

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL  
SOUTH ZONAL BENCH  
CHENNAI**

**Appeal No.E/105/2011**

[Arising out of Order-in-Original No.15/2010 dt. 29.10.2010 passed by  
Commissioner of Central Excise, Chennai]

Vectra Advanced Engineering Pvt. Ltd.

Appellant

Versus

Commissioner of Central Excise,  
Chennai-II

Respondent

Appearance :

Shri Sujit Ghosh, Advocate  
Shri Mannat Waraich, Advocate  
For the Appellant

Shri A. Cletus, ADC (AR)  
For the Respondent

**CORAM :**

**Hon'ble Ms. Sulekha Beevi, C.S., Member (Judicial)**  
**Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)**

**Date of Hearing : 18.12.2018**  
**Date of Pronouncement : 28.12.2018**

**FINAL ORDER No. 43151 / 2018**

**Per Bench**

The facts of the matter are that appellants are manufacturers of motor vehicles, namely, Dump Trucks under the brand name "HEMANG", used mainly in mines, tunnel industries. It appeared to department that appellants were purchasing parts, components and assemblies as spares for these vehicles in

bulk and selling them after repacking and relabeling in retail / bulk pack from their spare parts division without payment of excise duty on MRP based assessment as required under Section 4A (2) of Central Excise Act, 1944. Pursuant to verification, it appeared that appellants had established their spare parts division separately, adjacent to the factory premises for supplies of spares to their aforesaid vehicles in the market; that appellants imported spares (parts, components and assemblies) in bulk from abroad and also from local manufacturers; that on receipt of such spares in their premises, and completion of quality checks by the stores persons, for the accepted items "Goods Receipt Note" are made in the SAP system; subsequently items are stored in respective bins / storage places in the parts ware house; thereafter, parts of required items are packed in polyethylene bags or wrapped with bubble sheet; then paper labels are either affixed on the bags or tagged thereon. The parts are then put in a master carton printed with their logo / emblem and name "Tatra Vectra Motors" printed thereon, then sold to customers from spare parts warehouse are transferred to their parts warehouse of the appellants located in various places of India and sold them in retail. It further appeared that the purchases were made by appellants under the pretext that the goods were intended for manufacturing section; that based on this their suppliers had also mentioned ECC number pertaining to manufacturing section in their supply invoices; that appellant had adopted "list price" at the time of clearances from spare parts division and thereby maintained uniform price for spares all over country; that goods are sold at far higher price ranging from 70% to 120% in retail after repacking the goods. Statement of Shri G. Shankar Sr. Manager (Spare Parts) of appellants was recorded. The aforesaid investigations culminated in issue of SCN

No.10.04.2008 inter alia, proposing that activities undertaken by appellants should be considered as manufacturing activity, proposing demand of duty amount of Rs.3,94,56,933/- , education cess of Rs.7,89,139/- and HS Education cess of Rs.1,72,017/- with interest thereon and also imposition of penalties under various provisions of law. Another SCN dt. 03.12.2008 was also issued similarly proposing duty demand of Rs.1,13,28,277/- with interest and imposition of penalties. Both these notices were adjudicated by a common order No.13/2009 dt. 29.06.2009 inter alia, confirming a total demand of Rs.5,17,46,366/- with interest thereon, imposition of equal penalty under Section 11AC of the Act and penalty of Rs.1,00,00,000/- under Rule 25 of Central Excise Rules, 2002. Appellants preferred appeal before CESTAT Chennai, who, vide their Final Order No.1769/2009 dt.16.11.2009 remitted the matter to jurisdictional Commissioner that fresh decision on merits after extending reasonable opportunity to appellants. In the interregnum, another SCN dt. 06.10.2009 had also been issued proposing duty demand of Rs.82,55,468/- with interest and imposition of penalties. Along with de novo adjudication of first two SCNs dt.10.04.2008 and 03.12.2008, the third notice dt. 06.10.2009 was also disposed of vide an Adjudication Order (de novo) No.15/2010 dt. 29.10.2010, wherein all the demands made in the three SCNs namely, Rs.4,04,18,089/- (SCN dt. 10.04.2008), Rs.1,13,28,277/- (SCN Dt. 03.12.2008) and Rs.82,55,468/- (SCN dt. 06.10.2009) along with interest, imposition of equal penalties in each of the cases were confirmed by de novo adjudicating authority. Hence these appeals.

2. The matter had also been heard on 21.05.2018 and reserved for orders. However, since certain clarifications were found wanting and required for passing orders in the matter, the appeals were caused to be relisted for hearing today.

3.1 Today, when the matter came up for hearing, Ld. Advocate Shri Sujit Ghosh, assisted by Shri Mannat Waraich, Advocate appeared for the appellant and argued the matter and made oral and written submissions which can be broadly summarized as under :

i) De novo adjudication order has been passed by Commissioner without taking into account specific directions of the Tribunal and detailed submission made by the appellants.

ii) In the present case, Ld. Commissioner in OIO placed heavily reliance upon the statements of Mr.P.Ganesan and Shri.Neelakanta Rao in order to confirm the demand against the Appellant. In this regard, the Hon'ble Tribunal remanded the matter to the Ld.Commissioner with clear directions to allow the Appellant to cross-examine the witnesses. However, despite such clear directions, the Ld. Commissioner in the impugned OIO, once again, placed reliance upon the aforementioned statements, without granting any right of cross examination to the Appellant. Accordingly, the present OIO which has confirmed the demand on the basis of statements of dealers/agents without granting any opportunity of cross examination of such dealers/agents is bad in law and thus liable to be set aside.

iii) The Ld. Adjudicating Authority has relied upon the statements of the witness without granting a right to cross examine, on the basis that the statements being voluntary admissions, are valid in law and cross examination of such statements would lead to bias. Further, the Adjudicating Authority has also failed to list out the exceptional circumstances under which cross examination has been denied. Further, the Ld. Adjudicating Authority has failed to consider the affidavit filed by P.Ganesan dated 25.06.2009. Thus, the impugned OIO

which has sought to rely upon the statements without granting a right of cross examination and without seeking to establish any of the circumstances as laid down under section 9D of the Excise Act, is bad in law and liable to be set aside.

iv) As the matter has already been remanded once with specific directions to cross examine and verify, which were not undertaken, no purpose would be served by remanding the matter again. Accordingly, in light of the circumstances, the impugned order, being passed in violation of principles of natural justice, ought to be set aside. Reliance in this regard, is placed on the decision of the Hon'ble Tribunal at Madras in the case of Kiran Overseas v. Collector of Customs, 1988 (38) ELT 362 (Tribunal).

v) In the present factual scenario, none of the activities allegedly carried out by the Appellant as can be discerned from the affidavit as also the detailed reply to the SCN III go to suggest that there was ever any value addition carried out by the Appellant such that the goods can be made marketable. The entire activity was essentially given towards protecting the goods in question towards transit and aimed at logistical convenience. Whatever labels were affixed were solely for inventory management perspective and not for providing any information which would enable the customer to make a choice whether or not to purchase the same. In some cases, these supplied were made under Annual Maintenance Contracts for the trucks in question, sold earlier by the Appellant in respect of which the spares were supplied and also warranty replacements.

(i) There were also cases where the goods in question were dispatched as such without changing the original label. Accordingly, the activities carried out does not fall within the deeming fiction of 'manufacture'.

(vii) In any case, since the present spares are sold to industrial consumers or institutional consumers, the provisions of Packaged Commodity Rules, 1977 read with Standard Weights and Measures Act, 1976 would not be applicable. Accordingly, as the provisions of SWMA and PC Rules are not applicable, the provisions of section 4A of the Excise Act would also not apply and hence duty cannot be levied.

viii) The Appellant has strong case in his favour that the alleged activity of manufacturing does not fall within the purview of Section 2(f)(iii) read with Section 4A of the Central Excise Act. The Appellant was always of a bona fide belief that the activity undertaken by him does not fall within the contours of manufacturing. The transaction in question is an issue of interpretation and there was neither any misrepresentation nor suppression of facts with an intention to evade payment of duty.

3.2 In the last round of litigation before the Tribunal, appellants had specifically taken up the plea that the activity of assessee with respect to package or labelling needs to be verified and the correct position ascertained, apart from request of cross examination of their officials as well as dealers. Only based on these pleas had the Hon'ble Tribunal ordered remand of the matter for de novo consideration. This scope of the remand proceedings have also been acknowledged by the Commissioner in paras 10 & 11 of the impugned order.

3.3 Nonetheless, although the Tribunal had remanded the matter back vide their Final Order dt. 16.11.2009, the adjudication order was passed almost after an year on 29.10.2010 only. Even so, vide letter dt. 13.04.2010 appellants had informed the department of their shifting of their premises from Hosur to

Bangalore which was acknowledged by the department letter dt. 22.04.2010. In the circumstances, almost more than four months were available for the adjudicating authority to have caused verification of the activities of the appellants with respect to packaging and labeling, however, no such verification was caused to be done by the authority. Personal hearing in the matter was also accorded only on 29.10.2010. Due to this delay, the adjudicating authority has stated, in para-10 of the impugned order that there is no feasibility of conducting such a study as the appellants have closed down their manufacturing, packing / labeling activity and had shifted to Karnataka State. The non-conduct of the verification as directed by the Tribunal would have the effect of vitiating the de novo proceedings.

3.4 The adjudicating authority has found discrepancies between the affidavit dt. 30.11.2007 filed by Shri P. Ganesan, Deputy Manager (Finance) and the subsequent affidavit filed by the said employee dt. 25.06.2009 and the authority has noted that the averments in the affidavit does not leave him any categorical view as to whether their goods in question involved repacking / relabeling in their hands before being despatched for their customer / dealers / depots or whether they are absolutely cleared as such in original packing.

3.5 With regard to second direction of remand, namely, to consider results of fresh cross examination of staff and dealers of appellants, adjudicating authority has held that there is no scope of generating any fresh material evidence from the staff and dealers; that statements given earlier were voluntary admissions, hence they are binding in nature and valid in a court of law. Ld. Advocate contends that refusal to grant cross examination in spite of Tribunal instructions, will also vitiate the entire proceedings of the impugned order.

4. On the other hand, Ld.A.R Shri A. Cletus merely reiterated the facts. Neither any further submissions nor any counter arguments made in response to the submissions made by Ld. Advocate.

5. Heard both sides and have gone through the facts of the matter.

6.1 The relevant portion of the CESTAT remand order vide Final order No.1769/2009 dt. 16.11.2009 is reproduced as under :

*“3. We find that on the date fixed for personal hearing TVML represented by counsel, submitted an affidavit filed by the Deputy Manager (Finance) that the goods cleared to their customers were cleared as such. The counsel further requested that the activity of the assessee with respect to package or labelling etc. needs to be verified and the correct position ascertained. TVML further requested for cross – examination of their officers as well as dealers. Both the requests have been rejected by the commissioner who has proceeded to decide the case without extending an opportunity to TVML of being heard on the merits of the demand. Interests of justice therefore require that the impugned order be set aside and the case remitted to the jurisdictional Commissioner for fresh decision on merits after extending a reasonable opportunity to TVML for being heard in its defence. We order accordingly.*

*4. The appeal is thus allowed by way of remand.”*

6.2 In this regard, we find that the Ld.Advocate is correct in his contention that though the matter had been remanded by the Tribunal on 16.11.2009 and intimation of shifting of manufacturing was made by the appellant only on 13.04.2010 and acknowledged by department on 22.04.2010, the verification of the activity carried out by appellants had not been caused during the period of more than four months that had lapsed after the Tribunal order. Adjudicating authority has justified the non-conduct of such verification by the observing that due to shifting of the manufacturing there is no feasibility of conducting a study of the practice followed earlier. The incontrovertible conclusion that will become a

natural corollary on such facts is that there was no justifiable reason for non-conduct of the verification process when the appellant's manufacturing premises were still in Hosur. Such laches will therefore not only preclude the Revenue from wriggling out of responsibility for conduct of the verification process, but at the same time put a question on the stand of the department that activity of appellant only amounted to 'manufacture', which issue *per se* had been remanded by the Tribunal for de novo verification.

6.3 Even more surprising however, is the adjudicating authority's outright refusal to grant cross-examination in spite of the clear remand instructions of the Tribunal. In this regard, we find merit in the reliance of the Ld. Advocate of the following decisions wherein the following principles were laid down :

"J&K Cigarettes Limited v. Collector of Central Excise, 2009 (242) ELT 189 (Del.), CCE, Delhi v. Vishnu and Co. Pvt Ltd., 2016 (332) ELT 793 (Del.), Aswani and Co. v. CCE, Delhi, 2015 (327) ELT 81 (Tri.Delhi) and Metro (India) Woodcrafts Pvt Ltd. v. CCE, Patna :

- (i) A statement under Section 14 of the Central Excise Act is not a reliable evidence unless cross examination as contemplated under section 9D (2) of the Excise Act is not afforded. It is not so much about the admissibility of the evidence in law, as it is about the reliability of such evidence, in case there is a failure of affording cross examination.
- (ii) The exceptions mentioned under Section 9D for dispensing with cross examination in a given case are the only exceptions that can be used as a ground by the Department to deny cross examination. No other grounds are permitted and if there are any such extraneous grounds, then the findings become perverse and bad in law.
- (iii) It is the responsibility of the Department who seeks to rely upon the statement of a witness basis which the demand is confirmed to facilitate the cross examination of the witness and the onus does not lie on the Assessee.

- (iv) It would not be mere ipse dixit of the officer to state that the exceptional circumstances contemplated under section 9D of the Excise Act exist for denial of cross examination. Instead the concerned quasi-judicial authority must prove that the concerned grounds exist to deny cross examination and solely rely upon the statement of the witness.
- (v) The adjudicating authority ought to have considered the affidavits of the defense witness and allowed such witness to be cross examined and rejection of such affidavit solely on the ground that these were filed much later during the de novo proceeding cannot be countenanced especially where the affidavits were filed pursuant to the de novo proceedings.”

6.4 We also take note of the decision of the Tribunal in *Kiran Overseas Vs CC - 1988 (38) ELT 362* which had held in favour of appellants inter alia, on the grounds that finding of adjudicating authority was mainly based on the test report of expert who could not be made available for cross examination. The Tribunal also, without expressing any opinion on the merits of the case, on technical grounds, held that order impugned appealed which is against violative of principles of natural justice, cannot be sustained and since the matter had already been remanded once, it would not be just and proper to once again order remand. The appeal filed by department was dismissed by the Hon'ble Supreme Court as reported in 1996 (88) A187 (SC).

6.5 In any case, the necessity of strictly complying with the provisions of Section 9D of the Central Excise Act, 1944, including the requirement for grant of cross examination, has been consistently reiterated by higher appellate forums, for example, the Hon'ble Delhi High Court in the case of *J & K Cigarettes Ltd. Vs CCE - 2011 (22) STR 225 (Del.)*, wherein inter alia, held except for the circumstances stipulated under Section 9D of the Act, right of cross examination

cannot be denied in any quasi-judicial proceedings. Closer home, this very Bench in the case of Venus Cotton and Others vide Final Order No.43203-43204/2017 dt. 20.12.2017 has followed the ratio laid down by the Hon'ble Punjab & Haryana High Court in the case of *Jindal Drugs Pvt. Ltd. Vs UOI - 2016 (340) ELT 67 (P&H)* holding that not only the cross examination but examination-in-chief is required to be undertaken by the adjudicating authority and in absence of which statements of the deponents cannot be given much importance.

6.6 Viewed in this light, we are of the considered opinion that the directions of the Tribunal in the earlier final order dt. 16.11.2009 has not been complied with and has only been followed in the breach. In consequence, appellants surely have been denied natural justice and opportunity to establish their credentials and case.

6.7 The proceedings which have seen two rounds of litigation had commenced by way of issue of first SCN No.29/2008 dt. 10.4.2008. More than a decade has passed by, without any sign of resolution of the allegations raised by the department. As we found above, opportunity given for causing verification of the activity of the appellants was frittered away only due to quasi-judicial lethargy. The directions for granting cross examination was also not honoured. In the meantime, the factory of the appellant has shifted from Hosur to Karnataka. Predictably, many of the persons whose cross examination was sought for by the appellants in the first round of litigation may not be available, traceable or may have become too infirm to recall events and happenings which happened ten years earlier. For these reasons, we find no purpose would serve by once again causing remand of the matter to the adjudicating authority. In our view, it would lead to further agony for the appellants. In this regard, we draw

sustenance from the ratio of Tribunal's decision in *Kiran Overseas Vs CC* (supra) which stands affirmed by Hon'ble Supreme Court as reported in 1996 (88) ELT A 187(SC). The relevant portion of Tribunal's decision is reproduced as under :

*"6. Unfortunately, in this case the finding of the adjudicating authority is mainly based on the test report of the expert as could be seen from the orders of the adjudicating authority referred to supra. Since the expert could not be made available for cross-examination in spite of summons having been sent by the Collector of Customs, the only course open to the adjudicating authority in such circumstances would be to proceed with the adjudication de-hors the report of the expert. But in the .present case notwithstanding the fact that the CLRI did not respond to the summons of the Collector of Customs, i by sending any of its expert, the adjudicating authority has chosen to place reliance against the appellant, on the opinion of the expert body. Such a course apart from being violative of principles of natural justice, is not, permissible in law. Therefore, without expressing any opinion on the merits of the issue, on technical grounds, we held that the impugned order appealed against is violative of principles of natural justice and cannot be sustained. Since already the matter has been remanded once, we do not think would be just and proper to remand the matter once over in the context of the case. We are, therefore, constrained to set aside the impugned order in the above circumstances. We accordingly set aside the impugned order appealed against and allow the appeal."*

7. In view of the discussions, findings and conclusions herein above, and also relying upon the ratio of the cases laws supra, we hold that the impugned order cannot then sustain and will have to be set aside, which, we hereby do.

Appeal is allowed with consequential relief if any, as per law.

(Order pronounced in Court on 28.12.2018)

**(Madhu Mohan Damodhar)**  
**Member (Technical)**

**(Sulekha Beevi, C.S)**  
**Member (Judicial)**



