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

DIVISION BENCH
Court-I
Appeal No.E/2714-2715/2011

(Arising out of OIA No.14/DM/Adj./2011 dt.23.8.2011 passed by the Commissioner of Central Excise, Delhi-IV, Faridabad)

Date of hearing: 19.02.2019

Date of Decision: 01.04.2019

A.K.Singh, Director **Appellant**
R.K.Singh, Director
Vs.
CCE, Delhi-III **Respondent**

Present for the Appellant: Shri Anurag Mishra & Ms.Trapti Gupta, Advocates
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. 60295-60296/2019

PER: ASHOK JINDAL

The appellants are in appeal against the impugned order wherein the penalty of Rs.10 crore each has been imposed on both the appellants.

2. The facts of the case are that the appellants are directors of M/s.Pelican Tobacco Co.Ltd., (in short M/s. Pelican), who are manufacturers of cigarettes of different brands and the said factory of the appellants was under physical control of the Central Excise departmental officers and production and clearance activity were made in the presence of Central Excise officers. It was alleged against M/s. Pelican that they were engaged in the clandestine removal of cigarettes without payment of duty. It was also alleged

that the appellant created fictitious firms namely, M/s. J.S. Enterprises, Surya Tobacco Products and M/s.Imperial Tobacco and subsequently cleared the cut tobacco to M/s. Pelican without any accountal and record. Modus operandi of the above firms were that they used to purchase cut tobacco from the manufacturers namely M/s. Hilton Tobacco and M/s. Imperial Tobacco on their factory gate on cash payment basis and subsequently cleared to the M/s. Pelican without any accountal and record. There is no evidence in the record to prove this allegation. Even if it is presumed that such a modus operandi is done by M/s. Pelican to procure unaccounted cut tobacco from M/s. J.S. Enterprises, Surya Tobacco Products then the transportation of such a huge quantity of tobacco from their premises used in the manufacture of cigarettes which were cleared without payment of duty. As the appellants are before us run the firms under the supervision and control of the appellants being directors of M/s. Pelican. Therefore, a show cause notice was issued to demand duty on account of clandestine removal of the goods without payment of duty and to impose penalty on both the appellants under Rule 26 of Central Excise Rules, 2002. The matter was adjudicated, the demand of duty was confirmed vide Order-in-Original dt.23.8.2011 against M/s. Pelican and equivalent penalty under Section 11AC of Central Excise Act, 1944. The penalty of Rs.10 crore each was also imposed on both the appellants before us under Rule26 (1) of the Rules.

3. While entertaining the stay applications filed by the appellants along with M/s. Pelican, this Tribunal has directed M/s.Pelican to make deposit of 50% of duty within eight weeks and

on such deposit made by M/s.Pelican, waiver of pre-deposit was granted to both the appellants for entertaining the appeals. The said order was challenged by M/s.Pelican before Hon'ble Punjab & Haryana High Court and Hon'ble High Court vide order dt.26.7.2013 directed M/s.Pelican to deposit Rs.6 crores within 15 days. In the mean time, this Tribunal on 23.9.2013 dismissed all the appeals of M/s.Pelican as well as the appellants for non compliance with the direction of Hon'ble High Court. M/s.Pelican filed a special leave petition before the Hon'ble Supreme Court against the order of Hon'ble High Court. The Hon'ble Apex Court vide order dt.21.8.2015 directed M/s. Pelican to deposit Rs.4 crore on or before 31st December, 2015. The said amount was not deposited by M/s. Pelican and the order of dismissal of appeals of this Tribunal attained finality. Review Petition was also dismissed by the Hon'ble Supreme Court. As the appellants were granted waiver of pre-deposit subject to the condition that M/s.Pelican makes pre-deposit but the stay applications were not heard by this Tribunal on merits, therefore, the appellants moved the applications for restoration of appeals before this Tribunal and this Tribunal vide its order dt.27.8.2018 restored the appeals and thereafter, granted unconditional waiver of pre-deposit vide order dt.24.10.2018. Thereafter the appeals are listed for final hearing. Hence, the appeals being heard today i.e. on 19.2.2019.

4. Ld. Counsel for the appellants submits that there is no evidence to prove that such huge quantity is purchased by the appellant's company from the aforesaid firms then there has to be evidence of payment by the appellant to M/s.J.S. Enterprises and

M/s. Surya Tobacco Products. Only on the basis of statements of the owners of the aforesaid firms, the department has concluded that the aforesaid firms were indirectly run under the supervision and control of the appellants. The major demand has been created on the ground that whatever cut tobacco sold by M/s. Hilton Tobacco to M/s. J.S. Enterprises was actually being used by M/s. Pelican for manufacturing of cigarettes which were cleared without payment of duty. For this, the sale records of M/s. Hilton Tobacco were relied upon and where there is sale of cut tobacco from M/s. J.S. Enterprises, it was presumed that the same was cleared to M/s. Pelican without any documentary evidence and on the basis of statements of the owner of M/s. Hilton Tobacco and M/s. J.S. Enterprises, it was concluded that the entire quantity which was cleared by M/s. Hilton Tobacco to M/s. J.S. Enterprises were actually consumed by M/s. Pelican. There is no single piece of evidence except the statements to prove that the said cut tobacco were actually received by M/s. Pelican. The appellants have never admitted the same. Their statements were recorded by the department on number of occasions which simply explained the working of M/s. Pelican and denied the allegation that they have ever received cut tobacco from M/s. J.S. Enterprises and M/s. Surya Tobacco Products. The whole allegation is based on the statements which were obtained on the back of the appellants.

5. He further submits that it is alleged in the SCN that the CKT paper which was cleared by M/s. Gravure Printers & Convertors Pvt.Ltd. to M/s. Aman Enterprises were actually used by M/s. Pelican for manufacturing cigarettes. For this only one letter

dt.9.4.2010 from the director of M/s. Gravure Printers & Convertors Pvt.Ltd. was relied upon to prove the charges of clearance of CKT paper to M/s. Pelican in the garb of M/s. Aman Enterprises. Although there was nothing in the letter to prove that the CKT paper were cleared to the appellant company through fictitious firm in the name of M/s. Aman Enterprises. Therefore, on the basis of mere statements, the charge of clandestine removal is not proved. The said letter was further clarified and denied that no goods were cleared to M/s. Pelican under the garb of M/s. Aman Enterprises. Therefore, on the basis of mere statement, the charge of clandestine removal is not proved. Further there is no evidence on record to prove that the appellant company has procured other raw materials which are also essential for manufacturing of cigarettes without any accountal and record. Only one vague allegation has been made that like filter rods, max gum and CT gum procured by M/s. Surya Tobacco Products from NG adhesive and Hind filters were actually used by the appellant company for manufacturing cigarettes cleared clandestinely by the appellant. There is no evidence on record to prove that the cut tobacco, filters and other raw material procured by M/s. J.S.Enterprises and M/s. Surya Tobacco were actually been used by the appellant's company for manufacturing cigarettes cleared clandestinely by the appellant company.

6. He further submits that it is alleged in the SCN that the payment of clandestine removed goods were received by the appellant in different bank accounts of their employees or of their relatives which were opened at different places. It is further alleged

that the amount of clandestine removed goods were received in the said bank accounts by procuring drafts of less than value of Rs.50,000/- and same were used either for the payment of raw material or were cash withdrawn and it is presumed that the said cash withdrawn were handed over to directors of the company. Again to prove these charges, the statements of some of the employees were relied upon but in most of the occasion, the Revenue is unable to record the statement of such bank account holders. It is an admitted fact that in the said bank accounts not only cash amount was deposited but credit entries were also reflected. It is mere assumptions and presumptions that all these bank accounts were used by the appellant company to receive the payment of clandestine removed goods as well as making payment to the suppliers.

7. He further submits that the entire case of the Revenue is based on third party document or on the basis of the oral statements which were obtained from various employees of the appellant company as well as the owner of the J.S. Enterprises, M/s. Surya Tobacco Product and M/s. Aman Enterprises. The appellants have not been allowed to cross examine the persons whose statements relied upon by the Revenue. Therefore, there is gross violation of the provisions of Section 9D of the Act and the statements cannot be relied upon. The documents recovered from third party cannot be relied upon in the absence of cogent evidence.

8. He further submits that as per provisions of Rule 6 of Central Excise Rules, 2002, the manufacturing of cigarettes is

under the physical control of the department. Further, as per para 2.2. of Chapter 4 of CBEC's Supplementary instructions in respect of cigarettes the officers check the operations by the assessee as per instructions contained in the commodity manual for cigarette and thee were strict instructions mandated in the cigarette manual which are required to be followed by the officers and officers have to exercise different checks on arrival of the inputs, during the manufacturing and packing and at the time of removal. Besides following commodity manual for cigarettes para 2.2 of Chapter 4 of Supplementary instructions also prescribed that each and every invoice of cigarettes has to be countersigned by the inspector, or by the superintendent before the cigarettes were removed from the factory. It is well settled principle of law that in case of physical control the charges of clandestine removal of the goods cannot be held sustainable. Reliance is also placed on the judgment of Hyderabad Decan Cigarette Factory Pvt.Ltd. vs. CCE reported in 2010 (259) ELT 307 (Tri.-Bang.).

9. He further submits that it is well settled that the clandestine removal in case of goods which are under the physical control of the department cannot be held sustainable. The Ld. Commissioner without appreciating the fact that the unit was under physical control and there is no documentary evidence to prove the clandestine removal of goods from the appellant factory has confirmed the demand only on the basis of assumptions and presumptions and on the basis of the oral statements without allowing the cross examinations. He further submits that during the course of search no incriminating documents or any amount

which would have been sale proceeds of clandestine removed goods from the appellants. Therefore, the penalty is not imposable.

10. On the arguments advanced by the Ld. Counsel strongly opposed by the Ld. AR who submits that the appellant had filed combined appeals along with M/s. Pelican, who failed to make pre-deposit and in the absence of making pre-deposit, the appeals of the appellants clubbed together and dismissed as in the case of Lindt Exports-2012 (28) STR 216 (Del.), Cestat orders have been merged with the orders of High Court hence *functus office*.

11. She further submits that they have been put to injustice because of non payment of pre-deposit by the noticee was not taken by the appellant, against whom heavy penalties were imposed nor by any of the 7 noticees. The dismissal of the appeal by this Tribunal's order was not challenged for 5 years, wherein all appeals were dismissed for non compliance. It is only in 2018, when prosecution proceeding were launched, the appellants are seeking recourse by circumventing the law. They seek restoration of appeal in 2018. The counsel for the appellant has falsely quoted that that the bench had been provided and followed case laws submitted in this regard. However, it is re-ascertained that no case law was relied upon, submitted or mentioned in the restoration order dt.27.8.2018.

12. Further, this is case of serious proportion of clandestine removal of sensitive goods prone to evasion. The duty demand is above Rs.63 crores. The appellant has sought to deflect the issue with malafide intentions by trying to allege connivance by departmental officers.

13. She further submits that Shri A.K.Singh, director of M/s. Pelican was the main brain behind hatching the conspiracy to procure raw materials in such a way where no need of account arises as the same were procured in different fictitious firm names and by this way, they could hide the actual procurement of raw materials from the department and the appellants themselves made arrangements with Bommidala Purnaiah to procure cut tobacco in the name of J.S. Enterprises, which he described his trading unit to them. The payments of raw materials were made thorough demand drafts of the value less than Rs.50 to avoid the identity of the persons who get those demand drafts prepared. Such demand drafts were got prepared by his employees from different banks in Delhi by giving their false identities and addresses on the requisition slips. Shri A.K.Singh also floated a new company namely M/s. Pelican Enterprises of which M/s. Pelican Tobacco Co.Ltd. was the proprietor. The appellant floated this unit to manage the cash sale proceeds of the cigarettes clandestinely removed by M/s. Pelican. The cash sale proceeds were received back to M/s. Pelican Enterprises. During the course of investigation, the appellant did not give satisfactory explanation about the type of services or how the services were provided by M/s. Pelican Enterprises. The appellant were the main beneficiary of the money earned by M/s. Pelican by adopting all the unlawful means. During his statements deposed wrongly about many facts like he took the name of Shri Rakesh Johar at the time when he was no more in this world. This false statement he tendered only to hoodwink the department and tried to put the investigation agency into a position so that the matter could not be resolved. He

deposed falsely that his employees worked for Shri Jagjit Singh, Proprietor of M/s. J.S. Enterprises, whereas it was he who was the master mind all the game of procuring raw material in the name of fictitious firms.

14. Shri R.K. Singh, director of M/s. Pelican. He looked after the work relating to marketing of the goods. During the investigation, Shri R.K.Singh had falsely stated that they had one Regional Sales office i.e. in Delhi only whereas it was found that Shri R.K.Singh had appointed various Area Sales Managers/Regional Sales Manager/Agents, C&F across all over India. This fact also got corroboration from the letter dt.22.2.2010 written by Shri A.K.Singh to the Hon'ble Union Finance Minister of Government of India, wherein he had mentioned about 200 commission agents of his company. All the sales of M/s. Pelican were looked after by Shri R.K.Singh. He was ativitly involved in the clandestinely removal of cigarettes from M/s. Pelican without payment of duty and the receipt of payments with respect of those clandestinely removed cigarettes. She, therefore prayed that the penalties have been rightly imposed on both the appellants.

15. Heard the parties and considered the submissions.

16. On careful consideration of the submissions made by both sides, we find that the main objection raised by the Ld. AR this Tribunal is *functus officio* as the appeals have already been dismissed by this Tribunal for non compliance of the stay order and the order of this Tribunal have been merged with the order of the Hon'ble High Court. To support this contention, she relied upon the decision of this Tribunal in the case of Lindt Exports (supra). We

find that in this case, the appeals were dismissed by this Tribunal for non compliance by M/s. Pelican. In fact, the stay order was never approved by the Hon'ble High Court. In fact, M/s. Pelican approached Hon'ble High Court as well as Hon'ble Apex Court against the order of stay wherein M/s. Pelcan to make deposit 50% of duty in dispute. Further, the appeals of the appellants have already been restored by this Tribunal vide its order dt.27.8.2018 and the said order has not been challenged by the Revenue. Therefore, the objection raised by the ld.AR is not sustainable and accordingly, the same is discarded.

17. Now come to the merit of the appeals filed by the appellants. We find that during the relevant period in terms of Rule 6 of Central Excise Rules, 2002, the factory of the appellants was under physical control of the Superintendent or Inspector of Central Excise, wo were required to assess the duty payable before removal by M/s. Pelcan. However, as per Chapter 4, cigarettes would have been removed only on invoice which shall be countersigned by the Central Excise Superintendent. When the department itself is controlling manufacturing process of the appellant, in that circumstance, without hand in gloves with the Central Excise officers, the clandestine removal cannot take place. Moreover, in this case, no incriminating documents received from the possession of the appellants. Moreover, no extra amount has been received from the custody of the appellants which can be presumed the sale of clandestine removed goods. However, the whole case of the Revenue is based on the third party document and the statements of various persons whose cross examination has not been granted

in terms of Section 9D of the Central Excise Act,1944. The allegation based on the third party document without any corroborative evidence cannot be the basis to allege clandestine removal of the goods.

18. Further, we also take note of the fact that in the case of Kuber Tobacco India Ltd. -2016 (338) E.L.T. 113 (Tri. - Del.), this Tribunal has examined the issue of admissibility of statements of witness in para 14 of the order which is reproduced as under:

> ***"14.****In view of the above analysis, it is clear that during adjudication, the adjudicating authority is required to first examine the witness in chief and also to form an opinion that having regard to the facts and circumstances of the case, the statements of the witness are admissible in evidence. Thereafter, the witness is offered to be cross-examined. In the absence of examination-in-chief, allowing the cross-examination, is a futile exercise. We further find that the appellant have challenged the impugned order on the ground that the evidence in the form of statements gathered have no link of the appellant to the activities took at Sandeep Poultry Farm which is required to be examined on the basis of records available during the course of adjudication and the same has not been considered judicially."*

19. In view of above, we hold that *during* adjudication, the adjudicating authority was required to first examine the witness in chief and also to form an opinion that having regard to the facts and circumstances of the case, the statements of the witness are admissible in evidence. Thereafter, the witnesses were offered to be cross-examined. In the absence of examination-in-chief, allowing the cross-examination, the adjudication is a futile exercise. As the said procedure has not been followed by the authority below and the appeal of M/s. Pelican has already been dismissed. In that circumstance, the statements of witnesses on the basis it has been alleged that the appellants are engaged in the activity of

clandestine removal without payment of duty are not admissible. Nod corroborative evidence have been brought on record to support the statement of witnesses and the whole case is based on third party documents, the penalties on the appellants are not imposable. Therefore, we set aside the penalties imposed on the appellants.

20. In these terms, we set aside the impugned order imposing penalty on both the appellants. Consequently, the appeals filed by the appellants are allowed.

(pronounced in the court on 01.04.2019)

(BIJAY KUMAR)
MEMBER (TECHNICAL)

(ASHOK JINDAL)
MEMBER (JUDICIAL)

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