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

Appeal(s) Involved:

E/457/2009-SM, E/565/2009-SM, E/566/2009-SM

[Arising out of Order-in-Appeal No. 466/2008 dated 28/12/2008 passed by the Commissioner of Central Excise, Bangalore]

Kris Flexipacks Pvt. Ltd.
65, Shanthi Industrial Estate,
Sarojini Naidu Road, Malund(West)
Mumbai – 400 080

Fancy Bag Industries
6/6D, Hongasandra Begur Main
Road, Bommanahalli,
Bangalore – 560 068

Appellant(s)

Manoj Mehtsa, In-charge
Fancy Bag Industries, 6/6D,
Hongasandra Begur Main Road,
Bommanahalli
Bangalore – 560 068

Versus

C.C.E.-Bangalore-I
Post Box No. 5400,
CR Buildings,
Bangalore – 560 001,
Karnataka

Respondent(s)

Appearance:

Shri. M.S. Srinivasa, Advocate
#39/1, Pinaki, 2nd Floor
Sannidhi Road, Above SBI,
N.R. Colony, Basavanagudi
Bangalore - 560 004
Karnataka

For the Appellants

Shri. Raghavendra, Advocate

Shri. Kanipakam Murali,
Superintendent (AR)

For the Respondent

Date of Hearing: 02/07/2019
Date of Decision: 19/07/2019

CORAM:
HON'BLE SHRI S.S GARG, JUDICIAL MEMBER

Final Order Nos. 20570 – 20572 / 2019

Per : S.S GARG

The appellants have filed these three appeals against the common impugned order dated 28.12.2008 passed by the Commissioner (Appeals) whereby the Commissioner (Appeals) has rejected the appeal of the appellants and confirmed the Order-in-Original. Since all the three appeals are arising out of the same facts and there is a common impugned order, therefore all the three appeals are being disposed of by this common order. The details of the appeals are as under:

Sl. No.	Appeal No.	Order-in-Appeal No.	Duty (Rs.)	Penalty (Rs.)
1	E/457/2009	466/2008 dt. 28/12/2008	-	Rs. 10,000/-
2	E/565/2009	466/2008 dt. 28/12/2008	Rs. 12,17,620/-	Rs. 12,17,620/-
3	E/566/2009	466/2008 dt. 28/12/2008	-	Rs. 10,000/-

2. Briefly the facts of the present case are that the adjudicating authority vide Order-in-Original has held that the appellant Fancy Bag Industries had manufactured and cleared the impugned goods in the name of M/s. Nikita Plast, Daman without depositing the duty amount to the Government but instead deposited to the bank account of M/s. Nikita Plast. Adjudicating authority vide the Order-in-Original confirmed the demand of

Rs. 12,17,620/- (Rupees Twelve Lakhs Seventeen Thousand Six Hundred and Twenty only) towards excise duty on poly bag for the period from 2000-01 to 2005-06 and appropriated Rs. 5,00,000/- (Rupees Five lakhs only) already paid by the Fancy Bag Industries towards duty liability, imposed equivalent penalty under Section 11AC of the Central Excise Act, 1944 read with Rule 25 of Central Excise Rules, 2002, imposed penalty of Rs. 10,000/- (Rupees Ten Thousand only) under Rule 26 of Central Excise Rules, 2002 on Manoj Mehta of Fancy Bag Industries and also imposed penalty of Rs. 10,000/- (Rupees Ten Thousand only) under Rule 26 on M/s. Nikita Plast and also demanded appropriate interest under Section 11DD. The adjudicating authority also ordered that the amount available in the bank account of M/s. Nikita Plast, Daman which was frozen by the Department was to be adjusted towards the duty and penalty. The appellants are challenging the demand and confirmation of central excise duty as well as the penalties and interest and freezing of the accounts. First, I take up the appeal filed by M/s. Fancy Bag Industries, Bangalore. The appellant Fancy Bag Industries is a proprietorship concern and Shri. Bhupatrai Mehta is the proprietor of the said firm. Shri. Manoj Mehta is the in-charge of the said concern and is looking after the day-to-day operation of the concern. The said concern is engaged in the manufacture of poly bag and their turnover during the year 2001-04 did not exceed the exemption limit contained in the Notification No. 175/86 and 8/2003 as amended from time to time and this fact has not been appreciated by both the authorities, that the allegation of clandestine clearance was incorrect inasmuch as the appellant company had supplied from their unit against the order of M/s. Nikita Plast as they happened to be their commission agent also and since their own turnover was well within the exemption limit, there was no question of collecting any duty and question of demanding duty under Section 11D of the Central Excise Act. Further the appellant in order to cater the urgent need of their Bangalore based customers and to avoid delay in supply has cleared the goods manufactured by them in the name of M/s. Nikita Plast and on subsequent receipt of the goods from M/s. Nikita Plast has accounted the same in their name. Further the entire consideration along with duty received from the customers in respect of clearance of goods manufactured by the appellant in the name of

M/s. Nikita Plast has been credited into the account of M/s. Nikita Plast and M/s. Nikita Plast has already discharged duty liability on the same. Under these circumstances, the appellant submits that provisions of Section 11D of the Central Excise Act has no application to the facts of the present case. The learned counsel for the Fancy Bag Industries and M/s. Manoj Mehta submits that the impugned order is not sustainable in law as the same has been passed by wrongly appreciating the facts. He further submits that even though the show-cause notice was issued to M/s. Fancy Bag Industries, the proposal for demand of duty was made on Manoj Mehta. However, the impugned order as well as the adjudication order has proceeded to demand duty on M/s. Fancy Bag Industries by going beyond the scope of show-cause notice. For this submission, he relied upon the following decisions:

i. *CCE, Delhi-I Vs. Hi-Tech Electronics Industries – 2014 (314) ELT 689 (Tri.-Del.)*
ii. *JSEL Securities Ltd. Vs. CCE & ST, Jaipur-I – 2017 (4) GSTL 8 (Tri.-Del.)*
iii. *Preamier Heavy Engineering Corporation Vs. CCE – 2016 (337) E.L.T 332 (Guj.)*

2.1. He further submits that the impugned demand has been raised solely on the basis of assumption and presumptions without examining/investigating the facts that when the goods have been received from M/s. Nikita Plast on payment of duty and cleared subsequently, whether the appellant has raised any invoice for the said goods by including the value of the goods. He also submitted that provisions of Section 11D of Central Excise Act 1944 has no application to the facts of the case as even after including the value of clearances made by the appellant in the name of M/s. Nikita Plast was well within SSI exemption and hence the intention on the part of the appellant in collecting the duty and depositing into the account of M/s. Nikita Plast can at the most be treated as procedural lapse. He further submits that the demand has been raised on the basis of incomplete investigation without considering any of the pleas raised by the appellant. appellant since from beginning has pleaded that in order to cater the urgent need of their Bangalore based customers, they have supplied the goods manufactured by them in the name of M/s. Nikita Plast and on subsequent receipt of the goods from M/s. Nikita Plast have accounted the same in their account. Further the entire consideration received in respect of clearance made in the name of Nikita Plast has been credited into their account. He further submits that Section 11D is not applicable to the facts of the present case as the appellant has not collected the excess duty from the customers and the collected duty amount has already been paid by M/s. Nikita Plast. It is his further submission that duty demand should have been raised on M/s. Nikita Plast as the entire consideration received along with duty has been credited into the account of M/s. Nikita Plast as admitted in the impugned order. He further submits that for the period prior to March 2002, the demand is beyond the period of 5 years and hence cannot be sustained at all.

Grounds of appeal of M/s. Kris Flexipacks Pvt. Ltd. formerly knows as Nikita Plast

3. Learned counsel appearing for the Nikita Plast submits that the imposition of penalty on them under Rule 26 of Central Excise Rules, 2002 is not legally sustainable. He further submits that the employees of M/s. Fancy Bag Industries, Bangalore manufactured goods in question and clandestinely cleared the same by raising the invoices in the name of the appellant at their back without the knowledge of the appellant (Nikita Plast). He further submitted neither the adjudicating authority nor the appellate authority proved that the appellant had knowledge of said activity of M/s. Fancy Bag Industries, Bangalore and how they aided and abetted in such clandestine removal. He further submits that in the show-cause notice itself it has been alleged that during the period 2000-01 to 2005-06, the appellants have aided and abetted Shri. Manoj Mehta of M/s. Fancy Bag Industries, Bangalore by not actually supplying the goods to Bangalore based customers and received the sale proceeds of the fraudulently cleared goods. Further in the impugned order also on the same grounds penalty under Rule 26 of the Central Excise Rules has been imposed whereas prior to 01.03.2007 under Central Excise Law there was no penalty provision for penalizing person, who

issues an excise duty invoice without delivery of goods specified therein or abets in making such invoices. He further submits that vide Notification no. 8/2007 dated 01.03.2007 Rule 26 was amended and sub-rule (2) to Rule 26 was inserted to penalize the person who issues an excise duty invoices without delivery of the goods specified therein or abets in making such invoices. The said provision cannot be made applicable retrospectively to the present case so as to penalize the appellant. Further he submits that Rule 26 of the Central Excise Rules, 2002 talks about the personal penalty which can be imposed only on a natural person who knowingly and personally involves in violating the Central Excise provisions and not on any legal/juridical person/entity. In support of this submission, he relied upon the decision of the Larger Bench of the Tribunal in the case of ***M/s. Steel Tubes of India Ltd. Vs. CCE, Indore reported in 2007 (217) E.L.T. 506 (Tri.-LB)*** wherein the Tribunal interpreting the provisions of erstwhile Rule 209A of Central Excise Rule, 1944 which is similar to Rule 26 of Central Excise Rules, 2002 has held that the said provision has been introduced in the statute, in order to punish the guilty acting behind the veil of corporation/company. He also relied upon the decision of this Tribunal in the case of ***Homag India Pvt. Ltd. Vs. CCE, ST & Cus., Bangalore – II reported in 2017 (357) E.L.T. 1194 (Tri.-Bang.)*** wherein it has been held that to impose penalty under Rule 26 of Central Excise Rules, 2002 there must be a confiscation of any goods and in the instant case there is not even a proposal to confiscate any goods in the show-cause notice and in fact there is no confiscation but still the penalty was imposed. Further submissions of the learned counsel appearing for the Nikita Plast regarding the freezing of bank accounts the learned counsel submits that they have orally authorized Manoj Mehta only to act as their commission agent in the Bangalore and to collect and remit the sale proceeds in respect of the goods sold by them whereas Shri. Manoj Mehta in-charge of M/s. Fancy Bag Industries, Bangalore during the period 2000-01 to 2005-06 apart from acting as commission agent has manufactured the excisable goods and clandestinely cleared the same by raising tax invoice in the name of the appellant that too at appellant’s back. In respect of these clandestinely removed goods, the Department has made out a case against Manoj Mehta, in-charge of M/s. Fancy Bag Industries, Bangalore and also confirmed the demand with interest and penalty against M/s. Fancy Bag Industries. Based on the statement given by Manoj Mehta, the Department has also ordered for freezing of the bank account of the appellant in terms of Section 121 of the Customs Act, 1962 as made applicable to the Central Excise in terms of Section 12 of the Act and confiscated the amount on the presumption that the amounts available in the said account related to "sale proceeds" of the said clandestinely removed goods by M/s. Fancy Bag Industries, Bangalore during the period 2000-01 to 2005-06 and remit appropriation of the same towards the liability confirmed against M/s. Fancy Bag Industries, Bangalore. He further submits that in terms of Section 121 of the Customs Act, 1962 to confiscate the sale proceeds, the onus is on the Department to prove that the same relates to clandestinely removed goods, which is required to be discharged by production of an affidavit and tangible and positive evidence which the Department has failed to discharge. For this he has relied upon the decision of the Tribunal in the case of ***Pandit D.P. Sharma Vs. CCE, Calcutta reported in 2001 (137) E.L.T. 692 (Tri.-Kolkata)*** wherein the Tribunal by relying upon various decisions has held that the onus to prove that the amount in question is the sale proceeds of the clandestinely removed goods is upon revenue, which is required to be discharged by production of an affirmative tangible and positive evidence. The said decision has been upheld by the Apex Court as reported in ***2003 (157) E.L.T. A201 (S.C).*** He further submits that in the present case the Department has neither caused any verification or investigation nor recorded any statement with regard to the transactions in the frozen account. The said account has not been verified and no statement was recorded. He also relied upon the decision in the case of ***J.K.S. Air Travels Vs. CCE, Chennai-I reported in 2016 (331) E.L.T. 173 (Mad.)*** wherein the Hon'ble High Court considering Section 121 of the Customs Act, 1962 held that the person from whom the department wants to confiscate the sale proceeds should have sold the clandestinely removed goods having knowledge or reason to believe that the said goods are clandestinely removed goods.

4. On the other hand the learned AR defended the impugned order and

submitted that it is undisputed fact that Shri. Manoj Mehta of Fancy Bag Industries with the help of his employees generated invoices in the name of Nikita Plast, Daman and clandestinely removed the goods by forging the invoices of Nikita Plast and also using the rubber stamps of Nikita Plast. Further Shri. Manoj Mehta has admitted the goods manufactured by M/s. Fancy Bag Industries, Bangalore and supplied to various customers in Bangalore under the invoices of Nikita Plast, Daman and collected the sale proceeds including excise duty from the customers and deposited in Nikita Plast, Daman bank account. He further submitted that no evidence has been produced by the appellants that Nikita Plast, Daman has discharged duty on the impugned goods and further no evidence produced to say that impugned goods were transported from Nikita Plast, Daman to Bangalore. He further submits that Shri. Venkatesh Murthy, Accounts Manager, Fancy Bag Industries and Ms. Deepa M.S., Accounts Assistant M/s. Fancy Bag Industries admitted the clandestine activities. Further the buyers of the goods have also accepted the discrepancies in the sale invoice regarding the placement of orders through Manoj Mehta, supply of goods by Manoj Mehta, payment of sale proceeds to Manoj Mehta. Further he submits that invoices clearly indicated that the goods were received by the customers on the same day or even prior to invoice date/time of dispatch and none of the invoices were having the stamp/seal of check post. He further submits that once the illegal activity of clandestine is proved, the burden be shifted upon the assessee and in the present case Manoj Mehta has accepted the clandestine clearance and therefore once he has admitted the clandestine clearance, the Department need not prove the case further as it is a settled law that admitted facts need not be proved. In support of his submission, he relied upon the decision in the case of ***CCE, Madras Vs. Systems & Components Pvt. Ltd. – 2004 (165) E.L.T. 136 (S.C).***

4.1. He further submits that the duty of Rs. 5,00,000/- (Rupees Five Lakhs only) was voluntarily paid during investigation towards the demand which clearly shows that the appellants had admitted the clandestine production and removal of goods. He further submits that the submission of the appellant that the proposal in the show-cause notice is towards the demand of duty on Manoj Mehta but the same has been confirmed on M/s. Fancy Bag Industries is not tenable in law. To counter this, he has submitted that in reply to the show-cause notice, Manoj Mehta has categorically replied that he is appearing on behalf of Fancy Bag Industries and the proprietor Bhupatrai Mehta, father of Manoj Mehta has delegated the management and day-to-day affairs of business to him and he was looking after the whole affairs of the Fancy Bag Industries. Therefore, the duty has rightly been confirmed against the proprietorship concern and penalty has rightly been imposed on Manoj Mehta. With regard to the freezing of accounts of Nikita Plast, the learned AR submits that the very fact that the Nikita Plast has not lodged any criminal complaint against Manoj Mehta and Fancy Bag Industries shows that there was a collusion between them and therefore penalty has rightly been imposed and bank accounts have been rightly freezed.

5. After considering the submissions of both the parties and perusal of the material on record, I find that as far as the submission of the learned counsel appearing for the Fancy Bag Industries and Manoj Mehta, the only defense of Manoj Mehta is that he was the Manager of Fancy Bag Industries which is a proprietary concern and in the show-cause notice proposal is made to recover the duty from him whereas the demand has been confirmed against the proprietorship concern which is not tenable in law. This argument of the learned counsel is not tenable in view of reply of Manoj Mehta to the show-cause notice wherein he has admitted that he is in-charge of Fancy Bag Industries which is a proprietorship concern and is also looking after the day-to-day affairs. Further I find that in the present case, the Manoj Mehta is the mastermind in committing the illegal activities. The goods have been manufactured by Fancy Bag Industries and have been supplied to various customers in Bangalore under the invoice of Nikita Plast, Daman without their authority as argued by the counsel appearing for the Nikita Plast. Further Manoj Mehta has admitted that he has produced the goods in the name of Nikita Plast and supplied the same to their customers and collected the duty and deposited the same in the account of Nikita Plast whereas the counsel appearing for the Nikita Plast has rebutted this

allegation and submitted that he has not permitted Fancy Bag Industries as well as Manoj Mehta to manufacture the goods on their behalf. The counsel has also disputed the receipt of value of the goods and the duty in their account deposited by Manoj Mehta. Further I find that the employees of Fancy Bag Industries have admitted that they were clearing the goods by generating the invoice of Nikita Plast which is clearly not tenable in law. Further I find that the statement of the Manoj Mehta that subsequent to the clearance of goods by him to the customers he used to get the goods from M/s. Nikita Plast which was taken and stored by them, this statement has not been proved on record. Further the perusal of invoices produced on record shows that the goods were supplied on the same day showing it to be produced by Nikita Plast, Daman. The entire illegal activity has been done by Manoj Mehta without the knowledge of Nikita Plast. Therefore, I hold that in the impugned order the Commissioner has rightly confirmed the demand against the Fancy Bag Industries and rightly imposed the penalty on Manoj Mehta. As far as appeal of the appellant Nikita Plast is concerned, I find that the activities carried on by Manoj Mehta is without the concurrence of the Nikita Plast and Nikita Plast has no knowledge about the activity of Fancy Bag Industries, Bangalore and they have never asked them to print invoices in their name and clear the goods in their name. Further the imposition of penalty of Rs. 10,000/- (Rupees Ten Thousand only) on the Nikita Plast is not sustainable in view of the ratio decision of the Tribunal in the case of **Homag India Pvt. Ltd.** cited supra. Further the freezing of the bank account solely on the statement of Manoj Mehta is also not tenable in law. The Department has not caused any verification and investigation nor recorded any statement with regard to the transaction in the frozen account. The entire seizure of account and freezing the same is based on mere presumptions and at the back of the appellant who was not even put on notice before seizing the accounts. Further no verification whatsoever is done including to find out whether credits and the balances related to sale proceeds of the alleged clandestinely cleared goods. Further there is not even corroborative evidence and the entire case is merely based on co-noticee’s statement without any evidence. The appellant’s complicity in the alleged offence is not at all proved. On the other hand the evidences vindicate that the appellant Nikita Plast had no role whatsoever in the entire act. Therefore, in the absence of any evidence to prove the role of the appellant, Nikita Plast, freezing of the account and adjusting the amount therein towards the duty liability is wholly unjust, illegal and improper and therefore I order for defreezing of the account of the Nikita Plast and also hold that the appropriation from the said account is without any authority of law. In view of my discussion above, I upheld the order of demand against the Fancy Bag Industries and also upheld the imposition of penalty on Manoj Mehta but dropped the penalty imposed on Nikita Plast under Rule 26 of Central Excise Rules, 2002 and also order for defreezing of the account of Nikita Plast with immediate effect. Consequently, appeals by Fancy Bag Industries and Manoj Mehta are dismissed and appeal filed by the Nikita Plast is allowed with consequential relief.

(Order was pronounced in Open Court on **19/07/2019**)

(S.S GARG)
JUDICIAL MEMBER

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