CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
SCO 147-148, SECTOR 17-C, CHANDIGARH-160017

DIVISION BENCH
Court-I

Appeal No.E/61558,61567-61570/2018

(Arising out of OIO 16-CE-CHD-II-2016 dt.4.4.2016, OIO 86-95-CE-CHD-II-2016 dt.8.6.2016, OIO 44-50-CE-CHD-II-2016 dt.13.5.2016, OIO 63-CE-CHD-II-2016 dt.19.5.2016 and OIO 84-CE-CHD-II-2016 dt.1.6.2016 passed by the Commissioner of Central Excise, Chandigarh)

Date of hearing/Decision: 05.12.2018

G.Tech Industries **Appellant**
Shiva Mint Industries
Fine Aromatics
Ambika International
Jay Ambey Aromatics

Vs.

CCE, Chandigarh **Respondent**

Present for the Appellant: Shri R.K.Hasija, Advocate
Present for the Respondent: Ms.Seema Arora, AR

Coram: Hon'ble Mr. Ashok Jindal, Member (Judicial)
Hon'ble Mr.Bijay Kumar, Member (Technical)

FINAL ORDER NO. 63602-63606 / 2018

PER: ASHOK JINDAL

The appellants are in appeal against impugned orders wherein the refund claim had already been sanctioned to the appellant under Notification No.56/02-CE dt.14.11.2002 have sought to be recovered along with interest and equivalent penalty on the ground that the appellants had not manufactured the goods and only issued cenvatable invoices enabling the buyers to avail inadmissible Cenvat credit.

2. As the facts in these appeals are common, therefore, these appeals are taken up together and are disposed of by this common order.

3. The facts of the case are that an investigation was started at the end of the office of Commissioner of Central Excise, Merrut-II against various units located in their jurisdiction who were purchasing Menthol Solution and De-mentholised Oil from Jammu & Kashmir based units. The Meerut Commissionerate searched the premises of various commission agents and buyers as well as sellers of Menthol Solution & DMO. The officers 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 indicates that the farmers are non existence. On the basis of investigation at the end of commission agents and farmers, the Merrut Commissionerate concluded that J&K based units are not purchasing raw material, so there is no question of manufacture of finished goods by J&K based units, the goods manufactured were sold to UP based manufacturers who in turn partially exported their finished goods and partially sold in domestic market. The Merrut Commissionerate issued show cause notices to UP based manufacturers to deny cenvat credit availed on goods purchased from J&K based suppliers and at the insistence of Meerut Commissionerate, the jurisdictional Commissionerate issued show cause notices to various J&K based manufactures raising demand of duty refunded to them who are availing area based exemption under Notification No. 56/2002-CE

dated 14.11.2002. The adjudicating authority has confirmed demand on the grounds that the farmers are non existence ensuring non supply of raw material by commission agents to J&K based units and absence of evidence of power by the appellant. Therefore, by way of the impugned order, the cash refunded to the appellant was sought to be demanded from the appellants and penalties were also imposed. Against the said orders, the appellants are in appeal before us.

4. Appellants have submitted that the vehicles used for transportation of goods are trucks and there can be no case where hundreds of consignments moved from one place to another place on papers. The report sought from the Toll Tax authority at Lakhanpur has confirmed that the consignments were reported there. Similar report has been from ICC Madhopur. The Commissioner of Central Excise Jammu's report dated 21.052010 questioned the issue of SCNs to Meerut based recipients of raw materials, wherein it has been opined by the Commissioner that as per entries at borders, raw-materials were received by the appellants and DIC officers had regularly verified purchase consignments, range officers visited the factories of the appellants regularly for conducting PBC checks and nothing adverse was reported from the physically verified stocks and manufacturing activity. The appellants have installed diesel generator sets and expenses of purchase of diesel and maintenance of DG sets are on record. There is evidence in the form of certificates of physical finesses DG sets, pollution control department's visit to the premises. Further audits have been conducted by the department

from time to time. Commissioner Central Excise Jammu earlier issued SCNs to the appellants alleging that the process undertaken by them does not amount to manufacture and later on those SCNs were dropped holding that the process adopted by the appellants amount to manufacture. All these evidences clearly show that there was manufacturing activity and therefore it cannot be said that appellants have not received inputs and have not cleared the goods. It is worthwhile to mention here that the investigation was not conducted at the end by the officers of Jammu Commissionerate and the whole case has been investigated and conducted by the Commissioner Central Excise, Meerut. Without investigation, it cannot be held that the appellants were not manufacturers of the finished goods during the impugned period. Therefore, the impugned orders against the appellants are not sustainable, particularly when the investigation started in the year 2006 by the officers of Meerut Commissionerate, the appellants were sanctioned refund orders under Notification No. 56/2002-CE dated 14.11.2002 even after start of investigation by the Meerut Commissionerate. This clearly shows that the allegations are only based on assumptions and presumptions and it cannot be held that appellants had not manufactured the goods during the impugned period. The Hon'ble Tribunal vide various Final Orders in identical facts and circumstances emanating from the same Meerut Commissionerate, have allowed the appeals as per the following orders;

1. Rohit Aggrwal, Akash Traders and SB Aromatics V/s C.C.E. & S.T. Jammu & Kashmir and C.C.E- Delhi reported at 2018(11) TMI 830-CESTAT Chandigarh.

2. Final Order No. 63193-61196/2018 dated 28.08.2018 in the case of Nectar Life Sciences Ltd.
3. Final Order No. 63177/2018 dated 28.08.2018 in the case of M/s Nanda Mint & Pine Chemicals Ltd.

5. A letter dated 21.05.2010 of the Commissioner CE Jammu addressed to Chief Commissioner has been taken cognizance in the above Final Orders and the said letter referred the name of the present appellants also. Therefore, the impugned orders are not sustainable and the appeals by the appellants are to be allowed with consequential relief.

6. In Appeal No. E/61568/2018 in the case of Fine Aromatics and E/61569/2018 in the case of Ambika International, earlier SCNs were issued to these appellants on the ground of under-valuation, prior to issue of SCNs alleging no manufacture. The case of the department w.r.t. the under-valuation was that the appellants have supplied the goods to so called related persons. This case was based on the sole allegation that one of the partners in the appellant's firms were also director in the company to whom the goods have been supplied. The SCNs of under-valuation are also in contradiction to the allegation that there was no manufacturing activity. Although the Commissioner has dropped the demands on account of under-valuation and yet passed a strange, unprecedented order holding that the demand in the under-valuation would revive in the event demand of account of no manufacture is dropped by the appellate authority. There is no

discussion in the impugned orders as to how the buyers are related to the appellants so as to demand duty by applying the Rules of 9 and 10 of the Valuation Rules 2000 read with Section 4(3)(b). Neither there is any evidence nor there is the discussion in the impugned orders to the fact that so called related persons are also related as per clause (ii), (iii) or (iv) of Section 4(3)(b) of the Central Excise Act, 1944. There is nothing on record that there is the mutuality of interest between the appellants and the buyers. The impugned orders are totally silent on this issue.

7. Even though the demands have been dropped on under-valuation but the contingent demands on uncertain, contingent, future event cannot be sustained, being contrary to the rule of certainty governing tax adjudication, in view of the decision of the Hon'ble Tribunal in the case of Commissioner of Customs V/s GKB Vision Ltd., reported at 2017 (357) E.L.T. 580 (Tribunal-Mumbai).

8. Heard the parties and considered the submissions.

9. We find that in this case the sole allegation against the appellant is based on the investigation conducted by Commissioner of Central Excise, Merrut, and as per the investigation, it is alleged that farmers from whom the inputs were purchased were non-existence. 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.

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 appellants were not manufacturer of the finished goods 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 to 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 had 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 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."

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. vide Final Order No. 63177 / 2018 dated 28.08.2018, 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 non-existence. 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 in the 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 Orders-in-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. We also take note of the fact that in appeal No.E/61568/2018 in the case of Fine Aromatics and Appeal No.E/61569/2018 in the case of Ambika International, the show cause notices were issued earlier on the ground of undervaluation, prior to issue of impugned show cause notices and charge of undervaluation has been dropped. When there is charge of undervaluation against the appellants and the said charge has been dropped, therefore, the impugned show cause notices alleging that the appellants are not manufacturing the goods and only issuing the cenvatable invoices enabling the buyers to avail inadmissible Cenvat credit, are not sustainable.

13. In view of above analysis, we hold that the appellants are manufacturers during the impugned period and paid the duty on the goods manufactured by them, therefore, duty on account of erroneous refund cannot be demanded on the allegation that the appellants were not manufacturers.

14. In the result, we set aside the impugned orders and allow the appeals with consequential relief, if any.

(operative of the order was pronounced in the court)

(BIJAY KUMAR)
MEMBER (TECHNICAL)

(ASHOK JINDAL)
MEMBER (JUDICIAL)

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