CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
CHANDIGARH

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REGIONAL BENCH – COURT NO. 1

Excise Appeal No. 61465 Of 2018

[Arising out of OIO No. 108-118/CE/CHD-II/2016 dated 24.06.2016 passed by the Commissioner of Central Excise, Chandiarh]

V.S. Industries : **Appellant (s)**
Lane No. 4-B, Phase-III, SIDCO Industrial
Complex Bari Brahmana Jammu-181133

Vs

CCE- Chandigarh : **Respondent (s)**
C.R. Building, Sector 17-C, Chandigarh

AND
Excise Appeal No. 61464 Of 2018

[Arising out of OIO No. 108-118/CE/CHD-II/2016 dated 24.06.2016 passed by the Commissioner of Central Excise, Chandiarh]

Smt. Sangitha Garg-Partner : **Appellant (s)**
V.S. Industries
Lane No. 4-B, Phase-III, SIDCO Industrial
Complex Bari Brahmana Jammu-181133

Vs

CCE- Chandigarh : **Respondent (s)**
C.R. Building, Sector 17-C, Chandigarh

with
Excise Appeal No. 61468 Of 2018

[Arising out of OIO No. 108-118/CE/CHD-II/2016 dated 24.06.2016 passed by the Commissioner of Central Excise, Chandiarh]

Sh. Vinod Kumar Garg Partner : **Appellant (s)**
V.S. Industries
Lane No. 4-B, Phase-III, SIDCO Industrial
Complex Bari Brahmana Jammu-181133

Vs

CCE- Chandigarh : **Respondent (s)**
C.R. Building, Sector 17-C, Chandigarh

APPEARANCE:
Shri Vikrant Kackaria, Advocate for the Appellant
Shri Aneesh Dewan, Shri Narinder Singh, Authorised Representatives for the Respondent

CORAM : HON'BLE Mr. S. S. GARG, MEMBER (JUDICIAL)
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HON'BLE Mr. P. ANJANI KUMAR, MEMBER (TECHNICAL)

ORDER No. A/60328-60330/2023

Date of Hearing:05.06.2023

Date of Decision:31.08.2023

Per : S. S. GARG

The present appeals are directed against the impugned order dated 24.06.2016 passed by the Commissioner of Central Excise, Chandigarh whereby the demand has been confirmed to the extent of 1,94,93,730/- along with equal penalty and interest under Section 11AB/11AA of the Central Excise Act, 1944. By the impugned order, penalty has been imposed on the partners of the appellant firm to the extent of Rs. 2,00,000/- each.

2. Briefly the facts of the present case are that on the basis of investigation conducted by the officers of Commissioner of Central Excise, Meerut-Il against various units located in their jurisdiction who were purchasing Menthol Solution and Dementholised Oil from units based in Jammu & Kashmir. The premises of various commission agents and buyers as well as sellers of Menthol Solution & DMO were searched by the officers of Meerut Commissionerate and it was found that commission agents are neither maintaining proper record of sale of raw material nor purchased the raw material. The commission agents had issued Kissan Kharid Patra to various farmers whereas the investigation conducted at the end of farmers indicated that the farmers were either non-existent or had not supplied/sold the same. On the basis of investigation at the end of commission agents and farmers, it was concluded that units based in J&K based were not purchasing any raw material and issued only invoices showing clearance of the said goods without actually manufacturing and

clearing the same to UP based manufacturers. Show cause Notices were issued by the Meerut Commissionerate to UP based manufacturers to deny cenvat credit availed on goods purchased from J&K based suppliers. On the basis of investigations conducted by the Meerut Commissionerate and the investigation conducted by the jurisdictional Commissionerate, it appeared that the appellants have fabricated their production records and have issued bogus invoices without actual production and clearance of goods with an intent to claim inadmissible refund/self credit of duty paid through PLA fraudulently and also to facilitate availment of inadmissible CENVAT credit to their buyers fraudulently on such bogus invoices issued without actual production and dispatch of goods with active concealment of facts.

3. Accordingly, show cause notice was issued to the appellants for recovery of amount which was taken as self credit of the amount taken by the appellants in their PLA account. The adjudicating authority vide order-in-original no. 108-118/CE/CHD- 11/2016 dated 24.06.2016 confirmed the demand of Rs.1,94,93,730/- on the grounds that the evidences gathered by the department during the investigations was enough to prove that the appellants indulged in non manufacturing, fabrication of the manufacturing records and issuing the bogus invoices without actual production and clearance of the goods with intent to avail inadmissible refund/self credit of duty paid through account current (PLA) fraudulently and facilitated availment of input credit by buyers of said bogus invoices. The demand relates to that amount, penalty of equivalent amount was imposed on the appellants under Section 11AC of the Central Excise Act, 1944. Penalties under Rule 26(2) of the Central Excise Rules,

2002 were also imposed on the suppliers who have abetted in making false documents on the basis of the which the appellants and the buyers have taken ineligible benefits fraudulently.

4. Hence, the present appeals.

5. Heard both the parties and perused the records.

6. Ld. Counsel for the appellants submits that the only issue involved in the present appeals relates to demand of Central Excise duty on the ground that the appellant had taken the refund under Notification No.56/2002 but the goods were not manufactured by them. He further submits that the allegations in the show cause notice was that the investigations were undertaken by Meerut Commissionerate and it was found out that the suppliers of raw material to the appellant were non-existent and hence it was alleged that it is impossible to manufacture the goods and the refunds were wrongly taken by the appellant and the said refund has been proposed to be demanded by invoking the extended period of limitation. He further submitted that the Ld. Commissioner has wrongly confirmed the demand only on the ground that the appellant could not give any evidence to the effect that there was any alternative source of electricity generation because in the region of the appellant there were power cuts to the extent of 10-12 hours. He further submitted that the Ld. Commissioner in the impugned order itself has admitted that the buyers of the goods are available and the appellant has produced the evidence to the effect that the goods were duly entered at the Lakhanpur Toll Post. He further submitted that all the submissions have not been considered by the Ld. Commissioner while passing the impugned order. He further submitted that the issue

arising out of the same investigation is no more res-integra and has already been decided by the Tribunal in the following cases:-

- M/s Arora Aromatics (In Appeal No.E/1654/2010) Versus Commissioner of Central Excise, Meerut-II vide Final Order No.71939-71959 of 2017 dated 01.11.2017 decided by the Tribunal, Allahabad.
- M/s Nanda Mint & Pine Chemicals Ltd. Versus CC, Chandigarh- II vide Final Order No.63177 of 2018 dated 28.08.2018 decided by the Tribunal Chandigarh,
- Met Trade India Ltd. Versus CCE & S.T. Jammu & Kashmir vide Final Order No.62652-62653 of 2018 dated 28.08.2018 decided by the Tribunal, Chandigarh
- (iv) M/s Tripti Menthol Ind. Versus Commissioner of Central Excise, Chandigarh-ll vide Final Order No.60497 of 2019 dated 04.04.2019 decided by the Tribunal, Chandigarh

He further submitted that the department had even filed appeal in one of the cases before the Hon'ble Allahabad High Court and the Hon'ble Allahabad High Court in Central Excise Appeal No.05 of 2021 has dismissed the appeal of the department in the case of M/s Siddhant Chemicals Mohalla vide order dated 14.09.2021. He further submitted that since the issue has already been attained finality in the High Court and hence the demand does not merit to sustain. He further submitted that the department has not produced even a single decision in respect of the same investigation where the demand has been confirmed by any of the Appellate Authorities. He further submitted that the allegations of the department that there is no evidence of alternative source of generation of electricity is factually incorrect as only an allegation has been made that the said area does not have any electricity for 8-10 hours in a day. No evidence whatsoever has been produced by the department either in the show cause notice or the impugned order to show that even the electricity was disconnected even for hour during the relevant period. Merely stating that the area does not have electricity without any evidence has no legs to stand and in the absence of such an evidence no demand can be confirmed against the appellant. He further submitted that the appellant had produced the evidence that consignment had crossed the Toll Post at Lakhanpur and produced the copies of the same but the same have not been considered solely on the grounds that the Toll Post official do not verify the items. If the items in question were not being transported then the department ought to have produced that which items was being transported in the said truck which have crossed the Toll Plaza. There is no evidence whatsoever to show that the said input goods/finished goods have not crossed the Toll Plaza but some other goods were crossed the said barrier. He further submitted that the show cause notice and the impugned order is solely issued on the basis of presumption and assumption and no investigation whatsoever has been undertaken at the end of the appellant to come to the conclusion that the said goods were not manufactured by them. He also further submitted that it is on record that some of the manufacturers who had supplied the goods to the appellant had even been visited by the Preventive Department during the period in dispute not once but many times and even their stock had been verified. If no manufacture was being undertaken by the supplier of raw material then it is not understood as to how and what was verified by the Preventive Department. He further submitted that even the Commissioner of Central Excise, Jammu vide his report dated 25.02.2010 had categorically stated that it cannot be strongly alleged with certainty that the said units have not manufactured menthol oil. Ld. Counsel took us through the relevant portion of the report of the Commissioner of Central Excise, Jammu which is reproduced hereunder:-

> "5. Thus the officers of Merrut-Il Commissionerateinstead of selecting the consignments where no excisable goods were manufactured/supplied, have generalized that all the purchases of crude Mentha oil by these Mentha units located at Jammu were bogus units, these units did not have any infrastructure to manufacture the said products, were non functional and Transporters who did not tum up for tendering statements were declared non-existent etc. however, on close scrutiny of the records, the following facts emerges: (i) Most of the consignments of raw material were found entered at the Toll barrier. (ii) The Officers of District Industry Centre, who have assessed and fixed the capacity of manufacturing units, have been regularly verifying their purchase consignments. (iii) The Range staff had also been visiting these units for PBC Checks/verification of plant/machineries and reported nothing adverse against these units.
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> 6. Therefore, it may not be strongly alleged with certainty that during the period 2005-2006 to 2008-2009, these 27 units have not purchased crude Mentha oil and therefore have not manufactured any Menthol products in their units at all. There is hardly any time left for further investigation to strengthen the case as process is very time consuming and most of these of units have closed their factories due to withdrawal of Central Excise Duty on all Mentha products w.e.f 27.02.2010Thus, the investigation may not be in tune with the investigations conducted by the Central Excise Commissionerate Merrut-II."

He further submitted that no evidence has been produced by the department to the effect that the said goods were not supplied to the buyers who have availed the credit. No statements of transporters have been recorded. He further submitted that even otherwise the refunds were sanctioned vide various orders by the Adjudicating Authority and the said orders have not been challenged by the department till date and in the absence of challenge to the refund orders which were an appealable orders, the present demand cannot be made from the appellant. This view already stands confirmed by the Hon'ble Supreme Court as well as High Court in the following decisions as under:-

- Collector of Central Excise, Kanpur Versus Flock (India) Pvt. Ltd. reported as 2000(120) E.L.T285 (S.C.)
- (ii) ITC Ltd. Versus Commissioner of Central Excise, Kolkata-IV reported as 2019(368) E.LT.216 (S.C.)
- (iii) Commissioner of C. Ex. Shillong Versus Jellalpore Tea Estate reported as 2011 (268) E.L.T. 14(Gau)

He further submitted that the identical issue came up in the case of M/s Jellalpore Tea Estate cited Supra wherein it has been clearly held that the benefit of the notification cannot be denied and demand issued under Section 11A for the refund when there is no challenge to the refund order passed by the Adjudicating Authority. He further submitted that impugned order is even otherwise against the principle of natural justice as no opportunity of cross examination has been provided by the Adjudicating Authority on the statement of persons on whom reliance has been placed despite the appellants having asked for the same. The statements cannot be relied upon in the absence of cross examination of the persons whose statements have been relied upon in the show cause notice. As per the Ld. Counsel, this view has been held by the Hon'ble Punjab and Haryana High Court in the following cases:-

- Jindal Drugs Pvt. Ltd. Versus Union of India reported as 2016(340) E.L.T. 67(P&H)
- Synergy Steels Ltd. Versus Commissioner of Central Excise, Alwar reported as 2020(372) E.L.T. 129(Tri-Del)

7. On the other hand, the Ld. DR reiterated the findings in the impugned order and submitted that two decisions in the Final order no. 63177 of 2018 dated 28.08.2018 in the case of M/s Nanda Mint & Pine Chemicals and Final order no. 60497 of 2019 dated 04.04.2019 in the case of M/s Tripti Menthol Industries have not been accepted by the department and the appeals have been filed before the Hon'ble High Court of Jammu and Kashmir at Jammu and both the appeals have been admitted and ordered to be heard along with CEA No. 183/2019 but without granting stay in favour of the department. He further submitted that these appeals may be kept in abeyance till the decision of the Hon'ble High Court.

8. After carefully considering the submissions of both the parties and perusal of material on record, we find that as per the allegation in the show cause notice, the investigation were undertaken by the Merrut Commissionerte and it was found that the suppliers of raw-material to the appellant were non-existent. Further, we find that the demands have been confirmed only on the basis that there was no alternative source of electricity generation which is factually incorrect. Further, we find that on the basis of the same investigation, the demands were confirmed against many parties and some of the decisions have been rendered by this Tribunal on the same allegations and the demands have been dropped. The issue involved in the present appeals is no more res-integra as this Tribunal as well as the Tribunal at Allahabad has consistently set-aside the demands by considering all the evidences produced before them. We also find that in one of the cases, the department filed appeal before the Hon'ble Allahabad High Court and the same was dismissed as cited (supra).

9. Further, we also find that the department has not been able to produce even a single decision arising from the same investigation where the demand has been confirmed by any appellate authority. No evidence whatsoever has been produced by the department to show that even the electricity was disconnected even for hour during the relevant period.

10. Further, we find that the evidence produced by the appellant in the form of copies of toll posts at Lakhanpur have not been considered by the appellant. It appears that the show cause notice and the impugned order is solely issued on the basis of the presumption and assumption and no investigation whatsoever have been undertaken at the end of the appellant.

11. Further, we find that no statements of the transporters have been recorded. It is pertinent to note that the refunds have been sanctioned by the adjudicating authority but the department has not challenged the same till date and as per the decisions relied upon by the appellant cited (supra) it has been held by various Courts that in the absence of challenge of the refund order, the demands cannot be made from the appellant.

12. We also find that the impugned order passed without affording an opportunity of cross examining the witnesses in spite of the request made by the appellant for cross examination of the witnesses and in the absence of cross examination, their statements cannot be relied upon as held by the Hon'ble Punjab and Haryana High Court in the case of Jindal Drugs cited (supra). Here, we would like to reproduce the findings of the Tribunal in the case of Neeru Enterprises & Ors. Vs. CCE,Chandigarh-II vide Final Order No. 60368-60373 of

2019 dated 02.04.2019 which is recorded in Para 10 to Para 12 as under:-

"10. We further take note of the fact that, the investigation was not conducted at the end of the appellants and whole case has been based on the investigation conducted at Commissioner Central Excise, Merrut-II. Without investigation, it cannot be held that the appellant was not manufacturer during the impugned period. Moreover, the entries of vehicles at the toll barriers also certified that the movements of raw material and finished goods. We further take note of the fact that the during the period of investigation itself, the appellants were allowed continue their activity by procuring inputs from UP based supplier and selling goods manufacturing to their buyers. During the course of investigation, itself shows that the allegation is only on the basis of the assumption and presumption, therefore, it cannot be held that the appellants were not manufactured the goods during the impugned period. Moreover, as per the report of Jurisdictional Commissioner to Chief Commissioner dated 21.05.2010 reveals as under:

" 5. Thus the officers of Merrut-II Commissionerate, instead of selecting the consignments where no excisable goods were manufactured/supplied, have generalized that all the purchases of crude Mentha oil by these Mentha units located at Jammu were bogus units, these units did not have any infrastructure to manufacture the said products, were nonfunctional and Transporters who did not tum up for tendering statements were declared non-existent etc. however, on close scrutiny of the records, the following facts emerges:

(i) Most of the consignments of raw material were found entered at the Toll barrier.
(ii) The Officers of District Industry Centre, who have assessed and fixed the capacity of manufacturing units, have been regularly verifying their purchase consignments.
(iii) The Range staff had also been visiting these units for PBC Checks/verification of plant/machineries and reported nothing adverse against these units.
6. Therefore, it may not be strongly alleged with certainty that during the period 2005-2006 to 2008-2009, these 27 units have not purchased crude Mentha oil and therefore have not manufactured any Menthol products in their units at all. There is hardly any time left for further investigation to strengthen the case as process is very time consuming and most of these of units have closed their factories due to withdrawal of Central Excise Duty on all Mentha products w.e.f 27.02.2010. Thus, the investigation may not be in tune with the investigations conducted by the Central Excise Commissionerate Merrut-II."

11. We further take of the fact that the similar issue on identical facts came up before this Tribunal in the case of Nanda Mint and Pine Chemicals Ltd. (Supra), wherein this Tribunal observed as under:

" 6. We find that in this case the sole allegation against the appellant is based on the investigation made by Commissioner of Central Excise, Merrut, and as per the investigation, it is alleged that farmers from whom the inputs were purchased were nonexistence. Therefore, commission agents never supplied inputs to the appellant and the appellant did not manufacture the goods. Consequently, they have not sold the goods and it was alleged that the appellant has not manufactured the goods at all.
7. We take a note of the fact that the check post movement of trucks which were carrying inputs as well as finished goods were found entered. We further take note of the fact that the appellant has produced the evidence of the entry of all the transport vehicles i.e. trucks which have entered in the state of Punjab and have left the state of Punjab, as the same has been certified by the Punjab Sales Tax Department having entries of entry and exit all the vehicles, therefore, it cannot be said that the raw material/finished goods have never entered or left in the state of Jammu & Kashmir, therefore, the allegation on the basis of the investigation conducted by the Commissioner of Central Excise, Merrut is not sustainable. 8. Further, we take note of the fact that during the period of investigation itself, the appellant continued their activity by procuring inputs from U.P and selling the goods after manufacturing to the U.P based buyers and the Department allowed to continue the same during the course of investigation which shows that the allegation on the basis of investigation conducted at the end of Commissioner of Central Excise, Merrut is not sustainable that the appellant is not manufacturer the goods. Admittedly, duty is payable on the manufacture of goods and as per the report of the Commissioner of Central Excise, Jammu dated 25.02.2010, it has been revealed as under:

" 5. Thus the officers of Merrut-II Commissionerate, instead of selecting the consignments where no excisable goods were manufactured/supplied, have generalized that all the purchases
of crude Mentha oil by these Mentha units located at Jammu were bogus units, these units did not have any infrastructure to manufacture the said products, were non-functional and Transporters who did not tum up for tendering statements were declared non-existent etc. however, on close scrutiny of the records, the following facts emerges:
(i) Most of the consignments of raw material were found entered at the Toll barrier.
(ii) The Officers of District Industry Centre, who have assessed and fixed the capacity of manufacturing units, have been regularly verifying their purchase consignments.
(iii) The Range staff had also been visiting these units for PBC Checks/verification of plant/machineries and reported nothing adverse against these units. 6. Therefore, it may not be strongly alleged with certainty that during the period 2005-2006 to 2008-2009, these 27 units have not purchased crude Mentha oil and therefore have not manufactured any Menthol products in their units at all. There is hardly any time left for further investigation to strengthen the case as process is very time consuming and most of these of units have closed their factories due to withdrawal of Central Excise Duty on all Mentha products w.e.f 27.02.2010. Thus, the investigation may not be in tune with the investigations conducted by the Central Excise Commissionerate Merrut-II." 9. The said report also support the case of the appellant wherein it has been clearly mentioned that during the periodical checks by the departmental officers, the appellant found manufacturing the goods. Moreover, no discrepancy was found and on toll barriers it was found that the vehicles carried inputs/finished goods found entered. Moreover, the District Centre also certified the said fact. 10.We further take note of the fact that the various other departments namely Pollution

Control Department, District Industries Department, Electrical Department have visited the factory of the appellant and found functioning. All these facts have not been disputed by the Revenue. As there is no corroborative evidence to show that the appellant were not manufacturing the goods, therefore, the allegation alleged in the show cause notice is not sustainable. 11.We further take note of the fact that on the basis of the same investigation conducted by the Commissioner of Central Excise, Merrut, the case was booked against the various parties namely M/s Arora Aromatic & Others Vide Final Order No. 71939-71959/2017 dated 01.11.2017, this Tribunal observed as under: " 10. Having considered the rival contentions and on perusal of the facts on record, we find that the basic allegations in the Show Cause Notice was that M/s Arora Aromatics did not receive inputs on which they availed Cenvat credit basically on the contention of Revenue that M/s Ruchi Infotech System, Jammu did not have facility to manufacture the inputs received by M/s Arora Aromatics and that the goods did not move from Jammu & Kashmir to the appellants factory and therefore, Cenvat credit was not admissible. The evidence submitted by the appellant inthe form of Order-in-Original passed by Commissioner of Central Excise, Jammu on 31/03/2008, wherein it was held that M/s Infotech System, Jammu was manufacturing the goods was not accepted by the Original Authority stating that the said Commissioner, Jammu did not see himself that the goods have been manufactured. If such a logic is accepted then the basic system of assessment by Authorities under tax statute needs to be concluded to have been not properly understood by the Adjudicating Authority. The present system of assessment in Central Excise is record based. The Officer assessing the duty is not required to be present when the goods are being manufactured to witness the process of manufacture. The adjudication is to be done on the basis of evidence produced before the Adjudicating Authority. As per Evidence Act evidence in totality is to be taken into consideration and therefore, finding recorded in the impugned Order by the Original Authority who passed the said Order dated 29/01/2010 is bad in law. The Original Authority did not understand the process either of assessments or of adjudication. Further the investigations were not undertaken to find out wherefrom the inputs were received by the appellant for the goods they manufactured and on which they paid duty and which were exported, if they had been received the inputs from M/s Ruchi Infotech System, Jammu or the other suppliers of inputs. Further, the additional evidence submitted by the appellant indicated that in respect of units in Jammu, Central Excise Officers visited the factory premises and seen that the manufacturing process going on was evidence by them and such evidences being on record and submitted by the appellant it was the duty of the Original Authority to accept them and not to discard by saying that the Officers have not seen the goods being manufactured by their own eyes. Further, the receipt of inputs was verified by the Officers of Central Excise Department and sample of the same were also drawn and forwarded for Chemical Examination. Such evidence was also not accepted by the Original Authority, Therefore, it appears that the Original Authority was pre-determined to adjudicate the matter in the manner in which he has decided the issue and he was not just and fair and did not discharge his duty as an independent adjudicator. We, therefore, set aside both the impugned Ordersin-Original dated 29/01/2010 & 29/03/2011 and allow all the appeals filed by appellant. The appellant shall be entitled for consequential relief. All the demand and penalties imposed are also set aside. All the Miscellaneous/Stay Applications stand disposed, as infructuous." 12.In view of the above observations, we hold that without bringing any concrete evidence against the appellant on record, the proceedings against the appellant are not sustainable, therefore, the show cause notice issued to the appellant is only on the basis of the assumption and presumption and investigation conducted by the

Commissioner of Central Excise, Merrut, but without conducting any investigation at the end of the appellant, therefore, on the basis of evidences available on record, we hold that the appellant were manufacturing unit in the state of Jammu & Kashmir is entitled for benefit of the exemption Notification No. 56/2002-CE dated 14.11.2002 and claimed the refund of duty paid through PLA.

In view of this, we set aside the impugned order and allow the appeal with consequential relief if any."

12. In view of the above analysis, we hold that the appellant M/s Abhay Chemicals was the manufacturer during the impugned period and paid the duty on the goods manufactured by them, therefore, duty cannot be demanded on the allegation that the appellant was not a manufacturer. Consequently, the cenvat credit can't be denied to the recipient of goods located in the State of U.P i.e. M/s Siddhant Chemicals and M/s Neeru Enterprises. Therefore, no penalty is imposable on the appellants.

In view of the above, we set aside the impugned orders and allow the appeals with consequential relief."

13. Therefore, by following the ratio of the decisions cited (supra), we are of the considered opinion that the impugned order is not sustainable in law, and therefore, we set-aside the same by allowing all the three appeals of the appellants.

(Pronounced on 31.08.2023)

(S. S. GARG)
MEMBER (JUDICIAL)

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)

G.Y.