

CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
SCO 147-148, SECTOR 17-C, CHANDIGARH – 160 017

DIVISION BENCH
COURT NO. I

APPEAL NO. E/60416-60417/2017-Ex[DB]

[Arising out of Order-in-Original No. 09-11/CE/CHD-II/2017 dated 13.02.2017 passed by the Commissioner of Cen. Ex., Chandigarh-II]

M/s Parabolic Drugs Ltd : **Appellant(s)**
Sh. Parnav Gupta

VS

CCE & ST, Chandigarh-II : **Respondent(s)**

Appearance:

Present for the Appellant(s): Mr. Surjeet Bhadu, Adv. & Mr. Veer Singh, Adv.

Present for the Respondent(s): Mr. G.M. Sharma, A.R.

CORAM:

Hon'ble Mr. Ashok Jindal, Member (Judicial)

Hon'ble Mr. Bijay Kumar, Member (Technical)

Date of hearing/decision: 05.12.2018

FINAL ORDER NO. 63640-63641/2018

Per Bijay Kumar :

Being aggrieved with the impugned order, the appellants have filed these appeals. Vide the impugned order, the Ld. Commissioner has confirmed a demand of Rs. 4,62,04,200/- along with an equal penalty and the interest under the provisions of Section 11A(4), Section 11AA and Section 11AC(1)(e) of the Central Excise Act, 1944 (hereinafter referred to as the 'Act'). In the said order, the adjudicating authority has also imposed the penalty of Rs. 1 lakh on Sh. Parnav Gupta, Managing Director of the appellant Company. He

is also in the appeal against the penalty imposed on him under the provisions of Rule 26 of the Central Excise Rules.

2. The facts of the case are that the acting on the intelligence by the officers of the DGCEI, a search was conducted in the factory of the appellant on 12.02.2013 and a stock taking were conducted for raw material, quantity and value of work-in-progress and finished goods. It is also alleged that the appellants were availing the Cenvat credit on the bogus purchase invoice without physically receipt of the raw material. After stock taking of the goods, i.e. input, WIP and finished goods, it was revealed that there was a variation with respect to stocks under WIP at the 9 manufacturing plants of the appellants. The statement of Sh. Ashok Jindal, DGM (Accounts) was also recorded during the process of investigation. Subsequent to investigation, a show cause notice was issued to the appellants, which culminated into the passage of aforesaid impugned order.

3. At the time of personal hearing, the Ld. Advocate for the appellants submits as under:-

3.1 The stock taking of the material at the 9 manufacturing plants were taken on the basis of stock and work-in-progress statement made by the company as per the manufacturing plant. This was done as it was not possible to measure amount of stock/raw material under process in various reactors of manufacturing plants. No shortage of any nature of raw material, WIP or finished goods was pointed out by the visiting team.

3.2 Subsequent to thereof, the DGCEI officers made another visit on 22/23.02.2013 for collection of 'adequate samples' which initially was found to be short as per the prescribed quantity require for chemical analysis.

3.3 The visiting officers did not conduct any physical stock taking of all the WIPs, however contended that there was no stock of the goods namely, (i) 6-Amino Pencillanic Acid, (ii) Ceftriaxone Sodium Non Sterile and (iii) Dicloxcaillin Sodium in the premises, however the following balance and stock of the said three products was shown in the records on 12.02.2013:-

Sr. No.	Name of the Product	Qty (in Kgs)	Rate (per Kg)	Value (in Rs.)
1.	6-Amino Pencillanic Acid	39426.99	1049.34	4,13,72,318/-
2.	Ceftriaxone Sodium Non Sterile	49606.40	3894.35	19,31,84,684/-
3.	Dicloxcaillin Sodium	51467.28	1253.21	6,44,99,310/-
	Total			29,90,56,311/-

3.4 As there was a shortage of the products mentioned above, it was presumed that the above mentioned WIPs converted by the appellant into some unknown final product and the same were cleared without payment of duty to unknown buyers. The value for such goods was also calculated by loading of 20% on the assumed value of such WIPs. There was no other shortage noticed by the visiting officers.

3.5 The visiting officers resumed 13 box files containing sales bill for the year 2012-13, 9 files of Cenvat credit for the period May 2012 to January 2013 and 3 registers of daily stock (RG-1) along with the cost audit report, QPR statement, Bad debts/stock statement, miscellaneous files containing stock report, foreign payments, excise documents, quarterly result and balance sheet along with a laptop/computer. The visiting officers also resumed samples of 37 items which were claimed to be sent to the CRCL for testing. The Revenue has chosen to presume the clandestine clearance but did not rely upon any of such resumed documents or any test report of the drawn sample.

3.6 The demand has been raised on the statements of the employees of the appellant company holding that the said persons admitted the clandestine removal of the goods.

3.7 From the statement of Sh. Ashok Jindal, DGM dt. 23.02.2013 and the statement of Sh. Yatish Kumar Bansal, President (Technical) dated. 08.08.2013, it is not evident that they have accepted the clandestine removal of the goods. In fact, Sh. Yatish Kumar Bansal in his statement dated. 23.02.2013 has stated that *"on being asked about the specific reasons for stock of WIP goods found short during physical stock taking have to state that on making enquiry from the production staff of this unit, I admit to there is a probability that these WIP goods were utilized by us in manufacture of finished goods which were not accounted for in our records and the same were cleared without payment of Central Excise duty."*

3.8 It was stated by Sh. Yatish Kumar Bansal in his statement dt. 08.08.2013 that he tried to explain the reasons of missing WIPs as under:-

"1. In case of 6-APA and Dicloxacilin Sodium, we have to state that the said WIPs had been shifted from stores to scrap yard for incineration and the same had been incinerated.

2. In case of Centriasone Sodium, non sterile the material was lying in the sterile area at the time of search.

Q.13 : Why the above said facts were not brought to the notice of the visiting staff at the time of search on 23.02.2013?

Ans: The facts concerning the first issue could not be brought to the notice of the visiting staff as Dr. R.K. Singh, who is Vice President manufacturing and the senior most person of the company who was in the knowledge of facts stated at Sr. No. 1, was on leave and he could not have explained the same, had he been present. Regarding point Sr. No. 2, I have to submit that these facts were brought to the notice of the visiting staff. But they refuse to inspect the WIP in this sterile area as explained in my letter submitted today."

3.9 Sh. Parnav Gupta in his statement dt. 07.11.2014 has stated that he was not aware about the shortage of those three items till the time of the visit of the DGCEI officers. On subsequent enquiry from Sh. Yatish Kumar Bansal and Sh. R.K. Singh, he came to know that the three items were available in sterile area.

3.10 On being asked that why the same could not be explained earlier, he stated that Sh. Rakesh Singh, Vice President of Plants manufacturing was undergoing for a heart surgery and was not present in the factory at the time of visit of the officers. Sh. R.K. Singh was responsible for day to day production of the Derabassi, Lalru and Panchkula plants and all the stock related to plant activity including the WIP, SFG was under his direct control. When he joint back after his recovery, a detailed internal investigation was carried out on the shortage of WIP found by the visiting team.

3.11 Sh. Y.K. Bansal wrote a letter dt. 08.08.2013 to the Superintendent, DGCEI, Delhi and intimated the result of internal investigation for short material found during the search on 23.02.2013. It was informed that 6-APA and Dicloxacin Sodium were shifted to scrap yard for incineration in the month of November 2012 and which were verified. In regard of Cetriaxone Sodium non sterile, the same was lying in the sterile area at the time of search and the inspecting officers refused to inspect due to necessity of injecting drugs in the body of the person visiting that area, which was mandatory under the legal provisions.

3.12 From the above statement, it would be evident that the DGCEI exerted enormous pressure on the employees of the appellant, however, none of them actually admitted the clandestine removal of assumed goods and there was no corroborating evidence to that effect.

3.13 It was also submitted that as per the mandate provision of Section 9D of the Act, any evidence could not be taken on record

by adjudicating authority without forming the opinion regarding the admissibility of the evidence. Therefore, the statements recorded and relied upon by the adjudicating authority are not an admissible piece of evidence. The reliance in this regard is placed on the following case laws:

(a) CCE vs. Balajee Perfume – 2017 (358) ELT 87 (Delhi)

(b) SK Garg & Sons vs. CCE – 2017 (348) ELT 508 (Tri. Chan.)

3.14 Further, the case of clandestine removal cannot be confirmed solely on the basis of even inculpatory statements in absence of corroborating evidence. The reliance to this effect was placed on the case of **Davinder Sandhu Impex Ltd. vs. CCE – 2016 (337) ELT 99 (Tri. Del.)**.

3.15 The clandestine removal, which is a very serious allegation, cannot be made only on the basis of assumptions and presumptions without being substantiate by a complete chain of corroborative evidences. The reliance, to prove clandestine removal, is placed on the cases of **M/s R.A. Casting Pvt Ltd vs. CCE, Meerut-I – 2009 (237) ELT 674 (Tri. Del.)** and **M/s Arya Fibers Pvt Ltd vs. CCE – 2014 (311) ELT 529 (Tri.)**. In the case of **M/s R.A. Casting Pvt Ltd (supra)**, this Tribunal has held as under:

"22. *The clandestine manufacture and removal of excisable goods is to be proved by tangible, direct, affirmative and incontrovertible evidences relating to :*

(i) Receipt of raw material inside the factory premises, and non-accountal thereof in the statutory records;

(ii) *Utilization of such raw material for clandestine manufacture of finished goods;*

(iii) *Manufacture of finished goods with reference to installed capacity, consumption of electricity, labour employed and payment made to them, packing material used, records of security officers, discrepancy in the stock of raw materials and final products;*

(iv) *Clandestine removal of goods with reference to entry of vehicle/truck in the factory premises, loading of goods therein, security gate records, transporters' documents, such as L.Rs, statements of lorry drivers, entries at different check posts, forms of the Commercial Tax Department and the receipt by the consignees;*

(v) *Amount received from the consignees, statement of the consignees, receipts of sale proceeds by the consignor and its disposal.*

In the instant case, no such evidences to the above effect have been brought on record."

3.16 In this case also, no such investigation has been carried by the investigating agency as per the record of the case. Therefore, the demand is not sustainable in view of the above, as per the Ld. Advocate.

3.17 It was also submitted that the appellant is manufacturing the drugs, which is subject to various statutory regulations under Drugs Control Act. No parallel investigation has undertaken to find out as the result the manufacturing has taken the place without statutory permission and the same was cleared without payment of duty.

3.18 It is also on record that the visiting staff has not conducted proper stock taking and therefore this itself a clear

manifestation that the demand has been confirmed on the basis of aforesaid stock taking in a routine manner.

3.19 It was also argued that on the investigation of various records, the appellant has duly explained the shortage of the goods on 08.08.2013. However, the show cause notice did not include those evidences produced by the appellant and procured the issue the show cause notice pertaining a heavy demand of duty on the appellant.

4. On the other hand, the Ld. A.R. on behalf of the Revenue reiterated the reasons adopted by the adjudicating authority while confirming the demand.

5. We have considered the rival submissions and also perused the appeal records.

6. The issue before us is to decide as to whether the adjudicating authority was correct in confirming the demand raised against the appellants. It is evident from the records of the case that the stock taking was conducted by visiting officers of the DGCEI with respect to a stock, WIP and finished goods. The samples were also drawn at the time of initial search and more discrepancies were reported at the first instance. When the officers visited next time for collection of 'adequate sample', another stock taking was also conducted and the shortage was alleged with respect to aforementioned products.

7. It was presumed that as the stock was found to be short, the same could have been used in the manufacture of finished products and clearance thereof without payment of duty. The adjudicating

authority also relied upon the statement of Sh. Y.K. Bansal that when the stock which was not found to be there in WIP, could have been utilized manufacture of finished goods and clandestine removal thereof without payment of duty, but it is evident from the adjudication order as well as the appeal papers that no efforts were made by the department to find out as which product has been manufactured out of alleged shortage of the three aforesaid products and subsequent clearance thereof without payment of duty.

8. It is also not forthcoming from the adjudication order as to how this product was cleared and to whom it was cleared. The department has also not investigated the mode of transport of the alleged clandestine removal of the goods from the transporters. It has been held by the various Courts as well as this Tribunal that clandestine removal is a very serious allegation and required to be proved beyond reasonable doubt, which has not been done in this case.

9. We refer and rely upon the cases of ***M/s R.A. Casting Pvt Ltd (supra)*** and ***M/s Arya Fibers Pvt Ltd (supra)***. In the case of ***M/s R.A. Casting Pvt Ltd (supra)***, this Tribunal has held as under:

"22. The clandestine manufacture and removal of excisable goods is to be proved by tangible, direct, affirmative and incontrovertible evidences relating to :

(i) Receipt of raw material inside the factory premises, and non-accountal thereof in the statutory records;

(ii) Utilization of such raw material for clandestine manufacture of finished goods;

(iii) Manufacture of finished goods with reference to

installed capacity, consumption of electricity, labour employed and payment made to them, packing material used, records of security officers, discrepancy in the stock of raw materials and final products;

(iv) Clandestine removal of goods with reference to entry of vehicle/truck in the factory premises, loading of goods therein, security gate records, transporters' documents, such as L.Rs, statements of lorry drivers, entries at different check posts, forms of the Commercial Tax Department and the receipt by the consignees;

(v) Amount received from the consignees, statement of the consignees, receipts of sale proceeds by the consignor and its disposal.

In the instant case, no such evidences to the above effect have been brought on record."

10. In view of the above, we find that impugned order is not sustainable and therefore, we set aside the same.

11. In result, the appeals are allowed with consequential relief, if any.

(Operative part of the order pronounced in the court)

(Ashok Jindal)
Member (Judicial)

(Bijay Kumar)
Member (Technical)

RAS'