

CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL

SCO 147-148, SECTOR 17-C, CHANDIGARH – 160 017

**SINGLE MEMBER BENCH
COURT NO. II**

APPEAL NO. E/1014-1018/2010-EX[SM]

[Arising out of Order-in-Appeal No. 39-43/MA/GGN/2010 dated 22.01.2010 passed by the Commissioner of Central Excise (Appeals), Delhi-III, Gurgaon]

Date of hearing: 20.03.2018

Date of decision: 20.07.2018

For approval and signature:

Hon'ble Mr. Devender Singh, Member (Technical)

M/s Sukam Power Systems Ltd : Appellant(s)
Kunwar Deep Sachdeva, CEO
Karambeer, Driver
M/s Snow Track India
M/s Abhilasha Sales Corporation

VS

C.C.E., Delhi-III : Respondent(s)

Appearance:

Present for the Appellant(s): Sh. Naveen Bindal, Advocate

Present for the Respondent(s): Sh. Vijay Gupta, A.R.

CORAM:

Hon'ble Mr. Devender Singh, Member (Technical)

FINAL ORDER NO. 62550-62554/2018

Per : Devender Singh

The appellants are in appeal against the Order-in-Appeal No. 39-43/MA/GGN/2010 dated 22.01.2010 passed by the Commissioner of Central Excise (Appeals).

2. Brief facts of the case are that the appellant no.1 is engaged in the manufacture of invertors, UPS, EVR etc classifiable under Chapter 85 of the Central Excise Tariff. The appellant is registered with the department and is also availing the facility of Cenvat credit. The Officers of the department visited the premises of the appellant no.1 and conducted simultaneous searches and stock verification in the office-cum-depot of the appellant no.1, residential premises of Sh. Kunwar Sachdeva, CEO and other employees including Sh. Karambeer, Driver and business premises of two distributors namely M/s Snow Track India and M/s Abhilasha Sales Corporation. As a result of search, following goods were recovered:-

(a) Factory premises :

- Finished goods valued at Rs. 53,08,643/- in excess
- Raw material valued at Rs. 3,91,495/- in excess

(b) Adjacent place :

- Invertors/UPS/EVR valued at Rs. 44,555/-

(c) Registered office-cum-depot :

- Goods valued at Rs. 57,16,476/- involving duty Rs.7,88,479/- seized and goods found to be repaired and traded released.

(d) Residence of Sh. Karambeer :

- 544 invertors valued at Rs. 21,76,000/- packed in boxes with manuals etc.

(e) M/s Snow Track :

- 286 invertors valued at Rs. 16,78,688/-

(f) M/s Abhilasha Sales Corporation :

- goods valued at Rs. 53,620/- out of these goods valued at Rs.11,400/- released and goods valued at Rs. 42,220/- detained.

During the investigations, statements of Sh. Ram Pal Singh, authorized signatory, Sh. Sudhakar Dwevedi, H.O.D. and Sh. Pradeep Arya, Prop. of M/s Abhilasha Sales Corporation were recorded. The matter was adjudicated resulting in confiscation the goods at various places and imposition of redemption fine and penalties on various persons. The appellants went in appeal and Ld. Commissioner (Appeals) remanded back the matter to the adjudicating authority. The matter was re-adjudicated and following order dt. 29.08.2008 was passed by the adjudicating authority:

- "1. I confiscate the seized goods valued at Rs. 57,00,138/- (finished goods valued at Rs. 53,08,643/- and input valued at Rs.3,91,495/-) under Rule 25 of the Central Excise (No.2) Rules, 2001, but give an option to its lawful owner to redeem the same on payment of fine of Rs. Sixteen lacs only.*
- 2. I confiscate goods valued at Rs. 57,16,476/- seized at the Registered Office-cum-Depot of M/s Sukam under Rule 25 of the Central Excise (No.2) Rules, 2001, but give an option to its lawful owner to redeem the same on payment of fine of Rs. Sixteen lacs only.*
- 3. I confiscate goods valued at Rs. 21,76,000/- seized from the resident premises of Sh. Karambeer under Rule 25 of the Central Excise (No.2) Rules, 2001, but give an option to the lawful owner of the same to redeem the same on payment of fine of Rs. Seven lacs and fifty thousand only.*
- 4. I further confiscate components valued at Rs. 44,555/- which were seized at Plot No. 179, Phase VI, Udyog Vihar, Gurgaon under Rule 13 of the Cenvat Credit Rules, 2001 read with Rule 25 of the Central Excise (No.2) Rules, 2001, but give an option to its lawful owner to*

redeem the same on payment of fine of Rs. Twelve thousand only.

5. *I confirm the demand of Central Excise duty of Rs. 11,36,639/- (Rs. 7,88,479/- + Rs. 3,48,160/-) on M/s Sukam Communication Systems Ltd, leviable on the goods seized at the Registered office-cum-depot and residential premises of Driver Sh. Karambeer under Section 11A(2) of the Central Excise Act, 1944.*

6. *I impose a penalty of Rs. Fifteen lacs only upon M/s Sukam Communication Systems Ltd, under Rule 25 of the Central Excise (No.2) Rules, 2001.*

7. *I also confiscate goods valued at Rs. 16,78,688/- involving Central Excise duty of Rs. 2,68,590/- seized at the business premises of M/s Snow Track India, New Delhi under Rule 25 of the Central Excise (No.2) Rules, 2001, but give an option to its lawful owner to redeem the same on payment of fine of Rs. Six lacs only.*

8. *I confiscate goods valued at Rs. 42,220/- involving Central Excise duty of Rs. 6,755/- seized at the business premises of M/s Abhilasha Sales Corporation, New Delhi under Rule 25 of the Central Excise (No.2) Rules, 2001, but give an option to its lawful owner to redeem the same on payment of fine of Rs. Twenty five thousand only.*

9. *I confirm the demand of Central Excise duty of Rs. 2,68,590/- and Rs. 6,755/- on M/s Sukam under Section 11A(2) of the Central Excise Act, 1944.*

10. *I Order the recovery of interest at an appropriate rate on the amount of duty confirmed in this order under Section 11AB of the Central Excise Act, 1944.*

11. *I impose penalty as mentioned below against the name of each person/party under Rule 26 of the Central Excise (No.2) Rules, 2001:-*

(i) Rs. Two lacs only against M/s Snow Track India, 44/1, Radhu Place Cinema, Guru Angad Nagar, New Delhi.

(ii) Rs. Twenty lacs only upon M/s Abhilasha Sales Corporation, 47, Bank Vihar, Pitam Pura, New Delhi.

(iii) Rs. Ten lacs only upon Sh. Kunwar Sachdeva CEO of M/s Sukam Communication Systems Ltd.

(iv) Rs. Two lacs only upon Sh. Karambeer Driver of M/s Sukam Communication Systems Ltd.”

Aggrieved from the order dt. 29.08.2008 of the adjudicating authority, the appellants filed the appeals before the Commissioner (Appeals), however the appeals were rejected and the Order-in-Original was upheld. Against the said order of the Commissioner (Appeals), the appellants have files these appeals.

3. Ld. Advocate appearing on behalf of all the appellants, made following submissions:

(a) In respect of the goods found in the factory premises and in adjacent premises, contention is that the goods were not final were only buffer stock, so that during the peak season, supply could be easily made. It is further contended that department is relying on the statement dt. 30.01.2002 of Sh. Sudhakar Dwevedi, but said statement was never supplied till the matter reached the Tribunal and since the documents were not supplied during the original proceedings, matter needs to be remanded back. Further contention is that the request of the appellants for cross examination of various persons whose statements were recorded, was not granted by the authority and Section 9D of the Central Excise Act has not been complied. It is also contended that the department has withdrawn

the samples to ascertain whether the goods were final or not, but no test report was provided to the appellants and without knowing that the goods were final or not, their confiscation is not sustainable. Ld. Advocate also submitted that provisional release was granted after eight months and the value of the goods was deteriorated. He submitted that there is no provision under Rule 25 to confiscate the inputs as the said Rule is provided for finished goods only.

(b) In respect of the goods lying at the head office, it is contended that the appellants were having closing stock of duty paid material of 2655 invertors, whereas 2034 pieces of invertors were found from the said office and the godown, which was also the residence of the appellant. It is also pleaded that cross examination was requested but not granted and therefore, Section 9D has not been complied.

(c) As for the goods found in the residence of the driver, contention is that these were duty paid and part of the stock lying at the head office-cum-godown but was transferred from head office to this place due to space constraint.

(d) As for the goods found from distributors, contention is that the visiting staff of the department only visited the shop of the distributor, but the godowns were not visited. The distributors were having sufficient stock of duty paid material at the time of the searches.

Ld. Advocate relied on the following case laws in his support:

(i) M/s Ambika International & ors. Vs. UOI in CWP No. 12615 of 2016 and others (P&H).

(ii) Basudev Garg Vs. Commissioner of Customs – 2013 (294) ELT 353 (Del.)

(iii) M/s Mahadev Steel Industries vs. CCE, Chandigarh-I vide Final Order No. 60135-60136/2016 dt. 02.05.2016 (Tribunal Chandigarh).

4. Ld. A.R. for the Revenue reiterated the findings in the order of the Commissioner (Appeals) and submitted that cross examination of Sh. Ram Pal Singh was rightly rejected by the first authority and not asked for before second authority; Sh. Ram Pal Singh admitted of unaccounted of goods; Sh. Sudhakar Dvewedi admitted goods were finished and that he was the most appropriate person; copy of the above statement was received by Sh. Munish Kochar and the same was admitted by counsel; goods being unfinished is an afterthought and the party deliberately did not maintain proper and correct records; excise duty paid figures in the chart produced do not tally with monthly returns, hence, the same cannot be relied upon; stock taking was done in the presence of two independent witnesses; no evidence was produced in respect of goods found excess at reg. office-cum-godown being duty paid; goods found at residence of the driver admitted by his father and by Sh. Rajesh Khetarpal and no evidence of goods being removed on the issuance of duty paying document; goods seized from adjoining plot cannot be said as under production line as the place is not part of the factory (point raised after six years of the visit); no defence was put forth by Snow Track India; Prop of Abhilasha Sales admitted of having received goods without invoice for payment of cash.

Ld. A.R. relied on the following judgments in his support:

(i) Gulabchand Silk Mills Pvt Ltd vs. CCE, Hyderabad-II – 2005 (184) ELT 263 (Tri. Bang.)

(ii) CCE, Indore vs. Magnum Steels Ltd. – 2006 (197) ELT 572 (Tri. Del.)

(iii) Gopal Industries Ltd. vs. CCE, Indore – 2007 (193) ELT 478 (Tri. LB)

(iv) Global Spin Weave Ltd vs. CCE, Ghaziabad – 2006(193) ELT 478 (Tri. Del.) = 2008 (225) ELT 57 (All.)

(v) CCE, Surat-I vs. Umiya Chem Industries – 2005 (185) ELT 410 (Tri. Mum)

5. Heard the parties and perused the record.

6. After hearing both the sides, I find that the appellants have challenged the impugned order on the following grounds:

(i) Cross examination of various witnesses was not granted by the adjudicating authority.

(ii) Statements of witnesses were relied upon by the adjudicating authority without following the procedure laid down under Section 9D of the Act.

(iii) The department had withdrawn the samples to ascertain whether the goods were final or not, but no test report was provided to them.

(iv) There is no provision to confiscate the inputs under Rule 25 of the Central Excise Rules.

(v) Statement of Sh. Sudhakar Dwevedi was not provided to them at the stage of adjudication and at the stage of Commissioner (Appeals). Admittedly, the statement dt. 30.01.2002 of Sh. Sudhakar Dwevedi has been provided to them at the stage of Tribunal.

6.1 I find that the adjudicating authority has given the following findings about the statement of Sh. Sudhakar Dwevedi:-

"The fact about receipt of the statement of Sh. Sudhakar Dwevedi dt. 30.01.2002 has also been confirmed in writing by Sh. B.S. Yadav, Consultant on 21.04.2004. However I am surprised to know that even in the personal hearing held on 12.08.2008 and the written submission submitted that day, Sh. B.S. Yadav, Consultant has raised the issue of non supply of impugned statement. Therefore, it appears that the noticees are trying to adopt dilatory tactics to delay the adjudication process on one pretext or the other."

As the impugned statement was given on 21.04.2004, the ground taken by the appellants is not tenable.

6.2 I also find that on the request for cross examination of witnesses, the adjudicating authority has given the following findings about that cross examination:

"Coming to the last issue in the defence reply, the request for cross examination was decided by the previous adjudicating authority, vide communication dt. 10.03.2004, holding that no ground for allowing the cross examination of the department officers and their employees including the Authorized Signatory. I agree with the finding dt. 10.03.2004."

The above finding clearly shows that the request for cross examination has not been examined afresh by the adjudicating authority and there is adoption of findings of previous adjudicating authority without fresh application of mind. Such an approach is also in violation of the principles of natural justice as has been held by the Hon'ble High Court of Delhi in the case of *Basudev Garg Vs. Commissioner of Customs (supra)*.

6.3 I also find that the adjudicating authority has not followed the procedure laid down under Section 9D of the Act in respect of the

goods found at factory premises and the goods lying at the head office. The procedure has not been followed in respect of other goods also by the adjudicating authority. It is settled position in law that the procedure laid down under Section 9D of the Act is required to be followed by the adjudicating authority. In this regard, Hon'ble High Court of Punjab & Haryana in the case of *M/s Ambika International & ors. Vs. UOI (supra)* has held as below:

"25. *Clearly, therefore, the stage of relevance, in adjudication proceedings, of the statement, recorded before a gazetted Central Excise officer during inquiry or investigation, would arise only after the statement is admitted in evidence in accordance with the procedure prescribed in clause (b) of Section 9D(1). The rigour of this procedure is exempted only in a case in which one or more of the handicaps referred to in clause (a) of Section 9D(1) of the Act would apply. In view of this express stipulation in the Act, it is not open to any adjudicating authority to straightaway rely on the statement recorded during investigation/inquiry before the gazetted Central Excise officer, unless and until he can legitimately invoke clause (a) of Section 9D(1). In all other cases, if he wants to rely on the said statement as relevant, for proving the truth of the contents thereof, he has to first admit the statement in evidence in accordance with clause (b) of Section 9D(1). For this, he has to summon the person who had made the statement, examine him as witness before him in the adjudicating proceeding, and arrive at an opinion that, having regard to the circumstances of the case, the statement should be admitted in the interests of justice.*

26. *In fact, Section 138 of the Indian Evidence Act, 1872, clearly sets out the sequence of evidence, in which evidence-in-chief has to precede cross-examination, and cross-examination has to precede re-examination.*

27. *It is only, therefore,*

(i) after the person whose statement has already been recorded before a gazetted Central Excise officer is examined as a witness before the adjudicating authority, and

(ii) the adjudicating authority arrives at a conclusion, for reasons to be recorded in writing, that the statement deserves to be admitted in evidence, that the question of offering the witness to the assessee, for cross examination, can arise.

28. *Clearly, if this procedure, which is statutorily prescribed by plenary Parliamentary legislation, is not followed, it has to be regarded, that the Revenue has given up the said witnesses, so that the reliance by the CCE, on the said statements, has to be regarded as misguided, and the said statements have to be eschewed from consideration, as they would not be relevant for proving the truth of the contents thereof.*

29. *Reliance may also usefully be placed on para 16 of the judgment of the Allahabad High Court in C.C.E. V Parmarth Iron Pvt Ltd, 2010 (250) ELT 514 (All), which, too, unequivocally expound the law thus:*

"If the Revenue choose (sic chose?) not to examine any witnesses in adjudication, their statements cannot be considered as evidence."

30. *That adjudicating authorities are bound by the general principles of evidence, stands affirmed in the judgement of the Supreme Court in C.C. V Bussa Overseas Properties Ltd, 2007(216) ELT 659 (SC), which upheld the decision of the Tribunal in Bussa Overseas Properties Ltd v C.C., 2001 (137) ELT 637 (T).*

31. *It is clear, from a reading of the Orders-in-original dated 19.05.2016 and 01.06.2016 supra, that Respondents No.2 has, in the said Orders-in-Original, placed extensive reliance on the statements, recorded during investigation under Section 14 of the Act. He has not invoked clause (a) of sub-section (1) of Section 9D of the Act, by holding that attendance of the makers of the said statements could not be obtained for any of the reasons contemplated by the said clause. That being so, it was not open to Respondent No.2 to rely on the said statements, without following the mandatory procedure contemplated by clause (b) of the said sub-section. The Orders-in-Original, dated 19/05/2016 and 01/06/2016, having been passed in blatant violation of the mandatory procedure prescribed by Section 9D of the Act, it has to be held that said Orders-in-Original stand vitiated thereby."*

7. In view of the above observations, I find that the adjudicating authority has not followed the procedure laid down under Section 9D of the Act as discussed above and also violated the tenets of natural justice. In these circumstances, the impugned order is liable to be set aside and the matter requires to be adjudicated afresh by following the procedure laid down under Section 9D *ibid* and by following the principles of natural justice.

8. In the result, the impugned order is set aside and the matter is remanded back to the adjudicating authority to re-adjudicate the matter after following the procedure laid down under Section 9D *ibid* and by following the principles of natural justice.

9. Appeals are allowed by way of remand in above terms.

(Order pronounced in the court on 20.07.2018)

(Devender Singh)
Member (Technical)

RAS'