cannot be confiscated when no attempt has been made to clear the same without payment of duty. He has relied upon the following case laws:

(i) Southern Steel: 1979 ELT J402
(ii) New Polymer: 1995 (52) ELT 145
(iii) Katar Steel : 1997 (93) ELT 443
(iv) Cureworth India: 2000 (37) RLT 158
(v) Shanti Vrath: 1998 (99) ELT 154
(vi) Ratan Re-rollers Ltd.: 2001 (137) ELT 1169

4.7 The learned Commissioner has relied upon mostly the statements of personnel who are not produced for cross-examination. The learned Commissioner has not relied upon any depositions where buyers have stated that they have placed orders on M/s. WC only. The learned Commissioner has given a finding that since scrap of aluminium and tin were found in the premises; they must have manufactured crown corks. This is a clear example of presumptions and assumptions. Commissioner has confirmed reversal of MODVAT credit of Rs.83,935.86 on the ground that the appellant had irregularly availed credit on aluminium sheets which were used for clandestine manufacture and removal of PP caps. This was solely based on the statement of store keeper Mr. Roney D' Souza.

4.8. Commissioner has erred in finding that Shri Anantha Rao has given statement only to absolve Shri Prasanth Hegde and Shri Ullas Hegde. M/s. MCPL have clearly explained that the Managing Director of M/s. MCPL was not aware of the activities carried out by Shri Anantha Rao. Shri Anantha Rao carried his own business with the help of a few personnel of M/s. MCPL. Commissioner has erred in finding that M/s. MCPL and M/s. ECPL have manufactured and cleared PP caps and crown corks in the name of M/s. WC. Commissioner has come to this conclusion where even SCN to so-called dummy unit was not issued, clearly vitiating the proceedings. They relied upon the following:

(i) *CCE vs. Standard Watch Co.: 2000 (39) RLT 528*
(ii) *BMP Precision Eng. Co. Ltd.: 1994 (70) ELT 50 (T)*
(iii) *Dawn Fire Works Factory & Others: 1999 (31) RLT 104 (T)*
(iv) *Indian Metal Industries: 1999 (31) RLT 297 (T)*
(v) *East India Cotton Mfg. Co: 2000 (36) RLT 274 (T)*
(vi) *Ramsay Pharma Pvt. Ltd.: 2000 (47) RLT 713 (T)*
(vii) *Agesh Industries: 1997 (94) ELT 88*
(viii) *Ramsay Pharma Pvt. Ltd.: 2001 (127) ELT 789 (T)*
(ix) *Lakshmi Coffee Works: Final Order No.1717/97 dt.16.7.1997*
(x) *Asian Industries: 2001 (47) RLT 1034 (T)*

4.9 Learned Commissioner has imposed penalty under Rule 173Q whereas the Department has not proved with any evidence that M/s. MCPL has manufactured and cleared crown corks. When manufacture and clearance; and consequent duty evasion is not established, penalty cannot be imposed upon. They have relied upon ***Tamil Nadu Housing Board Ltd.: 1994 (74) ELT 9 (SC)***.

4.10 The allegation that 2036 Nos. of PP caps were removed without payment of duty on the reason that a shortage was found is arbitrary as the same has not been physically determined and ever proved to be cleared.

4.11. Hon'ble Tribunal vide its Final Order dated 5.3.2003 observed that all the submissions made by the appellants be considered, however, the Commissioner has ignored all the valid submissions.

4.12 A case was booked in 1987 by the Department on similar lines of clubbing clearances of M/s. MCPL and M/s. WC. It was ultimately dropped by CEGAT.

4.13 Lastly, the counsel submitted that, in case, the Tribunal decides that duty is payable by the appellants, cumduty price may be allowed for payment of duty as held in in ***Maruti Udyog: 2002 (49) RLT 1 (SC)***.

5. The learned Departmental Representative has submitted that the case was made on the basis of concrete evidence and not on presumptions and assumptions. The demand pertains to 1991-1994. The statements of different persons are summarised as follows:

(i) Shri Anantha Rao, in his letter dated 25.7.1994 claimed that his attendance in person was not necessary as advised by M/s. MCPL. However, latter, when he rendered his statement he brought in the story that he has started M/s. WC at Murugeshpalya as a partnership firm with Shri Ullas Hegde in 1991 but however, after few days it was dissolved. Shri Ullas Hegde stated that he handed over signed cheque book to Shri Anantha Rao and permitted him to conduct transactions in Catholic Syrian Bank on their behalf. Later, he changed version saying that the plot in Murugeshpalya belonged to his brother Shri Santhosh Hegde and was leased-out to Shri Anantha Rao. During 1991-92 to 1993-94, the debits and credits of M/s. WC in the Bank were to the order of Rs.66 lakhs, however, no payments for raw materials or to any statutory bodies or any statutory levies, bills, etc., are noticed through this Bank.

(ii) Shri Prasanth Hegde, Chairman of M/s. MCPL and M/s. ECPL vide his statement dated 4.5.1994 has accepted that records of M/s. WC and M/s. ECPL were found in the premises of M/s. MCPL; M/s. MCPL have undertaken job work for M/s. ECPL; neither permission was undertaken nor Central Excise procedure was followed; Duty was not paid on samples cleared; M/s. WC was working in the same premises and was closed down in 1989. Shri Prasanth Hegde, however, feigned ignorance as to why Shri Anantha Rao was using the telephone and address of M/s. MCPL for his business of crown corks. Shri Prasanth Hegde could not explain in his statement dated 17.5.1996 receipt of Rs.4 lakhs on 24.3.1993 and Rs.1 lakh on 23.8.1993 from M/s. WC

(iii) Shri Roney D' Souza Store Keeper of M/s. MCPL accepted in his statement 13.6.1994 that he maintained stock register and job cards of M/s. WC.

(iv) Shri N. C. Joshi, Manager, in his statement 15.6.1994 accepted that old records of M/s. WC were with

Shri Prasanth Hegde. He knows Shri Ullas Hegde to be the proprietor of M/s. WC, Murugeshpalya. Shri Anantha Rao gave cheques of M/s. WC for encashment to different personnel of M/s. MCPL. In his statement dated 22.5.1996, Shri Joshi stated that the amounts he collected belonged to Shri Ullas Hegde, brother of Shri Prasanth Hegde and was wrongly deposited in the account of M/s. WC instead of M/s. ECPL.

(v) Shri Ganesh Ram, employee of M/s. MCPL on 16.6.1994 stated that on request from Shri Anantha Rao, he collected payments from M/s. Balaji Bottlers.

(vi) Shri Mahesh Hegde of M/s. MCPL has accepted that he has maintained excise records of the both i.e., M/s. MCPL and M/s. WC. He confirmed that scrap was not accounted in RG-1 register. Shri Mahesh Hegde used to sign the different registers differently. On being requested by the Department, Government Examiner of Questioned Documents has confirmed the handwriting in both the registers to be of the same person.

(vii) Shri K. S. Dilip, Director of M/s. MCPL in his statement dated 27.6.1994 confirmed that the crown corks were printed and cut at M/s. MCPL but punching was done in M/s. ECPL. Movement of goods was without challans and without following procedures. Material belonging to M/s. ECPL was received at M/s. MCPL but not recorded anywhere.

(viii) 8411 kg of tin sheets indented by M/s. ECPL under challans K821 dated 8.6.1993 and K595 dated 27.5.199 were found entry at No.76, of the stock book seized at MCPL. The same were issued to manufacture, under job card No. 52 for Torino Brand Crowns. However, enquiries with the customer revealed that said order was placed on M/s. WC.

(ix) Similarly, production of PP caps supposed to be supplied to M/s. Gemini and Vorion Distilleries was mentioned in the production status registers of quality centre of M/s. MCPL. It was also found mention in the General Marketing File (at Sl. No.145) of M/s. MCPL and also in a kutcha paper found in File No.6. Similarly, entries relating to supply of PP caps to Kalyan Soft Drinks was mentioned in job card No.16 on 17.7.1993 in M/s. WC's name. It was also found on page 16 of M/s. ECPL register.

(x) Shri K. R. Sridhar was the marketing person who was also working for M/s. WC. Personnel of customers of M/s. WC like M/s. Balaji Bottlers, M/s. Kali Aerated Waters placed orders on Shri Sridhar only.

6. The Authorised Representative submitted that the evidences submitted by the learned counsel for the appellants purporting to prove the existence of M/s. WC were nothing but the statements and investigations conducted by the department. The KEB only confirmed an electricity connection being established at Murugeshpalya. However, most of the electric consumption for the most period was nil. Shri Anantha Rao's claim that he has worked mostly on the locally hired generators is only an afterthought. The visit by the Central Excise Officers to the unit revealed that the unit was closed and no machinery worthwhile was found. Though M/s. WC claimed independent existence, the bankers knew only Shri Ullas Hegde to be the Proprietor. A perusal of the accounts of M/s. WC revealed that all the amounts credited were withdrawn and given to various personnel of M/s. MCPL. The contention that no show-cause notice was issued to M/s. WC is not valid since it was not the case of the Department that M/s. WC was

existing independently. As wrongly claimed by the counsel, it is not a case of clubbing of clearances but was a case of M/s. MCPL manufacturing and clearing PP caps and crown corks in the name of different companies.

6.1. The learned DR relied upon the following case laws to buttress his submissions:

i. *S. M. Steel Ropes vs. CCE (Adjn.) Mumbai: 2014 (304) ELT 591 (Tri. -Mum.)*
ii. *Niemla Textile Finishing Mills Pvt. Ltd. vs. CCE, Chandigarh: 1988 (35) ELT 671 (Tri.)*
iii. *Mitex Impex vs. CCE: 2017-TIOL-441-HC-AHM.-CX*
iv. *M/s. NGA Steels (P) Ltd. vs. CCE: 2017-TIOL-440-HC-MAD.-CX*

7. Heard both sides and perused the records of the case. The Department relies/alleges on the following facts ascertained during the investigation.

(i) M/s. WC is a fictitious or non-existing entity. It was created only on paper. The records pertaining to M/s. WC were not only found in the premises of M/s. MCPL but were maintained by the personnel of M/s. MCPL. Goods were manufactured in M/s. MCPL only and cleared in the name of M/s. WC.

(ii) The amounts pertaining to the sale proceeds of M/s. WC were deposited in the Catholic Syrian Bank but were withdrawn by the personnel of M/s. MCPL. Shri N.C. Joshi, Manager of M/s. MCPL in his statement dated 15.6.1994 has accepted that the amounts belong to Mr. Ullas Hegde, brother of Mr. Prasanth Hegde, the MD of M/s. MCPL.

(iii) Shri Mahesh Hegde has maintained excise records of both M/s. MCPL and M/s. WC and he used to sign the different registers in a different fashion. This was confirmed by Government Examiner of Questioned Documents.

(iv) Shri K. S. Dilip, Director of M/s. MCPL in his statement dated 27.6.1994 confirmed that the crown corks were printed and cut at M/s. MCPL but punching was done in M/s. ECPL.

(v) Shri K. R Sridhar, Marketing person of M/s. MCPL was also working for M/s. WC. The customers of M/s. WC like M/s. Balaji Bottlers and M/s. Kali Aerated Waters, etc., have confirmed that they were in contact with Shri Sridhar only with respect to the purchase of crown corks from M/s. WC.

(vi) No statutory authority has either confirmed or acknowledged the existence of M/s. WC.

(vii) The bankers i.e., Catholic Syrian Bank recognised Shri Ullas Hegde to be the Proprietor of M/s. WC and Mr. Anantha Rao was created only as a dummy.

(viii) Material pertaining to M/s. ECPL was more often then not has been off loaded in M/s. MCPL only.

7.1. Whereas, the defence of the appellants was on the following lines.

(i) M/s. WC was, in fact, an existing proprietorship concern as is evidenced by the electricity connection and other statutory recognition given by authorities.

(ii) As held in various judgments by Courts and Tribunals, the clearances of a limited company (private or public) cannot be clubbed as they have independent existence.

(iii) M/s. MCPL have no facility for manufacture of crown corks as submitted by them during the investigation and during the proceedings before lower authorities and as confirmed by Shri Manivannan, Superintendent during the cross-examination; therefore, when there is no manufacturing facility it cannot be alleged that crown corks are manufactured and cleared by M/s. MCPL in the name of M/s. WC.

(iv) Though it is admitted that certain records of M/s. WC were found in the premises of M/s. MCPL, the fact was some of the employees of M/s. MCPL were working for M/s. WC without the knowledge of the management. On finding out, action has been taken against the employees and they had some issues to settle the scores with M/s. MCPL and therefore, have given false statements to the Department. Department could not produce them for cross-examination.

(v) Similar case of irregular availment of MODVATcredit by M/s. ECPL was raised by the Department during the earlier period but the proceedings were dropped this very Bench vide Order dated ***2002 (149) E.L.T. 639 (Tri.-Bang.)*** holding that goods were sent on job work to M/s. MCPL and mere non-maintenance of records and non-observance of procedures shall not take away the substantial right to avail credit.

(vi) The Department has not issued any show-cause notice to M/s. WC, the allegedly dummy company, therefore, the entire proceedings are vitiated in view of the judgment of Chennai Bench in the case of ***Poly Resins***: ***2003 (161) ELT 136 (Tri.-Chennai)***.

7.2 We find that the appellants were vehemently contending on the fact that there was no facility to manufacture crown corks in the factory of M/s. MCPL. Therefore, it cannot be alleged that they have manufactured and cleared crown corks. During the cross-examination on 1.9.2005, during the *de novo* proceedings, on being told that mahazar dated 3.31994 contains details of machinery and records seized and on being asked as to whether M/s. Metal Closures had infrastructure to manufacture crown corks, Shri Manivannan, Superintendent of Central Excise, stated categorically that there was no facility for manufacture of crown corks in M/s. MCPL. Similarly, we find that Shri M. B. Mammoo (now name officially changed as M.B. Mahmood), during cross-examination on 9.8.2005 stated that he did not remember as to whether he had conducted any investigation regarding the availability of infrastructure to manufacture crown corks at M/s. MCPL. We find that the Department has not sufficiently rebutted this claim by the appellants. In fact, we find that the Commissioner in the *de novo* adjudication order had cursorily mentioned that "the productivity status register and production register of the assessee's unit (M/s. MCPL) confirm the view that the crown corks were manufactured by M/s. MCPL, therefore, it can be inferred that though part of the activity like punching has been undertaken at M/s. ECPL and invoices were raised by M/s. WC, the crown corks cleared were manufactured at M/s. MCPL. Since the manufacture was done in the assessee's premises, I confirm the duty of demand raised in the show-cause notice with regard to manufacture and clearance of crown corks". It is pertinent to see that neither the mahazar or any subsequent statement or investigation conducted have given reasons for this inference. The show-cause notice alleges that the manufacturing activity was done by M/s. MCPL, without giving any concrete proof to the effect that M/s. MCPL had any facility to manufacture the same. As contended by the appellants, department did not issue any show-cause notice to M/s. WC. Even assuming that the Department has considered M/s. WC, a non-existing unit, the issue required to be investigated deeply whether such goods were manufactured at M/s. ECPL, this investigation was not conducted. Moreover, no show-cause notice was given to M/s. ECPL alleging manufacture of crown corks that was ultimately alleged to have been cleared by M/s. MCPL in the name of M/s. WC. We find that the SCN acknowledges the fact that M/s WC was started in 1983 and was functioning from the premises of M/s MCPL and was closed down in 1987. Shei Ananth Rao has stated that he has started the unit M/s WC again in 1991-92 from premises at Murgeshpalya. We find that Revenue has not taken any steps to come to a definitive conclusion as to whether the impugned crown corks were manufactured at M/s. MCPL or at M/s. ECPL. This being not done, we find that arriving at a conclusion that the goods have been manufactured at M/s. ECPL and cleared later by M/s. MCPL in the name of M/s. WC does not stand the scrutiny of law. We rely on the ratio of the Tribunal rendered in the following cases as submitted by the learned counsel:

i. ***Sapna Engineering: 2006 (201) ELT 201 (Tri.-Mum.)***
ii. ***Radhika Hydraulics: 2015 (328) ELT 109 (Tri.-Ahmd.)***
iii. ***Vijay Packaging Systems Ltd.: 2010 (262) ELT 832 (Tri.-Bang.)***

7.3. We find that the learned AR has mainly relied upon cases where in clandestine manufacture etc are discussed, However, these cases do not discuss the facts of the instant case in as much as absence of manufacturing facilities are concerned. Therefore, as far as the allegation of manufacture and clearance of crown corks by M/s. MCPL, in the name oif M/s WC is concerned, we find that the appellants have a point. The SCN and the order in *de novo* are silent on the claim that the appellants had no manufacturing activity. Whereas, the show-cause notice alleges that the crown corks have been manufactured in the premises of M/s. MCPL, the Order-in-Original talks of crown corks have been manufactured in the premises of M/s. ECPL. We find that the Department has not issued show-cause notices either to M/s. WC or to M/s. ECPL. Following the ratio of the judgment of the Tribunal in the case of *Poly Resins* (supra), we find that the assessee's contentions on this ground too are strong.

7.4. Moreover, we find that both the Karnataka Electricity Authority and Central Excise having jurisdiction over Murugeshpalya, did not come to the categorical conclusion that the unit by name M/s. WC did not exist there. Whereas, Karnataka Electricity Authority has only given that the premises had an electricity connection in the name of Shri E. Hanumantha Rao and have given certain details of electricity consumption from which it could only be inferred that the electricity consumption was less and infrequent. The statement of Shri Hanumantha Rao, stating that he had used generator sets was dismissed as an after thought without conducting any further investigation. Similarly, the findings of the Central

Excise Department were to the effect that the unit was closed and no machinery appeared to be available inside was on the basis of the officers peeping through a window. It was well within the powers of the officers to brake open the lock and to carry investigation in detail and to record the proceedings in a mahazar, which was not done. On the contrary, the appellants have produced various correspondences between M/s. WC and the bankers and have also brought on record the fact that the payments by customers of M/s. WC were made into the Bank accounts of M/s. WC. On this count also, the appellants have a case.

7.5. Coming to the financial dealings, the investigation could establish the suspicious transactions only to the extent of Rs.4,00,000/- on 24.6.1993 and Rs.1,00,000/- on 23.8.1993, which was deposited/withdrawn in the Bank accounts of M/s. MCPL by M/s. WC or Shri Anantha Rao through Shri N. C. Joshi. We find that the entire transaction of M/s. WC was alleged to be to the tune of Rs.67,78,000/-. The show-cause notice alleges that certain amounts ranging from Rs.10,000/- to Rs.4,00,000/- were withdrawn by Shri N. C. Joshi on six occasions and the show-cause notice alleges that such withdrawal has not been satisfactorily explained by either Shri

N. C. Joshi or Shri Prasanth Hegde. However, the show-cause notice does not provide any proof regarding the accrual of such sums to M/s. MCPL. In the absence of any financial flow in both directions, we are afraid that this much would not suffice to establish mutuality of interest between M/s. MCPL and M/s. WC, as held by the Hon'ble Supreme Court in the case of ***Xerographic Limited: 2010 (257) ELT 11 (SC)***.

7.6. Coming to the other allegations, we find that the Department has made a strong case in their favour so far as the removal of PP caps clandestinely by M/s. MCPL, clearance of scrap clandestinely by M/s. MCPL and irregular availment of MODVAT credit by M/s. MCPL and irregular availment of MODVAT credit by M/s. ECPL. We find that the appellants have not submitted any cogent reasons on their behalf for the above allegations, as it is evident from the records like job register, productivity status register, production register and the statements of different officers of the appellants, the department's allegations are valid. The only defence taken by the appellants was that, the registers were written at the behest of Shri K. R. Sridhar, who was removed by them, cannot be relied upon. We find that such defence is not acceptable and does not answer the questions raised in the show-cause notice. As discussed above, the show-cause notice was able to bring out from various records and statement of the officers of M/s. MCPL that clandestine removal of PP caps and scrap has taken place. No entries have been made in the statutory records like RG-1 Register. We find from the records that M/s. MCPL are required to pay duty of Rs.4,49,056/- as shown below:

(i) Rs.1,09,557/- (i.e., Rs.96,913.30 BED + Rs.12,643.75 SED) on clandestine removal of PP Caps.

(ii) Rs.2,25,386/- (i.e., Rs.2,07,715/- BED + Rs.17,671/- SED) on aluminium scrap clandestinely removed by them.

(iii) Rs.1,13,814/- (i.e., Rs.1,10,900/- BED + Rs.2,913.45 SED) on aluminium tin and wad scrap clandestinely removed.

(iv) Rs.299/- on 2036 Nos. of PP caps found short.

7.7. On the allegation of irregular MODVAT credit availed, we find that M/s. MCPL are required to pay MODVAT credit wrongly availed of Rs.83,936/- (i.e., Rs.72,987.71 + Rs.10,948.15).

7.8. It was alleged that M/s. ECPL have availed MODVAT credit on 88.637 MT of tin sheets during the period 1991-92 to 1993-94. We find that the appellants could not produce any proof to sustain that credit was correctly availed by them with the help of any statutory or private records maintained either at M/s. ECPL or at M/s. MCPL. Therefore, we find that M/s. ECPL are required to pay MODVAT credit of Rs.3,57,314/- (i.e. Rs.3,27,131.15 BED + Rs.30,182.90 SED) wrongly availed by them on goods which were not utilised in their factory.

7.9. We find that the adjudicating authority has imposed penalties on the M/s. ECPL and M/s. MCPL and various personal penalties. Looking into the amount of duty confirmed on M/s. MCPL, we reduce the penalty imposed on M/s. MCPL from Rs.5,00,000/- to Rs.2,00,000/- (Rupees Two Lakh Only) and the penalty imposed on Shri Prasanth Hegde, from Rs.2,00,000/- to Rs.1,00,000/- (Rupees One Lakh Only). We do not interfere with the penalties imposed on M/s. ECPL. However, looking into the role of various persons involved, we find that penalties imposed on Shri Mahesh Hegde (E/1174/2005) and Shri K. S. Dilip (E/1175/2005) are harsh. It was brought on record that Shri Mahesh Hegde used to sign differently in different documents and the same was confirmed by Government Examiner of Questioned Documents. However, it is not clear as to any criminal proceedings have been initiated against him. As far as the instant proceedings are concerned, nothing was brought on record to show that as to how they were benefitted by the alleged evasion by M/s. MCPL or M/s. ECPL, to substantiate the penalties levied on them, hence, we set aside the penalties.

8. In view of the above, we partially allow the appeals confirming duty and penalty to the extent as follows:

Appeal No.	Appellant	Duty	Penalty
E/1173/2005	M/s. Emcee Crowns (P) Ltd.	Rs.3,57,314.05	Rs.1,00,000
E/1174/2005	Shri Mahesh Hegde, Accounts Assistant M/s. Metal Closures (P) Ltd.	-	Nil
E/1175/2005	Shri K. S. Dilip, Director M/s. Metal Closures (P) Ltd.		Nil
E/1176/2005	Shri Prashanth Hegde, Chairman M/s. Metal Closures (P) Ltd.		Rs.1,00,000/-
E/1183/2005	M/s. Metal Closures (P) Ltd. No.39/4B, 12th KM Kanakapura Road Bangalore.	Rs.4,49,056/- and Reversal of MODVAT credit of Rs.83,936/-	Rs.2,00,000/-

(Order was pronounced in Open Court on **26.09.2018.)**

P. ANJANI KUMAR
TECHNICAL MEMBER

S.S GARG
JUDICIAL MEMBER

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