

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHENNAI**

REGIONAL BENCH – COURT NO. III

Excise Appeal No. 42064 of 2016

(Arising out of Order-in-Original No. 51/COMMR/CE/2016 dated 13.07.2016 passed by Commissioner of Central Excise, Central Revenue Building, NGO-'A' Colony, Tirunelveli-627007)

M/s. Balaji Packagings,
141, Sukkiravarapatti Road,
Thiruthangal,
Sivakasi-626 130.

: Appellant

VERSUS

Commissioner of GST & Central Excise,
Tirunelveli Commissionerate,
Central Revenue Building, NGO 'A' Colony,
Tractor Street,
Tirunelveli-627 007

: Respondent

AND

Excise Appeal No. 40725 of 2019

(Arising out of Order-in-Appeal No. 05/2019 dated 31.01.2019 passed by Commissioner of GST and Central Excise (Appeals), Coimbatore, Circuit Office, Madurai, No.4, Lal Bahadur Shashtri Marg, C.R. Building, Bibikulam, Madurai – 625 002)

Commissioner of GST & Central Excise,
Madurai Commissionerate,
Central Revenue Building,
No. 4, Lal Bahadur Shashtri Marg, Bibikulam,
Madurai – 625 002.

: Appellant

VERSUS

M/s. Balaji Packagings,
141, Sukkiravarapatti Road,
Thiruthangal,
Sivakasi-626 130.

: Respondent

APPEARANCE:

Shri N. Viswanathan, Advocate
For the Assessee

Shri M. Ambe, Deputy Commissioner (Authorized Representative)
For the Revenue

CORAM:

HON'BLE MS. SULEKHA BEEVI C.S., MEMBER (JUDICIAL)
HON'BLE MR. M. AJIT KUMAR, MEMBER (TECHNICAL)

FINAL ORDER Nos. 40741-40742/2023

DATE OF HEARING : 15.06.2023

DATE OF DECISION : 01.09.2023

ORDER : PER MS. SULEKHA BEEVI C.S.

The issue involved in all these appeals being the same and being inter-connected, these appeals were heard together and are disposed of by this common order.

2.1 Brief facts are that M/s. Balaji Packagings (hereinafter referred to as 'BPKG'), Sivakasi are engaged in the manufacture of 'Corrugated Cartons' and have obtained Central Excise Registration. They are availing the exemption provided under Notification No. 08/2003-C.E. dated 01.03.2003, as amended. The partners of BPKG namely, Sri A. Subbiah, Shri V. Nagaraj and Shri K. Ravichandran and his wife Smt. R. Rukmani started another partnership firm with the name M/s. Balaji Packaging Industries (BPI).

2.2 On gathering intelligence that BPKG manufactured corrugated cartons and availed SSI exemption provided under Notification No. 08/2003 and when the value of clearances was likely to exceed Rs.1.5 crores, the partners of M/s. BPKG started another firm with the name and style "M/s. Balaji Packaging Industries" (hereinafter referred

to as BPI) investigations were conducted. It was noted that when the value of clearances exceeded Rs.1.5 crores, BPI was registered with the Central Excise Department and started paying Central Excise Duty. Further, they started floating different proprietorship/partnership firms keeping themselves as proprietors/ partners or with their relatives as partners. It was also noted by the Department that all these firms manufactured corrugated cartons and cleared the same availing SSI exemption as if they were all independent units. BPKG has floated some trading firms also without having any factory premises and machinery and the corrugated cartons manufactured in such firms, including BPKG and BPI, were cleared under the invoices of these trading firms and thus evaded Central Excise duty. The appellants, by floating various partnership and proprietorship firms had kept the clearances within the exemption limit of Rs.1.5 crores so as to avail the benefit of Notification No. 08/2003 dated 01.03.2003 by using the invoices of the trading firm having no manufacturing facility.

2.3 Search operations were conducted in the factory premises of M/s. Balaji Packagings, M/s. Balaji Packing Industries, M/s. Sri Hari Pack, M/s. Naga Packaging, M/s. Sri Eswari Packs, M/s. Balaji Cartons, the residential premises of Shri K. Ravichandran and factory premises of M/s. Shri Pothis Packaging Industries.

2.4 The Department also called for documents from the Commercial Tax Department, Tamil Nadu and statements of

partners/proprietor were also recorded. Investigation conducted revealed the following:

- Apart from the main unit, BPKG, the corrugated boxes were manufactured and sold under the invoice of 5 units namely, BPI, SHP, BC, KRK and BP.
- Out of this, Shri Andal Packaging (SAP) and Shri Pathmavati Packs (SPP) had no machinery for manufacture.
- Balaji Packaging (BPKG) having three partners namely, Shri V. Nagaraj and Shri K. Subbaiah and Shri K. Ravichandran, the *de facto* partner, representing his wife Smt. R. Rukmini, exercised overall control in the business activities of all manufacturing firms namely, BPKG, BPI, SHP, BC, KRK and BP and trading firms namely, SAP, SPP, SBPT, SEP and BIP.
- By doing so, they carried out their business activities with the common office staff and with the help of Shri R. Kasi Viswanathan, Manager of BPI and resorted to the following:-
- *started manufacturing firms namely BPKG, BPI, BC, KRK, BP and SHP and trading firms namely SAP, SPP, SBPT, SEP and BIP with the help of their close relatives (as partners and proprietors), with an intention to evade excise duty payable on the clearances of Corrugated Carton Boxes manufactured by them at their BPKG unit or such other manufacturing units and by clearing such goods under the invoices of such manufacturing units of such trading firms in order to keep the value of clearances from such units below the exemption limit for small scale industries, with an intention to evade payment of central excise duty payable thereon and for availing the SSI exemption on Corrugated Carton Boxes cleared in excess of Rs. 1.5 crores for which they are not entitled*
- *controlled the affairs of trading firms namely SAP, SPP, SBPT, SEP, BIP as admitted by themselves and concerned sleeping partners and diverted Corrugated Carton manufactured in other manufacturing firms on account of these trading firms*
- *started BIP, a proprietary firm with Smt R Rukmani as the proprietrix since 2003, which did not possess important machinery namely corrugation machine to manufacture corrugated cartons during the period of demand; the corrugated cartons manufactured in SHP and other manufacturing firms were sold under the invoices of BIP*
- *appellant influenced Shri.K.Gopi (owner of NAGA and job worker for BPKG group of firms) to start a proprietary firm by name SEP with the premises of NAGA being declared as the factory premises and without having any factory premises for itself, the corrugated cartons sold under the invoices of SEP were manufactured in BPKG, Shri Gopi did not know the business activities of SEP and he did not receive any profit from the business activities of M/s Sri Eswari Packs,*
- *they have engaged two job workers namely M/s Naga Packagings and M/s. Sree Pothis Packaging Industries; although raw materials were supplied by BPKG or BPI to these*

job workers, the corrugated cartons manufactured were cleared on account of trading firms namely SAP, SPP, SBPT, SEP and BIP and conversion charges were paid from the accounts of these trading firms and also from manufacturing firms namely BC and KRK.

- *they exercised common control in all operational, administrative, managerial and financial matters of all the BPKG group firms; operated from common office premises, with the help of common staff, under their directions*
- *though purchase orders for the supply of corrugated cartons were placed by the customers in the name of individual firms including trading firms, they drew the attention of V.Nagaraj, one of the three persons, irrespective of the fact whether he is the proprietor or partner or not of said firm; the name of the firm under whose invoice the said Corrugated Carton Boxes are to be sold are mentioned in the Purchase Order under the markings as "OC" (i.e. Order Confirmation)*
- *although they purchased raw materials in the name of individual firms, they were brought to the premises of Common Office situated at BPI and distributed among the firms having manufacturing facilities such as BPKG, BC, KRK, SHP as per immediate requirement of the customers.*
- *even though all the manufacturing firms viz. BPKG, BPI, KRK, BC, BP and SHP have sufficient machinery to manufacture corrugated cartons and there is no difference in the type of goods manufactured (corrugated cartons), most of the corrugated cartons manufactured in BPKG, KRK, BC and SHP were sold under the invoice of other manufacturing firms of BPKG group including BPI and BP,*
- *they interchanged raw materials and final products among themselves without any monetary consideration*
- *they had shown mutual financial interest in as much as all proprietor (s) and partners of BPKG group of firms are close relations and since no coolie charges were collected for manufacture of corrugated cartons in one firm for the other firm among BPKG group units, no money flow for exchange of raw material and final products, no interest was paid for money taken on lending*
- *in view of above, all the firms of BPKG group of units have not maintained distinct identity for themselves, as procurement of purchase order for supply of corrugated cartons, procurement of raw materials and the manufacture of ordered quantity of corrugated cartons was carried out commonly under uniform control without any monetary compensation; that clearances of corrugated boxes/cartons manufactured in one unit was freely done under the invoices of other units, resulting these units being inseparably intertwined with each other from the point of financial control, managerial control, operational control and administrative control.*

2.5 It appeared that BPKG and BPI have procured raw materials such as Kraft Paper, Gum Powder and Stitching Coils and engaged in

the manufacture of corrugated cartons. They have sent the raw materials to their manufacturing firms namely, SHP KRK, BC and BP and got corrugated cartons, manufactured and sent the same under invoices and delivery notes of other firms prepared at the common office, functioning at the premises of BPL. Show Cause Notice No.26/2014 dated 27.03.2014 was issued for the period from March 2009 to March 2013 alleging –

"It appeared that BPKG and BPI have procured raw materials such as kraft paper, Gum powder and Stitching Coils and engaged in the manufacture of corrugated cartons; they have also sent the said raw materials to their manufacturing firms viz SHP, KRK, BC and BP and got corrugated cartons manufactured and sent the same under the invoices and Delivery notes of other firms were prepared at the common Office which functioned at the premises 37. These units resorted to exchange of raw materials from one unit to another unit as directed by the said 'group of three persons' the corrugated cartons manufactured in these manufacturing firms were cleared under the invoices of their trading firms viz BIP, SBPT. SAP SPP and SEP floated with them relatives as proprietors/partners: BPI and BPKG have also supplied raw materials to the job worker) firms viz NAGA and SPPI and got the corrugated cartons manufactured and sold under the invoices of their floated firms as decided by the said three persons.

Partners of the firms, Smt. N. Devaki, Proprietor of SPP and Partner of BPI, Smt. R. Rukmani, Proprietor of BIP and Partner of BPKG / BP, Shri S. Rajathilagar, Proprietor of SHP, Shri K. Kanakaraj, Proprietor of SAP, Shri K. Gopi, Proprietor of SEP stated that they did not involve in the business activities of their respective firms. Shri K. Ravichandran , Partner of BPI/BC/BP, Proprietor of KRK and Sri V. Nagaraj, Partner of BPKG / BC and Proprietor of SBPT and Sri A. Subbiah partner of BPKG and BC admitted that they are carrying out the business activities of all firms. Therefore, Sri K. Ravichandran, Sri. V. V. Nagaraj and Sri A. Subbiah were responsible for running the business of all firms.

From the above, it appeared that from the common office functioning at the premises of BPI which is headed by Shri R Kasi Viswanathan, the Manager of BPI, who looked after the entire business activities of all the manufacturing and trading firms of BPKG group under the directions of Shri K Ravichandran, Shri V Nagaraj and Shri A Subbiah a fact admitted by him in his statement dated 20-12-2013, there was financial flow among the units, which was claimed to have been carried out, when sufficient fund was not available in the account of a firm, there were no payments of interest on the outstanding amount due to other firms at the end of the year, Shri R Kasiviswanathan also admitted in his statement dated 20 12 2013 that he did not know that interest should be charged on the outstanding amount among the group firms; though raw materials were sent from BPI and BPKG to all the manufacturing units, no coolie charges have been paid by BPI and BPKG, instead the coolie payments were paid from the account of trading firms as admitted by Shri K. Ravichandran in his statement dated 19-12-2013.

From the above it appeared that exchange of raw materials and finished products took place among the units of BPKG group without any monetary consideration; no payment of coolie charge made by the firm which supplied raw materials to the firm which manufactured Corrugated Carton Boxes using such raw material, instead, at times, payments were made from the accounts of the trading firms for money lending among the BPKG group units, interest was not charged on the outstanding amount out of such financial flow. Therefore, it appeared that said three persons have exercised pervasive managerial control, operational control, administrative control and financial control over all the business activities all the firms of BPKG group, they are also the partners (including the de facto partner) of BPKG, which is the first firm started by them. BPKG represented by the group of three persons is the leading manufacturer manufacturing corrugated cartons as discussed above, since the firms of BPKG group have not maintained any distinctive identity and inseparably intertwined in their dealings, the aggregate value of clearances of corrugated cartons manufactured and cleared under the invoices of all the manufacturing units and trading firms are includable with the value of clearances of BPKG in terms of para 2(v) and 2(vii) of the notification No 8/2003 dated 13 2003 as amended. The provisions of said paragraph of the notification are reproduced below:

Para 2(v) "where a manufacturer clears specified goods from one or more factories. the exemption in his case shall apply to the aggregate value of clearances mentioned against each of the serial numbers in the said Table and not separately for each factory"

Para 2(vii) the aggregate value of clearances of all excisable goods for home consumption by a manufacturer from one or more factories or from a factory by one or more manufacturers, does not exceed rupees four hundred lakhs in the preceding financial year"

It appeared that the group of three persons namely Shri K.Ravichandran, Shri V.Nagaraj and Shri A.Subbiah were able to carry out the affairs of the BPKG Group units/firms in the above manner since they have exercised over all managerial, financial, operational and administrative control over the business activities of all the firms of BPKG group such as procurement of purchase orders, procurement of raw materials, distribution of raw materials, manufacture and clearance of corrugated cartons. They started the BPKG group firms with an intention to evade payment of central excise duty payable thereon for availing the SSI exemption on Corrugated Carton Boxes cleared in excess of Rs. 1.5 crores for which they are not entitled, and value of clearances of all the units/firms are clubbable with the value of clearances of BPKG, the firm having the said three persons as partners (or de facto partner) and being the firm started first, in terms of sub para (v) and para (vii) to para 2 to Notification No.8/2003 as amended. Show Cause Notice No. 26/2014 dated 27.03.2014 was issued to the appellants inter alia proposing to club the clearances of all the factories / firms and for demanding duty along with interest and for imposing penalties."

3. After due process of law, the original authority vide Order-in-Original No.51/COMMR/CE/2016 dated 13.07.2016, held as under :-

"13.01. I hold Shri K. Ravichandran to be the defacto partner of BPKG

13.02. I hold that BPKG controlled and run by Shri. V. Nagaraj and Shri. A Subbiah, the partners, and Shri K. Ravichandran, the de facto partner, representing his wife Smt. R. Rukmani, to be the manufacturer of corrugated cartons in the premises of BPKG, BPI, BC, BP, SHP and KRK and as manufacturer of goods cleared on account of the other trading firms namely SAP, SPP, SBPT, SEP and BIP

13.03. I order that the value of clearances of corrugated cartons manufactured in the factories of BPKG, SHP, BP, BC, KRK and BP1 and also got manufactured from the job workers namely NAGA and SPPI, which were effected under the invoices of those manufacturing firms and the trading firms viz. SAP, SPP, SBPT, SEP and BIP during the period from 2008-09(01.03.2009 to 31.03.2009) to 2012-13, be included together in terms of Para 2(v) and 2(vii) of Notification No.8/2003 CE dated. 01.03.2003, as amended, to determine the aggregate value of clearances of BPKG controlled and run by the 'group of three persons'.

13.04. Having ordered as above in paras 13.01 to 13.03 supra, I confirm and demand an amount of Rs 2,27,22,336/-(Rupees Two Crores Twenty Seven Lakhs Twenty Two Thousand Three Hundred and Thirty Six Only) towards Central Excise duty. Educational Cess and Secondary & Higher Education Cess from BPKG payable on the total value of the corrugated cartons and corrugated pads falling under heading No. 4808 10 00 and 4919 10 10 cleared during the period from 2008-09(01.03.2009 to 31.03.2009) to 2012-13, under sub Section 4 of section 11A of Central Excise Act, 1944.

13.05.1 appropriate the amount of Rs 30,00,000/ [Rupees Thirty Lakhs Only] already paid under challans detailed in para 14 of the notice by M/s Balaji Packaging Industries, 136, Sukkiravarpatti Road, Anaikuttam Post, Thiruthangal towards the duty payable by BPKG, treating them as one single manufacturer.

13.06.1 also demand interest at applicable rate under section 11AA/AB of Central Excise Act, 1944 on the duty demanded in para 13.04.

13.07.1 impose a penalty of Rs 2,27,22,336/(Rupees Two Crores Twenty Seven Lakhs Twenty Two Thousand Three hundred and Thirty Six Only) under Section 11AC of the Central Excise Act, 1944 on BPKG controlled and run by Shri V.Nagaraj and Shri A Subbiah and Shri K.Ravichandran

13.08. In respect of the co-noticees viz, BPI, BC, BP, SHP, KRK, BIP, SHP, SAP, SPP, SBPT, S/Shri. K. Ravichandran, V.Nagaraj, A Subbiah and R. Kasi Viswanathan, I impose a penalty of Rs. 50,00,000/ (Rupees Fifty Lakhs only) on each of them under Rule 26 of the Central Excise Rules, 2002."

4. Aggrieved by above, the appellant is now before the Tribunal.

5. Subsequently, show cause notices on the very same set of facts and investigation was issued for the different period from 01.04.2013 to 30.06.2017. After due process of law, the original authority confirmed the demand, interest and imposed penalty. On appeal, the Commissioner (Appeals) set aside the confirmation of demand, interest and penalties. Aggrieved by such order the department has filed appeal **E/40725/2019.**

6.1 On behalf of the appellants, Ld. Counsel Sri N. Viswanathan appeared and argued the matter. The details of the various units / firms, their address, constitution of partnership and nature of business is given as under :

S.No.	Name of the Firm	Address	Name of proprietor/ partner	Date of formation	Remarks
1.	Balaji Packaging [BPKG]	141, Sukkiravarpatti Road, Anaikuttam	V. Nagaraj, A. Subbiah & Smt. R. Rukmani (w/o Ravichandran)	08.07.88	SSI unit
2.	Balaji Packaging Industries [BPKG]	136, Sukkiravarpatti Road, Anaikuttam	K. Ravichandran & N. Devaki (w/o Nagaraj)	11.08.95	Duty paying
3.	Balaji Cartons [BC]	144, Muthhunagaiya Puram, Periyar	K. Ravichandran, Nagaraj & A. Subbiah	14.06.99	SSI unit
4.	Balaji Ind Packs [BIP]	141B, Sukkiravarpatti Road, Anaikuttam	R. Rukmani (w/o K. Ravichandran)	11.08.03	SSI unit
5.	KRK Packaging [KKR]	1/90F Vadamalpuram, TTL-17-11-2009 [RAC]	K. Ravichandran	11.11.05	SSI unit
6.	Sri Hari Pack [SHP]	1/528, Sivakasi Co. Operative Industrial Estate, Sivakasi	S. Rajathilakar (s/o Subbiah)	15.06.07	SSI unit
7.	Balaji Ind Pack [BP]	136B, Sukkiravarpatti Road, Anaikuttam	K. Ravichandran, R. Rukmani &	01.02.09	SSI unit

			Smt. N. Devaki		
8.	Sri Eswari Packs [SEP] Formerly Packaging	171, SIDCO Industrial Estate, Kappalur, Madurai	K. Gopi	15.10.10	Job unit
9.	Sri Balaji Pack Tech[SBPT]	1/363, Sukkiravarpatti Road, Anaikuttam	V. Nagaraj	14.10.09	Trading
10.	Sri Andal Packaging[SAP]	725/H-1, Virudhunagar Road, Thiruthangal, Sivakasi	K. Kanagaraj	19.11.09	Trading
11.	Sri Padmavathi Packs [SPP]	1/17, North Street, M. Alagapuri, Meesalur PO, Sivakasi	Smt. K. Devaki	07.10.10	Trading

6.2 The Ld. Counsel filed written submissions as follows :

That BPKG is a partnership firm established in the year 1988 and were engaged in the manufacture of corrugated cartons and pads falling under Chapter 48 of the Schedule to the Central Excise Tariff and were availing the value-based benefit of the SSI exemption issued from time to time with its annual turnover remaining within the threshold limit of Rs.1.5 crores. In pursuant to certain purported intelligence that BPKG has created another unit BPI when about to exceed the limit of exemption to evade payment of the duty even the fact on record show that BPI which was started in the year 1995 only and was duly registered as a duty paying unit from its very inception apart from recording that later BPKG had floated various SSI units from time to time with their friends and relatives either as sole proprietors or partners, as and when each of the unit was to cross the exemption limit apart from floating certain trading firms to avail the SSI exemption and to evade the payment of the duty commenced the investigation in this matter.

6.3 In furtherance to the said intelligence, the officers attached to the erstwhile DGCEI carried out search operations on 04.12.2012 in eight premises which included the factory premises of BPKG, BPI, KRK, SHP, NAGA, BC SPPI & residential premises of one Shri K. Ravichandran who is either a proprietor or a partner in one or more of the firms. The search resulted in the investigation finding that each unit was comprised of different proprietors or partners and each unit was located at different geographical locations, had its own infrastructure and labourers besides having been registered under the TN VAT Act and remitting the appropriate VAT and filing of returns. Statements were recorded from certain individual showing the line of the investigation. As a sequel, a notice dated 27.03.2014 was issued proposing the clubbing of clearances/sales effected from the various manufacturing and trading units to fasten the demand on BPKG by holding that it was controlled and run by group of three individuals by name S/Shri V. Nagaraj A.Subbiah and K. Ravichandran to be the manufacturers of all the goods besides holding K. Ravichandran as the defacto partner of BPKG in the place of the existing partner namely his wife R. Rukmani. The notice demanded the duty by taking the value of clearances as declared by each of the units in their respective VAT returns. The notice also asked the other manufacturing trading and job working firms to show cause as to why their clearances should not be clubbed with that of BPKG controlled and run by group of 3 persons apart from proposing the imposition of the penalty under rule 26 of the Central Excise Rules on all the fifteen noticees which included the Manager except for BPKG.

6.4 The basic fact involved in this case is that there were 11 independent units involved of which one was a duty paying unit as already stated, six other units were manufacturing units. having their own factory infrastructure, finance, labourers, complying with the VAT, and Income Tax laws maintaining proper accounts and availing the SSI exemption, one was a job working unit and the remaining two trading units.

6.5. The Reasons for clubbing in short are as under :

1. The units had partners or proprietors who are related or friends to the GTP;
2. Maintenance of accounts and preparation of invoices for all the units from a common place viz. at the premises of BPI;
- 3 Distribution of the raw materials from the premises of BPI for all the units even while admitting that the purchases were made in the name of the individual units
4. Non-payment of coolie or job charges for job work done by the units for one another till the year 2011;
5. Financial accommodation on certain occasions for the only reason of non-payment of interest on the loan provided by one unit to the other.

6.6 BPKG on being initially advised approached the Hon'ble Settlement commission and paid the admitted tax of Rs 30 lakhs besides debiting the amount of Rs 1, 51, 332/- lying as balance in the cenvat account of BPI apart from remitting the interest of Rs 9,65,101/-, admitting only to the clubbing of the clearances effected

by the 3 trading firms getting goods manufactured through the other units on job work basis and one other manufacturing unit BIP sending materials cartons for corrugation to BPKG and BPI and the other job working unit Naga Packaging even while claiming that the latter two units are entitled for the benefit of notification no 83 & 84 of 1994 while reiterating that the proposal to club the clearances of the independent units in the admitted facts cannot be sustained by citing plethora of judgments. The applicants also claimed exclusion of the export value clearances inter unit, and the clearances after the visit of the officers and certain difference in value for the month of March 2009 besides claiming the benefit of cenvat credit [para 63 of the settlement commission order at page 392]. However, on the matter being referred to the respondent commissioner he sent a report dated 29.10.2014 strongly opposing to the grant of settlement, except for the value towards inter unit transfer and difference in value for March 2009. The Settlement Commission after hearing both sides passed order No. 97 111/2014 SC dated 24.02.2015 rejecting the application on the ground that the matter involved, complex facts and law and accordingly remitted the case back to the adjudicating authority.

6.7 It was at this time that the appellant engaged the services of the present counsels on record to be advised that the notice issued to them is not sustainable both on fact and law. The counsel for the appellant there after took the matter with the Chief Commissioner for change of adjudicating authority but since his request was rejected twice, he caused the filing of the replies for all the 16 noticees and

appeared for the personal hearing before the respondent and made detailed submissions for all the units including the individuals. The appellant submits that in the interregnum show cause notices for the subsequent periods were issued by the department and accordingly he prayed for the adjudication of the said notices subsequently since the hearing granted was in respect of the main notice only. The respondent passed the order in original dated 13.07 2016, verbatim confirming the proposal made in the notice by recording certain legally unfounded findings and without adverting to the various factual and legal submissions as well as the plethora of judgments relied in support in a most mechanical manner by merely borrowing the contention in para 11 of the notice by relying upon the statements obtained from the various personals.

6.8. The basic dispute to be resolved in this case is as to whether the clubbing of clearances of all the manufacturing units including one which is duty paying unit which is admittedly independent having their own funds, labour, machinery, factory in different geographical location and the job working unit and the three trading units who are admittedly eligible to avail the benefit of the exemption under Notification No. 83 & 84 of 1994 which is denied to them for the sole reason that they did not file the undertaking with the jurisdictional authorities as contemplated in the said notification even while not disputing the substantial compliance with the said notification and for the reasons that the units are owned by relatives and friends and that upto the year 2011 certain units have not paid the job charges to the other units

even though it involved a stray incidents only and the same being a reciprocal arrangements between the said units and that the units have taken loans from the other without stipulation for the payment of the interest thereon and more particularly by creating and treating the Group of three persons who were not the partners of BPKG as the manufacturer who have manufactured and cleared the goods from all the units so as to deny the benefit of the SSI exemption in terms of para 2 [v] and [vii] of notification No. 8/2003 CE dated 01.03.2003 as amended.

6.9 The allegations made and the consequent proposal contained in para 21 of the notice (at page 238/239 typed set) calling upon BPKG controlled and run by the group of three person [GTP for short] namely S/Shri K. Ravichandran, A. Subbiah and V. Nagaraj to answer the charge as to why the six manufacturing units, one job working unit and the three trading units should not be deemed to be the factories belonging to BPKG and the clearances/sales effected by the said units should not be clubbed for the period from 13.2009 to March 2013 and the SSI benefit availed by them individually should not be denied and consequently the duty amount of Rs2,36,72,410/- short/not paid should not be demanded from BPKG controlled and run by the Group of three persons invoking the larger time limit as per Section 11 A [4] of CEA 1944 is highly improper contrary to law which totally vitiates the impugned notice rendering it *ab initio* void which requires the consequent order passed to be set aside in liminie for the following:

6.10 The notice is not only unclear in making the above proposal but also made such a proposal in violation of the settled position of law since the revenue had not made it clear as to whether they wanted to sustain the demand and fasten the duty liability on the Group of Three persons (GTP) who were admittedly not the partners of BPKG which is a registered partnership firm, and whether such a proposal is sustainable in law especially under the partnership Act.

6.11 If the revenue wanted the demand to be slapped on the GTP out of which two are partners of BPKG, then the revenue ought to have made the demand on them considering as members of the partnership either jointly and severally instead of the demand being made on BPKG by modifying its constitution which is beyond the authority of law and therefore also the whole notice fails.

6.12 The demand on the other hand, having been made on BPKG on the premise that BPKG was controlled and run by GTP even when the constitution of the firm was different not only defies logic but also the legality of such a demand.

6.13 The charge and proposal to treat Shri K. Ravichandran as the defacto partner of BPKG and his wife R. Rukmani (factual partner) as the dejure partner is basically fallacious since neither the Partnership Act, 1932 nor the Central Excise Act, 1944 recognises the concept of any defacto or dejure partner. It is made to suit the convenience of the revenue but not supported by law and such a proposition by the authorities is not only bad in law but also against the provisions of law leaving no authority for them to make any such proposals.

6.14 The authorities failed to take note of the clear position of the law that partnership business is created by a deed of partnership whether registered or not and the authorities or for that matter no one else are authorised to form a different partnership on the basis of assumption or fiction. Holding a non-partner as a defacto partner is unknown to law and the Revenue is not empowered to create such new partnership contrary to the law and which is not intended or found in the deed for the only reason of somehow fasten the tax liability by denying the legitimate exemption availed by the various units.

6.15 Adding fuel to fire the notice issuing authority committed total judicial impropriety in making the above proposal to substitute the actual partner of BPKG with the alleged defacto partner without putting the actual partner to notice and also without notice to the alleged defacto partner with the specific proposal.

6.16 The evasive finding recorded by the respondent in para 07.08 of his order at page 76 clearly sustain the ground raised by the appellant herein. Thus there is a clear case of violation of the principle of natural justice especially when the liability is unlimited in a partnership firm and deeming a person as a partner without notice to him or her cannot be sustained in law and the said defect is not curable requiring the order passed to be set aside.

6.17 The findings recorded by the respondent in para 07.01 to 07.03 of his order at page 74 in spite of admitting that the above arguments advanced on behalf of the appellant appears to have strong force viewed with the provisions of the Partnership Act alone, had

however gone on to record certain frivolous and unacceptable findings and had relied upon two judgments of the Hon'ble Supreme Court permitting the lifting of the corporate veil of the status granted to the companies without being conscious of the fact that the units in question covered by the present dispute are not companies and therefore do not hold any corporate status to require the lifting of the corporate veil thereby his above finding totally devoid of any merits and contrary to law requiring the order passed by him to be set aside as not maintainable in law.

6.18 Again para 10.04 of the impugned order at page 81 had recorded based on the state as well as documentary evidences that it was GTP who were looking after the administrative financial matters of all the units and therefore have to be treated as one by relying upon the decisions of the tribunal without properly considering that the decision either held all the units to be owned by the same persons having financial control or dummy corporate entities by lifting the corporate veil which is totally different from the admitted facts in this matter.

6.19 The further observation of the respondent in para 08.02 of his order at page 76 to the effect that there existed an undisclosed partnership which actually ran the business to confirm the demand as proposed is wholly erroneous for the reason that in the first place there was no such allegation in the notice which resulted in the respondent traversing beyond the scope of the notice issued, to affirm the demand. The respondent further failed to take note of the law that a partnership

can only be a disclosed one that too by way of a partnership deed and the involvement of any other person tacitly or otherwise cannot change the constitution of the partnership and its liability and as such no demand could be fastened on a partnership firm on the basis of any assumed role of any other person who is not a partner.

6.20 A partnership business is based on trust and the liability acquired is unlimited and it is not necessary that in a partnership business every partner has to play an equal role and it is for the partners to decide the role of each one of them. The presence of S/Shri Nagaraj and Subbiah are sufficient to run the business and affairs of BPKG and the muted and passive role of Smt. Rukmani cannot be called in question by others especially the Revenue when the provisions of the partnership act does not authorise or approve such a proposal. A sleeping partner to the benefits of the partnership who has put only capital but undertakes liabilities as well and hence forcible inclusion of Shri Ravichandran by the Revenue in exclusion of Smt Rukmani, the actual partner is not only ex-facie illegal and un-warranted but also a case of clear transgression of law by the revenue.

6.21 The ultimate finding recorded in para 10.06 of the order in original, [pp 83], that the BPKG partnered by the GTP is the real manufacturer of the subject corrugated boxes manufactured by all the firms is ex facie illegal and erroneous since the GTP is not a legal entity and were not the actual partners of BPKG.

6.22 Even though there were 11 units in all, the notice/order has chosen to fasten the tax liability only on BPKG run and controlled by

the GTP and not on any other unit and reasons therefor are not known or disclosed. Even the clearances of the already duty paying unit expose the high handed and arbitrary action of the authorities Failure to identify the principal manufacturer is fatal to the case as has been held in the case of *Ghaziabad Organics Ltd Vs CCE, Ghaziabad- 2016* (344) ELT 965 (Tri.-All).

6.23 The intelligence said to have been received and allegation levelled that the GTP created the units at different points of time clearly belies the allegation since the facts on record show that the units were not started only after a particular unit was about to exceed the exemption limit and the notice also did not bring out any contrary fact in support of the said allegation.

6.24 In a nutshell, the above arbitrary and illegal proposal made in the show cause notice to treat BPKG controlled and run by the GTP as the manufacturer of the goods from all the units by itself evidence to the fact that the revenue otherwise was not in a position to sustain the clubbing of clearances of all the units and to deny the benefit of the SSI exemption in the admitted facts of the case so as to make the said illegal and unsustainable proposal to treat BPKG run by GTP to be the manufacturer for the purpose of denying the benefit of the SSI exemption.

6.25 Apart from the above, even though the show cause notice was issued to the other ten firms asking them to show cause as to why their clearances should not be clubbed with BPKG run and controlled by the GTP for which each of the units responded by filing their detailed

objections, supported by documentary evidences the respondent had never considered these objections but had proceeded to confirm the liabilities on BPKG run GTP causing gross violation to the principles of natural justice rendering his order unsustainable.

7. The Ld. Counsel put forward the following contentions to argue that the proposal to club clearances is not sustainable on merits also.

7.1 The department has alleged five reasons for clubbing the clearances of all eleven (ii) units detailed in the table. In para 8.03 of OIO dt. 13.07.2016, the original authority had framed three main questions to answer the issues related to clubbing of clearances and confirmation of demand, interest and penalties. These three questions as in para 8.03 are :

- (i) *Whether there exists an undisclosed partnership among the GTP consisting of S/Shri Ravichandran, V. Nagaraj, and A. Subbaiah and if so, whether that partnership can be considered as BPKG, a partnership first established with S/Shri V. Nagaraj, A. Subbaiah and Smt. R. Rukmani, W/o Shri K. Ravichandran as partners ?*
- (ii) *If such a partnership exists, whether the same can be considered as the actual manufacturers of the Corrugated Carton Boxes and Pads manufactured by all the manufacturing firms of BPKG group and also of the Corrugated Carton Boxes and Pads cleared by the trading firms of the group and thus their value of clearances are clubbable and reassessed in the hands of BPKG partnered by GTP ?*
- (iii) *Whether all the manufacturing and trading firms declared and registered with different authorities such as Central Excise, Commercial Tax and Income tax etc. can be treated as non-est in the eyes of Central Excise Ac, for the purpose of*

payment of Central Excise duty availing SSI exemption under Notification No.8/2003-CE dated 01.03.2003?

7.2 It is submitted by the Ld. Counsel, that these questions are answered against the appellant by deeming that GTP is an undisclosed partnership consisting of S/Shri K. Ravichandran, V Nagaraj and A. Subbiah that ran this partnership (BPKG) and also established other 10 firms.

7.3 It is thus alleged that the investigation revealed that though BPKG was formed with the three actual partners it was actually GTP who ran the partnership, and thereafter established the other firms one after the other in their name or in the name of their family members or with the members of their families and exercised managerial, administrative and operative controls and financial matters of all the firms.

7.4 The statements obtained from the other persons have admitted to the fact of their not being involved in any of the business activities of the affairs of the said firm whereas contrary to the same they have claimed as independent legal entities with their own funds complying with the requirements of the VAT and Income Tax laws and that the mere common usage of office premises clerical staff and manager to maintain their accounts in the same computer installed with a tally software rendering assistance of the GTP who happened to be partners/relatives/long time acquaintances of them to run the business cannot make their status of separate legal entities as non-est

in the eyes of law It was also recorded that since they did not have any previous experience of dealing with the preventive officers of the department they have signed the statements as asked for. In para 09.02 and 09.03 the claim for independent legal entities was rejected for the reason of lifting the corporate veil relying upon the judgments of the Supreme Court cited therein. The respondent thus without adverting to any of their defence submissions on fact and law merely approved the contentions made in para 11 of the show cause notice totally violating the principles of natural justice besides exposing his bias and non-application of mind.

7.5 The respondent relied upon the statements obtained from the various deponents holding that the same in the absence of retraction or seeking permission to cross examine the officers is admissible in terms of Section 14 of the Central Excise Act and in support of the same judicial pronouncements as recorded in para 09.04 to 09.07 of the order.

7.6 Findings were recorded in para 09.09 relying upon the decisions of the Supreme Court to record that *"I am afraid that if the contention of the noticees is accepted for the reasons put forth by them then any group of persons can establish any number of units and mis-use the SSI exemption provided under the Excise law"*.

7.7 In para 10.01 at pg. 79, the respondent again reproducing the various allegations on fact made in the notice had adopted the said versions without any consideration for the objections raised by BPKG as well as by others which shows that the said authority had no

answer to the subtle contentions on fact and law and the settled position of law as per the plethora of judicial pronouncements cited in support by the appellant and others.

7.8 In para 10.02 at pg 81 had conceded that the allegation that certain units have manufactured the goods on behalf of others without collection of the job charges till 2011 are small or negligible still he went on to record that the said instances evidences to the fact of clearance of the goods manufactured in one unit by another unit and as a corollary the common managerial financial and administrative control exercised by GTP which is highly improper and totally unreasonable besides being contrary to the settled position of law. The said authority on the claim made by the appellant that such stray cases are also covered by notification no. 83 & 84 of 94 CE had while not disputing the said fact had denied them the said benefit for the only reason that they did not fulfil the condition of furnishing the undertaking to the jurisdictional authorities citing certain judgments which are distinguishable while also accepting that the said condition is only procedural and not substantive [paras 10.05 10 to 10:05:08 pgs 82 to 83].

7.9 The respondent further in para 10.03 at page 81 heavily relied upon the judgment of the Supreme Court in the case of Modi Alkalis & Chemicals a case totally distinguishable on fact to hold that the clubbing of clearances for denial of the SSI exemption is permissible on grounds of common managerial /administrative and financial control flow back of money without any interest common

maintenance of the books of accounts and all the units had common supplier which is totally improper and incorrect. Placing reliance on the same judgment and another case of *Parle Bisleri* decided by the Apex Court (para 07.04 to 07 06 pg 75) the respondent had denied the benefit of circular no 6/1992 dated 29.05.1992 issued by the Board which squarely supported the case of the appellant.

8. The Ld. Counsel argued that department committed gross violation to the principles of justice by merely adopting the averment in the notice without considering any of the admitted facts on record not showing any inter-dependence or pervasive managerial control of one over the other that the partners are different in the various units. The finding that the partners are either related in some way or the other or friends and hence they are not truly independent is bereft of any logic or meaning and is also against the settled position of law. The respondent also failed to appreciate that since liability of partnership firm is unlimited, it is but natural that partnership business is started taking the family members at the first instance as partners and in the second instance like mined and trusted friends as partners. As mutual trust is the back bone of a partnership firm, members of the family and friends becoming partners is nothing strange and the said practice is legally permissible and no objections could have been taken against it.

8.1 With regard to the independent status of the various entities who were either partnership firms or sole proprietor firms, the respondent in para 09.02 & 09.03 of his order placing reliance on

certain decisions of the Apex Court had held that the corporate veil could be lifted or pierced to ascertain true nature of the persons who constitute such entity and their business relationships especially in the matter of tax evasion. There is no qualm on the part of the appellant to appreciate the right of respondent to pierce the corporate veil to ascertain who hides behind such veil. On the other hand, it is the submission of the appellant that the case laws cited pertained to corporate entities whereas none of the eleven entities involved are limited companies and there is no fictional corporate personality attached to any of the eleven units: They are either partnership firms or sole proprietor firms and hence the question of lifting any corporate veil or piercing it does not arise at all. Unlike the case of the corporates whose liability is limited, the liability of a partnership firm or sole proprietorship is unlimited. There is no special or fictional legal personality conferred on a partnership or proprietorship firms. Partners in a partnership firm are jointly and severally liable for the obligation cast or the liability acquired by the said firm, whereas the Companies Act clothes a limited company with a distinct and separate legal personality of its own and normally the said status confers a legal personality on the company which cannot be called into question and the persons who manages such entity either as directors or managers or even shareholders are distinct and different from that of the company. [Section 9 of the Companies Act of 2013 refers] Hence the doctrine of lifting or piercing of such corporate veil is permitted by the Courts only under certain compelling circumstances like tax evasion etc. That doctrine has no nexus to partnership firms, or

proprietorship firms when the liabilities on the individuals are unlimited. The partnership deed clearly discloses the partners and their role, rights and liabilities. Hence the reliance placed on the said proposition supported by the case laws do not at all apply to the case of the appellant.

8.2 The status of the partnership firms have been dealt with in the Section 37 B Circular no 06/92 dated 1905 1992 issued by the Board in the context of availment of the SSI exemption in which it was specifically clarified that partnership firms with uncommon partners are distinct and different and each such partnership firms are eligible to avail the SSI exemption separately and in the present case it is a fact on record that none of the five partnership firms constituting the manufacturing units there is any common partners and even in fact in the said firm firms outside members are also partners and hence the respondent ought to have religiously followed the instructions contained in the said circular which is still valid and existing and also binding on him. failure of which renders his order otiose and redundant. On the other hand, the respondent had placed reliance on the decisions of the Hon'ble SC in the case of *Modi Alkalies & Chemicals Ltd.* reported in 2004 [171] ELT 155 (SC) to get over the above circular which is wholly misplaced. The said decision was rendered in the context of the peculiar facts and circumstances in which the three front companies established were found to be dummy and the directors of the said front companies were either directors or employees of Modi Alkalies and the entire gas produced was sent

through pipe lines to the adjacent premises where the three companies existed which were in a common premises with Modi Alkalis and that they merely filled the gas in the cylinders and sold the same, the machinery to fill the gas and the cylinders belonged to the parent company and they had advanced huge capital to the later and the price charged per unit was a mere 0.50 per cylinder whereas the front companies sold the same for Rs.5/- and the paid-up capital for the front companies were a mere Rs.200/- and the collection of sale price was done by the employees of the parent company and in the above context it was held that the front companies were dummy and the availment of exemption was a façade. The observation of the Supreme Court that the above Board Circular was made in the context of old notification no 175/86 CE and not for Notification no 1/93 CE was a mere obiter and not any ratio laid down by the SC and the fact of the matter is the said clarification was considering an identical provision and hence it is applicable. It is further submitted that the above circular having not been quashed by the court or withdrawn by the Board makes it valid in law in fact the board itself was applying the clarification issue to an earlier notification no 176/77 dated 18.06.19978 which had identical wordings In any event, what is relevant to be seen is whether there were complete interdependence and all-pervasive control of one over the other and the answer to the same in this case is a big no.

8.3 The reliance placed on the other decision of *Parie Bisleri Pvt Ltd.* -2011 (263) ELT 15 (SC) is also distinguishable for the reason

that in the said case two limited companies claimed independent status only based on their corporate legal status and on facts there was complete interdependence and all pervasive managerial control of one over the other and the other and the unit was also using the brand of name of the other.

8.4 The appellant respectfully submits that the revenue without establishing the commonality of funding and the financial flow back. (sharing of profit) of the or proving that the units in question are dummies or camouflage which is not the fact in this case ought not to have deemed the units as belonging to BPKG controlled and run by thee GTP The law is also settled that unless the revenue discharges it onus by establishing that there is common funding or financial flow back the clubbing of clearances for denial of the SSI exemption is not permissible. The appellant submits that even though there are large number of pronouncements on this point they would like to cite the following few case laws in support of their above contention:

1. *Deep Jyote Vs CCE - 2000 [117] ELT 223 CESTAT LB;*
2. *Bentex Industries Vs CCE - 2003 [151] ELT 695 CESTAT;*
3. *Studio line Interior Systems Vs CCE -2006 (201) ELT CESTAT;*
4. *CCE Vs Vaspar Concepts - 2006 (196) ELT 95 CESTAT;*
5. *Coimbatore Engineering Works Vs CCE - 2009 (239) ELT 366.*
6. *CCE Vs Bombay Neon Signs - 2004 [166] ELT 102 CESTAT,*
7. *Renu Tanden Vs UOI - 1993 [66] ELT 375 Raj;*
8. *CCE Hyderabad Vs Beaver Engineering Components - 2017 (353) ELT 126;*
9. *CCE Vs Saron Mechanical Works - 2016 [332] ELT 80 Pun & Har;*

10. *Associated Engg Projects Vs CCE, Meerut - 2019 [370] ELT 756;*
11. *Jain Pole Industries VS CCE, Jaipur - 2018 [364] ELT 189 Tri Del;*
12. *CCE Jaipur Vs Electro Mechanical Engg. Corpn - 2008 (229) ELT 321 SC;*

8.5 In this case, admittedly, the funds for the establishment of the units for purchase of machineries, working capital, funds for the purchase of raw material and expenses for production having admittedly been met by the respective units from out of their own funds and not provided by others there is absolutely no question of maintaining the allegation that there was Commonality of funds or flow back of funds BPKG was established by obtaining loan from TIC which fact has been stated in the statement of the partners of BPKG Similarly, the other units were established by the funds brought in by the partners of the said firms or by the respective proprietors. This aspect is clearly stated and declared in the respective P & L Accounts of the respective units. The Revenue neither has alleged nor provided any shred of establish the contrary. The allegation of any financial flow back is neither alleged nor established. The profit from the business enterprise has accrued to the concerned partners in business who have filed their IT returns offering the same to income tax. This can be seen from the profit and loss account and the income tax statement of the firm. BPKG was not associated with any other firms as a partner in business and no amount of profit flowed to it There is no commonality of partners between BPKG and the other units. Since the investment and profit belonged to the firm and properly reflected

in their books of accounts which have been properly audited the clubbing made is not legally sustainable. By no stretch of imagination the transactions of BPKG were managed by any outsiders and the transactions were only managed by their partners and not the so-called group of three persons as being alleged. There is nothing wrong or illegal among persons who have common interest and trust in each other in joining hands to start a partnership firm. The appellant as a firm has nothing to do with the affairs of the other firms, except maintenance of accounts for all the units in the common office premises of BPI wherein the purchase and sales records of all units were maintained in the tally software.

8.6 On the other hand, the notice had made only two basic allegations for claiming financial accommodation namely that there has been inter unit movement of raw materials resulting in production of goods by one unit for the other for which admittedly and no job charges were paid by the other and advancement of loan without stipulation for interest to support the allegation that there is financial accommodation (para 10.6 and 10.7 pg. 220 to 225).

8.7 In this regard, as already submitted that such instances being few and also as it was a reciprocal arrangement and as the respondent had only sustained the said allegation based on the judgment of the Supreme Court in the case of *Modi Alkalies & Chemical* which is distinguishable the whole allegation should fail for the above reason.

8.8 Non -payment of coolie charges for having undertaken the job work by the representative units has been cited as a reason for financial flow back and for the consequent clubbing it is on record @pp 213 that the various units at different points of time gave raw materials to the job working units such as M/S NAAGAS and Sree Pothis Packaging Industries and got the cartons manufactured by them and paying the appropriate coolie charges to the said job workers and hence the value of such goods cannot be clubbed with BPKG. The job working units were independent units doing job work to others as well by the units themselves in case of necessity. It is well settled that conversion of raw materials into finished goods amounted to manufacture and the person who undertakes production is the manufacturer who is answerable for the tax liability on such goods and not the raw material supplier. Hence the value of goods manufactured and removed by the job worker could not at all be clubbed with that of BPKG. The above activities of the job working manufacturers was also exempted vide Notification No.83 & 84/1994.

8.9 It is on record that the other manufacturing units also at certain points of time did job work for the other units but did not pay coolie charges till 2010-11 but the said payments started from April 2011. Getting the goods converted on job work basis were far and few especially during a time when a unit was given time bound bulk orders and when it is not possible for them to fulfil these orders within the stipulated time. In such situations only the unit in question supplied the raw material to another unit and got the goods

manufactured on job work basis while selling the finished goods against their own invoices. As each of the units had done job work for other unit at some point of time, the cost of job charges gets squared up and in any event the cost of conversion is quite small when compared to the price of carton boxes having no substantial liabilities whereas such charges even if added gets subsumed into the extent of the exemption provided. In any event those transactions have been properly accounted for in their books and job work by one SSI Unit to another SSI unit is permissible under the erstwhile Notification no 83-84/1994 and it is legally permissible so long as the units properly account for the same. In this case, all those transactions have been properly captured and accounted for in their respective turn over [para 40-43 of the reply by BPKG] The respondent had denied the benefit for the only reason no undertaking was filed which is contrary to the decisions reported in 2007 (218) ELT 405 (Tri-Chennai), 2009 (246) ELT 561 (Tri-Ahmd.), 2014 (308) ELT 546 (Tri-Del.), 2014 (310) ELT 200 (Tri-Bang.).

8.10 The allegation made in the notice that the corrugated cartons manufactured in the appellant's unit were cleared under the invoices of other firms is outrightly denied. The appellant had cleared only those goods which were manufactured in their respective factories on their own account on the strength of their invoices and accounted for the same. As submitted earlier, the appellant also did job work/conversion for other manufacturing and trading units on certain occasions out of the raw material supplied to them by the said units.

Those converted goods were cleared by the respective units under their invoices to the respective customers who had placed orders on them. The despatches were covered under proper invoices. For the purpose of determining the limit of SSI exemption, the appellant had already aggregated the job worked goods value also and hence there can be no objection from the department on this account.

8.11 Without prejudice the notice had also fairly admitted that each of the manufacturing units including that of the job worker have factory premises of their own and they are not either dummy or letter pad companies. [pgs 92 & 93 of the typed set- para 3.1.5 and 3.1.8 of the notice - para 32 of the reply by BPKG. Only the trading premises were found not having any machineries Trading firms naturally need not have any manufacturing facility as they are mainly supplying raw material and getting the goods converted on payment of the job charges or coolie charges. All the trading units have VAT registration and discharged VAT which fact is not disputed. Similarly, all the manufacturing units have also paid VAT and the authorities had collected the sales figures only from VAT authorities and not even a single transaction was found to have suppressed or unreported

8.12 The allegation that distribution of raw materials was made from the premises of BPI to all the units is factually incorrect: [Reply @ para 46, 49 of BPKG refers] As all the records for the purchase of the units were maintained at the premises of BPI, the truck carrying the materials first come the premises of BPI for the purpose of making entry in the books of the respective units maintained in the computer

at BPI to be later sent to the concerned units which has procured the materials for its use. If a single truck carrying different consignments meant for different units visit BPI since it was a bigger unit and known to all, after making entry in the computer the individual consignment will be sent in small van or cart etc with delivery challans indicating the respective invoice no etc to the respective units for its use. This procedure was followed for ease of transportation, and accounting but has been blown out of proportion alleging that all the materials were purchased by BP and distributed to others in fact, it is on record that individua units have placed orders for the supply of materials, paid for the material and got the material delivered to them for further production and sale. There is no evidence to show that BP) or BPKG had placed orders for the raw materials required for all the units and paid for them from out of their funds Distribution of raw materials from the premises of BPI for ease of proper accountal and transportation only which does not show any malafide or sinister move had been wrongly projected by the revenue for reasons best known to them

9. In regard to the allegation that loans were given for which no interest was paid the Ld. counsel explained that temporary loans and advances given by unit to the other in case of necessity which were not regular or substantial have duly been accounted and paid back as reflected in the financial records of the concerned units. From 2010-2011 onwards, the units have started collecting the interest if any even for a small loan advanced which is reflected in the respective

annual reports of the concerned units. The non-collection of interest for temporarily loans it is submitted is a normal business practice without any taint reply of BPKG @ para 52. Non-payment of interest in itself will not make the units are dummy or inter dependant or involved any financial flow back or to call such units not independent and the law in this regard is also well settled in the following Judicial pronouncements :

1. *M/S Bright Gems Company Vs CCE*
2004 [173] ELT 173 CESTAT
2. *M/S Polly Printers Vs CCE*
2002 [139] ELT 295 CESTAT
3. *M/S Alpha Toya Ltd. Vs CCE*
1994 (71) ELT 175 CESTAT

10. One other allegation is that accounts of all units were maintained in a common place (at the premises of BPI). It is argued that Maintenance of accounts of several units in a common office for cost conservation and utilisation of the services available in common is permissible in law especially for SSI units which could not result in the units being called non-independent which legal position has been affirmed in the cases reported in (i) 2013 (294) EL1 561 (T), (ii) 2008 [229] ELT 321 (SC), (iii) 2003 (152) ELT 194 (T.-Del), (iv) 2004 [167] ELT 299 [Tri Mum) (v) 2009 (243) EL1 79 (Tri Chennai) and (vi) 1993 (66) ELT 375 (Raj); CESTAT Chennai Final order in appeal Appeal Nos. E/41748, 41748, 41749 & 41750/2018 DB. The same position prevails for issue of invoices from the common premises.

11. In regard to the appeal filed by department it is submitted that the notice issued for the clubbing of clearances of the manufacturing units for the subsequent period on being confirmed by the original authority the same was vacated by the learned Commissioner of Central Excise (Appeals] Madurai vide her order in Appeal No.MDU-CEX-000-APP-05-2019 dated 30.01.2019 consequent to which the duty paid was also refunded to the units. The Ld. Counsel prayed that party / assessee appeals may be allowed and department appeal may be dismissed.

12. The Ld. A.R Shri M. Ambe appeared and argued for the department. The names of the firms related to BPKG, the addresses, date of commencement given in para 3.1.9 of OIO dt. 13.07.2016 is as under :

S. No.	Name of the Firm	Address	Name of proprietor/ partner	Date of formation	TIN no.	Date of surrender
1.	Balaji Packagings	141, Sukkiravarpatti Road, Anaikuttam, Sivakasi	V. Nagaraj, A. Subbiah & Smt. R. Rukmani (w/o Ravichandran)	8/7/1988	33186000558	
2.	Balaji Packaging Industries	136, Sukkiravarpatti Road, Anaikuttam, Sivakasi.	K. Ravichandran & N. Devaki (w/o Shri Nagaraj)	11/8/1995	33186001140	
3.	Balaji Cartons	144, Muthhunagaiya Puram, Periyapulampatti (P.O), Peraiyur	K. Ravichandran, Nagaraj and A. Subbiah	14/6/1999	33275041809	
4.	Balaji Ind Packs	141B, Sukkiravarpatti Road, Anaikuttam, Sivakasi	R. Rukmani (w/o K. Ravichandran)	11/8/2003	33576001944	
5.	K.R.K Packagings	1/90F Vadamalpuram, TTL-17-11-2009 [RAC]	K. Ravichandran	11/11/2005	33136002186	

6.	Sri Hari Packs	1/528, Sivakasi Co.-Op.Industrial Estate, Sivakasi.	S. Rajathilakar (s/o Subbiah)	15/6/2007	33596002418	
7.	Balaji Pack	136B, Sukkiravarpatti Road, Anaikuttam, Sivakasi.	K. Ravichandran, R. Rukmani (w/o K.Ravichandran) and Smt. N. Devaki (w/o V.Nagaraj)	1/2/2009	33546001718	31/12/2011
8.	Sri Balaji Pack Tech	1/363, Sukkiravarpatti Road, Anaikuttam	V. Nagaraj	14/10/2009	33156002854	31/12/2011
9.	Sri Andal Packagings	725/H-1, Virudhunagar Road, Thiruthangal, Sivakasi	K. Kanakaraj, (Brother of K. Ravichandran)	19/11/2009	33046002866	31/12/2011
10.	Sri Padmavathi Packs	1/17, North Street, M. Alagapuri, Meesalur (PO), Sivakasi	Smt. K. Devaki	7/10/2010	33895782385	31/12/2011
11.	Sri Eswari Packs	174, SIDCO Industrial Estate, Kappalur, Madurai	K. Gopi, relative of Shri V. Nagaraj (as Per stt.Dt.06.12.12 of Shri Kasi Viswanathan, Manager)	15/10/2010	33676003053	31/12/2011

13. From the above table itself, it is clear that in all the 11 firms, Shri Nagaraj, Sri K. Ravichandran, and Sri A. Subbiah were among themselves either as proprietors or as partners with their close relatives, Shri N. Devaki w/o Shri Nagaraj, Smt. R. Rukmini w/o Shri K. Ravichandran; Shri K. K. Kanakaraj brother of Shri K. Ravichandran, Sri S. Rajathilagar, s/o A. Subbiah. Some of the firms were closed on 31.12.2011.

13.1 The 10 units were dummy units floated by BPKG to wrongly avail the SSI exemption benefit, when the clearance of each unit exceeded

Rs.1.5 crore. In fact, all these units were managed by a group of three persons (GTP) namely Shri V. Nagaraj, Shri Ravichandran and Shri A. Subbiah. The other partners were close relatives of these three persons. The facts that these units were dummy units and did not have factory premises, machinery or workers for carrying out manufacturing activity is clear from the discussions by adjudicating authority in para 4 of the OIO dt. 13.07.2016. With regard to Sri Andal Packaging Ltd. (SAP) it was noted by the department that this firm has not obtained central excise registration for manufacturing activity. The invoices issued by SAP for BPI showed the address as 725/HI, Virudhunagar, Thiruthangal when officers visited this address, on 05.12.2012, it was seen that one Srinivasan claimed to be owner of the premises who was running hotel as 'Rajkamal'. On being asked about SAP he categorically stated that no such firm was in existence in the said address, and that the room was rented out to employee of BPI for accommodation for a short span. It is thus clear that no factory or machines was in existences in the name of M/s.Sri Andal Packaging. The corrugated cartons cleared under the invoices issued by SAP were in fact manufactured by M/s.BPI. The electricity consumption details of M/s.SAP was also obtained. On examination of the sales turnover as disclosed to commercial taxes and electricity, it appeared that SAP have declared to Commercial Tax Authorities a huge amount of sale proceeds without consuming any electricity which appeared to be sales turnover from trading.

13.2 Further on examination of the Despatch Register Sl.No.97 (enclosed in Sl.No.54 of Annexure B) seized from the premises of BPKG

under mahazar dated 04.12.12, it appears that it contains despatch details of corrugated boxes manufactured at BPKG; The details includes Name of the customer, No. of bundles, No. of boxes, Vehicle no. used for transporting the consignment and the name of the firm under whose invoice the consignment was sold. On examination of dispatch entries contained therein, it appears that there were despatches of Corrugated Carton Boxes which were manufactured at BPKG but cleared under the invoices of SAP; for instance. i. (860 +225+65) Nos. of corrugated boxes were despatched from BPKG to M/s.Thiyagarajar Mills Nilakottai, under the Invoices No.537 dated 02-03-2010 of SAP through vehicle No.TN67L0183 and the same is found tallied with the respective invoice found in the Invoice file bearing Sl.No.28 (Enclosed in Sl.No.28 of Annexure-B) containing the invoices of SAP recovered from the premises of BPI under mahazar dated 04.12.2012. On further examination of the dispatch details contained in the aforesaid Production Registers of BPKG and BC (para 4.1.3 & 4.1.4), it appears that there were despatches of Corrugated Carton Boxes, which were cleared under the invoices of SAP, found recorded through out the period for which production and dispatch details available in the said registers. One such instance is given in Annexure-I (SAP). From this it appears that the corrugated cartons sold under the invoices of SAP were manufactured in the premises of BPKG and BC.

13.3 On scrutiny of ledger folios for payment of conversion charges (Enclosed in SI.No.61 of Annexure-B), it appears that SAP have paid coolie charge of Rs.581244 to NAGA during the year 2009-10 (19-11-2009 to 31-03-2010) and Rs. 539700/- to BIP during the period

2011-12 (1-4-2011 to 31-12-2011) and during the period 2010-11 no coolie charges appears to have been paid by SAP. It appears from the discussion in paras 4.1.3, 4.1.4 & 4.1.5 of the impugned order that the finished products namely corrugated cartons were manufactured and cleared from BC and BPKG under the invoices of SAP. Further it also appears that SAP have paid cooly charges to BIP, as if BIP had carried out manufacture of corrugated cartons, but BIP did not have facility to manufacture corrugated cartons as discussed in para 4.5 of the order. It appears from the files containing invoices of SAP recovered from the office premises of BPI under mahazar dated 4-12-2012, that the invoices of SAP were prepared at the office premises of BPI. Shri R. Kasi Viswanathan, the Manager of BPI has inter alia stated in his statement dated 20-12-2013(Enclosed in Sl.No. 17 of Annexure-A) that he has been looking after the entire business activities of Balaji Packaging Industries and other allied units namely Balaji Packagings, Balaji Cartons, Sri Hari Packs, KRK Packagings, Balaji Packs, Balaji Ind Pack, Sri Andal Packgaings, Sri Pathmavathi Packs, Sri Balaji Pack Tech and Sri Eswari Packs and he also added that no associate firms has office except the common office functioning at the premises of BPI. Shri.K.Ravichandran, Partner of BPI vide his statement dated 19-12-2013, Shri.V.Nagaraj partner of BPKG vide his statement dated 18-12-2013 and Shri.A.Subbiah, partner of BPKG vide his statement dated 15-11-2013 have admitted that Shri.R.Kasi Viswanathan has been looking after the business activities of all the firms as per their direction.

13.4 All the above established that SAP was a fictitious firm which did not have factory premises, machinery, workers and the corrugated cartons were manufactured at BPKG & BC. Further all invoices and accounts were maintained by all firms at common office at BPI premises and maintained and monitored by single person Shri Kasivishwanath. Thus the value of clearance/sales effected under the invoices of SAP have rightly been clubbed / included with the value of clearances of M/s.BPKG.

13.5 The verification of details of M/s.Sri Padmavathi Packs (SPP) also revealed that the address given in the sales invoices of SPP was a residential premises. Sri Devaki, the proprietor of Sri SPP said that it is a residential building and not a factory. It was stated by her though she is the proprietor of M/s.SPP, the business activities are looked after by her husband Sri V. Nagaraj and Sri R. Ravichandran. It was also stated by her that it started on 17.09.2010 and was closed on 31.12.2011. It can be seen that M/s.SPP was a trading firm and the corrugated boxes sold by M/s.SPP vide invoices was manufactured in the factory of BPI. On comparing the details of sales turnover disclosed by M/s.SPP to Commercial Taxes Authorities (CTA) it was seen that without consumption of electricity and manufacturing activity they raised invoices and the sale proceeds are only from trading. On dispatch entries contained in the register seized from premises of BPKG it contained despatches of corrugated boxes which were cleared under invoices of SPP. For eg. On 04.01.11; 5300 Nos. of corrugated boxes appears to have been delivered from BPKG to M/s Devi Crop Science, but no corresponding invoice was there among the invoices of BPKG on

the said date contained in the files recovered from the premises of BPI, where the same quantity of boxes appears to have been cleared under the invoice nos. 233 of SPP contained in the Invoice File bearing sl.No. 106-1/2 (Enclosed in SI.No.56 of Annexure-B) of SPP recovered from M/s Balaji Packaging Industries under mahazar dated 04.12.2012.

13.6 On scrutiny of the ledger folio "Conversion Charges" for the year 2010-11 and 2011 12(Enclosed in S1.No.61 of Annexure-B), it appears that SPP had paid conversion charges of RS. 32,81,392/-to POTHIS & SRIPATHI in 2010-11 and Rs.37,64,554/- to BC in 2011 12; no coolie charges appears to have been paid to BPKG by M/s Sri Padmavathi Packs. It further appears from the discussion in para 4.2.3& 4.2.4above that corrugated cartons were manufactured and cleared from BPKG under the invoices of SPP, On examination of ledger folio under the head "INTER UNITS" (Enclosed in S1.No.61 of Annexure-B) for the period 2011-12, it appears that there were financial flow from one firm to other firms of BPKG group and no interest was paid to those firms, in the ledger folio under the head "TDS"; on examination of P&L for the years 2009-10 to 2011-12 of BPKG(Enclosed in S1.No.61 of Annexure-B) no income under head "interest" was shown.

13.7 In the case of M/s.Sri Balaji Pack Tech (SBPT) the address given in the sale invoice, as provided for obtaining commercial tax registration was a residential premises owned by Sri V. Nagaraj. He stated that he purchased raw materials such as Kraft paper, Gum etc. and send the same to BPI for the manufacture of corrugated boxes. SBPT was a trading firm and there is no requirement of workers and

electricity. The details of sales turnover of SBPT was obtained from CTA. On examination, it was found that without having factory premises, machinery and without consuming electricity, SBPT has declared huge sales turnover before CTA which appeared to be from trading. The production registers seized from the factory premises of M/s.Sri Hari Pack (SHP) it contained details of dispatch of corrugated boxes. It was seen that despatches of SHP were made under invoices of SBPT. For eg. In case of despatch of 700 nos. of corrugated boxes; it doesn't mention any corresponding invoice by SAP, whereas the same quantity of corrugated boxes are shown cleared under the invoice of SBPT on the said date. Sri K. Ravichandran admitted that boxes manufactured from other units were cleared in the name of M/s.SBPT. Thus M/s.SBPT was fictitious firm and corrugated boxes sold under invoices of M/s.SBPT are manufactured by M/s.BPKG.

14. Ld. A.R. adverted our attention to discussions in para 4.4 in regard to certain fictitious firms which though had machines was not carrying out any manufacturing activity. On examination of Registration Certificate (CTA) of M/s.Sri Eswari Packs (SEP) the office address was at Sukkiravarpatti Road, Thiruthangal. The factory address was at SIDCO, Kappalur, Madurai. When officers visited the factory premises, the factory was running with the name M/s.Naga Packagings and Sri Gopi was the Proprietor. Sri Gopi stated that after surrendering RC in the year 2007 he undertook job work for BPI, BPKG and BC by converting raw materials received from them into corrugated cartons. That RC was not needed from CTA for job work. It therefore

revealed that the sales turnover declared by SEP for the years 2010-11 and 2011-12 were not sales turnover of boxes manufactured by them but happened to be the boxes made in the premises of Naga by K. Gopi for BPKG group of firms. Sri K. Ravichandran of BPI stated that Sri Gopi was doing only job work and he was paid only conversion charges. It is very much clear that M/s.SEP is dummy firm. The electricity consumption of M/s.Naga Packagings was also obtained. On details of sales turnover of SEP and Naga Pacakagings the following was observed :

<u>Name</u>	<u>Year</u>	<u>Sales Turnover</u>
SEP	2010-11	57,55,845
SEP	2011-12	1,45,70,139
Naga	2011-12	1,04,756
	2012-13	5,51,264

15.1 The delivery notes recovered from the premises of M/s.Naga showed delivery notes of BPI, KRK, SHP, SAP underwhich raw materials were supplied to Naga. On examination of production register, recovered from BPKG, it appeared that boxes cleared under invoices of M/s.SEP were manufactured by M/s.BPKG.

15.2 On scrutiny of details collected from CTA in regard to M/s.Balaji Industries Pack (BIP), the Proprietor Smt. R. Rukamani, the address was Anakuttam, Thiruthangal. On comparison of electricity consumption with sales turnover, it appeared to be disproportionate. Where there was high turnover and less electricity consumption. Sri Ravichandran, her husband said that they did not possess important

machinery called "Corrugated Machine" which consumes huge electricity. Sri Kasi Vishwanathan stated that BIP did not have machinery and corrugation was done at BPI. Thus it is evident that boxes cleared from BIP were not manufactured by BIP. Thus BIP was only a dummy firm without sufficient machinery to manufacture products.

16. The Ld. A.R submitted that the firm viz. M/s.Balaji Cartons (BC) M/s.Balaji Packs (BP), M/s.Sri Hari Packs (SHP) though had machinery etc. for manufacturing boxes were clearing their goods under the invoices of other firm of the BPKG Group. On examination of the Reel Receipt note bearing Sl.No.11 73 (Enclosed in S1.No.41 of Annexure-B)) recovered from the factory premises of BC, it appears that BC had received kraft paper in reel form from BPI for the manufacture of corrugated boxes. Shri D.Murugan, Supervisor of BC has stated in his statement dated 4.12.2012 (Enclosed in si.No.22 of Annexure-A) that the plain kraft paper and printed kraft paper were received from BPI through the transport vehicle Van; the corrugated cartons manufactured at BC were cleared, to Britannia Industries under the invoices of BC prepared at BPI and sent through the transport vehicle van. On examination of the deliver notes contained in the File bearing Sl.No.143 (Enclosed in Sl.No.42 of Annexure-B) recovered from the premises of BPI under mahazar dated 04.12.2012, it appears that BPI had sent raw materials to the sister concerns of BPI including BC for the. Manufacture of corrugated cartons. When these delivery notes contained in the said file was shown to Shri K.Ravichandran, partner of BC, and was asked to comment, he has inter alia, stated in his

statement dated 19-12-2013 (Enclosed in Sl.No.10 of Annexure-A) (Ref: Ans. To. Q.No 14) that he agreed that the raw materials mentioned in the Delivery Notes contained in the aforesaid File (Sl. No. 143) were actually, delivered from BPI to its sister firms; whenever, orders were received in BPI with a request to deliver the goods within a very short period, raw materials were sent to BPI's sister concern's and corrugated cartons were got manufactured on behalf of BPI; the conversion charges for the cartons manufactured by BC for BPI were paid to BC from the account of trading firms of BPI viz. SAP, SPP and SBPT; no account had been maintained in the books of BPI for payment of conversion charges to BC.

16.1 On examination of delivery note books it appeared that Delivery Note Books of BPI, BPKG, SAP and Form JJ Book of BPKG and SHP, were kept in BC to Clear the Corrugated Carton Boxes manufactured at BC under Delivery Note and Form JJ of the. aforesaid other firms of BPKG group; the Corrugated Carton Boxes, despatched under the aforementioned Delivery Note and JJ Form seized from BC, were actually manufactured at BC. From this, it appears that BC got manufactured Corrugated Carton Boxes out of raw materials received from BPI and had cleared the same under the Delivery Note and JJ Forms of the aforesaid firms kept available in the factory premises of BC; no conversion charges were received by BC from BPI, BPKG, SHP and SAP.

16.2 Since all the firms were the group of Balaji firm, they had to resort to manufacture of corrugated boxes in one firm and clear the same under the invoices of another firm.

16.3 The Ld. A.R. adverted to the table in para 10.1.2 of the OIO to argue that Shri K. Ravichandran, Shri V. Nagaraj, Sri A. Subbiah had exercised managerial, operational and administrative control of all 11 firms. BPKG was constituted in 1988 and later all other firms were floated to evade payment of excise duty. They had common office and common staff for maintenance of accounts at the premises of M/s.BPI. Further, from examination of Ledger folio of each group firms under the head "SISTER CONCERN"(Enclosed in S1.No.6 1of Annexure-B), it appears that there was frequent financial lending from one unit/ firm to other unit/ firm during the material period; that the firms whose amount stand as outstanding in the account of other firm did not receive any Interest for such outstanding amount, a fact admitted by Shri.R.Kasi Viswanathan in his statement dated 20-12-2013 (Ref:Ans.to Q.No. 10). It appears that it is obligatory on the part of the debtor to deduct TDS from the interest amount payable to the creditor on the Outstanding amount; the ledger folios under the head "TDS" (Enclosed in S1.No.6lof Annexure-B) showing payments of coolie charges and interest paid to the Bankers indicate that while there were entries for payment of conversion charges to NAGA and SPPI for the job work of manufacturing corrugated cartons, interest paid to City Union Bank and other cooly charges paid to other job workers such as Lami Coats, Reka Cutting Works etc.; but no payment of conversion charges were indicated in the said account folios Viz. CONVERSION CHARGES PAID |Enclosed in SI.No.61of Annexure-B) among the BPKG group units/ firms such as BC, SHP or KRK; no payment of interest on the outstanding amount was made in the, said account folios for the

period April 2009 to January 2013 (Enclosed in S1.No.61of Annexure-B) among the group firms as creditors.

From the above, it appears that though there were financial accommodation from one firm to others, interest payable on the outstanding amount was never charged as per the ledger folios under the head "SISTER CONCERN", "TDS PAYABLE"(Enclosed in S1 No.61of Annexure-B); transfer of funds from one firm to other firm was done mainly for the procurement of raw materials when one firm has insufficient funds; such transfer of funds had occurred both the ways i.e. from BPI and BPKG to other firms and other firms to BPL and BPKG. Therefore, it appears that all BPKG group firms/ units have mutuality of interest among themselves, since the proprietors & partners of all the firms are closely related; they resorted to financial accommodation by lending of funds without charging interest and exhibited close interdependence in their activities; this was possible since business activities all these firms were monitored, managed and financially controlled by Shri K. Ravichandra Shri V. Nagaraj and Shri A. Subbiah with help of Shri Kasi Viswanathan, Manager of BPI.

16.4 Thus BPKG was run by the group of three persons and had mutuality of interest with all firms. The value of group firms (both trading & manufacturing) have been correctly clubbed for raising the demand.

16.5 In regard to the appeal filed by the department, the Ld. A.R submitted that Commissioner (Appeals) has erred in holding that periodical SCNs cannot be issued on the basis of very same investigations unless it is established that the said facts continue to

exist. It is prayed that assessee appeals may be dismissed and department appeal may be allowed.

17. We have heard the detailed arguments of both sides and perused the records carefully.

18. The moot point for consideration is whether the clubbing of clearances of the 11 units in terms of para 2 (v) and 2 (vii) of Notification No.8/2003-CE dated 01.03.2003 can be sustained or not.

19.1 Notification 8/2003 grants exemption from payment of excise duty in case of Small Scale Industrial units whose value of clearances does not exceed Rs.1.5 crores. This exemption is subject to certain conditions. The SCN dt. 27.03.2014 alleges that the aggregate value of clearances made by Balaji Packagings (BPKG) for the period 2008-09 (01.03.2009 to 31.03.2009) to 2012-13 should be calculated by clubbing the clearances of the clearances made by factories BPKG, SHP, BP, BC, KRK and BPI and also value of goods manufactured by job workers Naga and SPPI and also sales turnover of SAP, SPP, SBPT, SEP and BIP in terms of para 2 (v) and 2 (vii) of notification 8/2003.

19.2 The relevant para of Notification 8/2003 reads as under :

Para 2(v) "where a manufacturer clears specified goods from one or more factories, the exemption in his case shall apply to the aggregate value of clearances mentioned against each of the serial numbers in the said Table and not separately for each factory"

Para 2(vii) the aggregate value of clearances of all excisable goods for home consumption by a manufacturer from one or more factories or from a factory by one or more manufacturers, does not exceed rupees four hundred lakhs in the preceding financial year"

19.3 At the outset, it has to be stated that the department is a bit confused as to the provisions of Notification 8/2003 which have been invoked in the SCN. Para 2(v) speaks about the situation for calculation of aggregate value of clearances for exemption limit (Rs.1.5 crore) when a manufacturer has one or more factories. It states that for the purpose of calculating the value of aggregate clearances the value of clearances of each factory of manufacturer should not be considered separately. In other words, each factory of a single manufacturer cannot claim exemption limit of Rs.1.5 crores. Para 2 (vii) speaks about the situation of computing the value of aggregate clearances of a manufacturer who clears goods from one or more factories or from a single factory by one or more manufacturers. The exemption is available if the aggregate value of clearances does not exceed Rs.4 crores in the preceding financial year. These are separate situations. The SCN alleges that BPKG (run by three persons) is the manufacturer carrying out clearances from various other units, including the trading units. The value of clearances of all these units are to be clubbed together with the clearances of BPKG in terms of Para 2(v) of notification to raise the demand considering BPKG as a single manufacturer having many factories / units. However it is also alleged in the SCN that BPI exceeded the exemption limit of Rs.4 crores as provided in para 2 (vii) of notification No.8/2003 (see para 15 of SCN). Although it is alleged that BPKG which is run by GTP (Group of Three Persons) has exceeded the exemption limit and other units are dummy units, it is also alleged that BPI has exceeded the exemption limit of

Rs.4 crores in terms of para 2 (vii). Admittedly, BPI is a firm which holds Central Excise registration and is paying excise duty. In other words, it does not avail SSI benefit. The unit BPI clears its goods on payment of duty. This fact has been accepted by the adjudicating authority. The duty liability raised in SCN is Rs.2,43,82,782/-. Taking into consideration the duty paid by BPI (Rs.16,60,246/-) the amount confirmed was reduced by the adjudicating authority to Rs.2,27,22,336/- (para 11.01 of OIO). Though it is accepted that BPI is a duty paying unit, it is considered as a dummy unit and the clearances are clubbed. The demand is confirmed against BPKG partnered by GTP. Thus, the concession of duty already paid by BPI is given to BPKG partnered by GTP. A unit holding Central Excise registration and paying duty without availing SSI exemption benefit is now considered to be a dummy unit.

20. Apart from the confusion in invocation of provisions of notification 8/2003, we also find the conclusion arrived by department to be moving away from provisions of law. Before going into this discussion, we would like to reproduce the relevant part of the impugned order passed by Commissioner (Appeals) in regard to the demand for the subsequent periods. The discussions read as under :

“The department had not conducted any investigation to ascertain that the same modus operandi that existed at the time of investigation by DGCEI continued to exist during the subsequent period for which the impugned notices were issued. There is nothing on record to show that the same practice continued even after the period for which the first notice was issued. The charges of clandestine removal cannot be proved on conjectures and surmises. The Tribunal and Courts, in the various cases, has held that the charge of clandestine removal is to be established by the

department and that the burden to prove the clandestine removal lies solely and exclusively on the department and is required to be discharged by concrete and clear evidence. Mutuality of interest, financial integrity among various units and unit of control are sine qua non for clubbing of clearance of units involved. The CESTAT, South Zonal Bench, Chennai in the case of Commissioner Of C. Ex., Chennai-IV Versus B.K. Office Needs (P) Ltd. (2015 (318) E.L.T. 288 (Tri. Chennai)] had held that mere common partners and staff and common managerial control not sufficient to consider other units as one and same if no material on record of flow back of funds between Units having separate registration of sales tax and income-tax, etc. and that there is no reason for clubbing of clearances for purpose of duty demand. No allegation that the appellant and other units clubbed together were manufacturing their products by using common machinery, common labour or the like. It has been admitted by the department that the units have separate plant & machinery. The department had failed to produce any evidence or ingredients, as mentioned above, required for clubbing of clearances of the various factories with the appellant's value of clearance. Hence the demand has to be held as not sustainable.”

21. From the above, it can be seen that Commissioner (Appeals) has set aside the order passed by original authority for the subsequent period confirming the demand, interest and penalty on the ground that the department has not conducted investigation to adduce fresh evidence that same modus operandi is continuing for subsequent periods also. The department has issued subsequent SCNs by applying the facts of investigation for the previous period. As the issue is for clubbing of clearances and denying SSI exemption benefit alleging that the aggregate value of clearances for the disputed period has exceeded the prescribed limit of the notification, indeed, the department has to prove with fresh evidence that the assessee is not eligible for SSI exemption limit for the subsequent period also. In the absence of such evidence, the above view taken by the Commissioner (Appeals) according to us is legal and proper. It is also observed that the burden

to prove clandestine removal of goods is on the department. In case of clubbing of clearances of different units to deny the SSI exemption benefit there should be concrete evidence of mutuality of interest, financial flow among the units. The decision in the case of *CCE Chennai IV Vs B.K. Office Needs (P) Ltd.* - 2015 (418) ELT 288 (Tri.-Chennai) was relied wherein it was held that mere common partners, common staff, common managerial control is not enough to hold that there is flow back of funds and mutuality of interest so as to club the clearances. The department has filed appeal against this order of Commissioner (Appeals).

22. In the case of *Studioline Interior System (P) Ltd. Vs CCE Bangalore-I* - 2006 (201) ELT 250 (Tri.-Bang.) it was held that mere presence of common directors / partners cannot be reason for clubbing of clearances. The interest of parties directly or indirectly in the business of each other and flow back of profit of one unit to another has to be proved. When units belong to a group of persons, occasional financial accommodations may not be uncommon. When each unit is registered with Central Excise / State authorities there should be clear evidence to treat them as dummy units. The Hon'ble Supreme Court in the case of *Attire Industries* - 1995 (17) ELT 323 (SC) observed that 'Mutuality of Interest' means both the companies mutually got benefited with each other by sharing profit and losses.

22.1 The decision of the Apex Court in the case of *CCE New Delhi Vs Modi Alkalies & Chemicals Ltd.* 2004 (171) ELT 155 (SC) has been

relied by the adjudicating authority in para 10.3 and 10.4 of the order. The facts, in the case of *M/s.Modi Alkalies & Chemicals* show that all the three bottling units were located in one single shed and were separated from each other by small brick walls of 4 ft. height. The Directors of the three front companies were employees of MACL or other Modi Groups of companies and they were frequently changed. They had common staff for maintenance of records and operation. The main plant and machinery i.e. cylinders for filling the gas, had been supplied by MACL only and the total finance was provided by MACL as unsecured loans or had been arranged by finance companies whose whereabouts were not known to the directors. The balance sheet revealed that whatever income is earned went to MACL in the form of lease rent of cylinders. The facts in the case of *Modi Alkalies and Chemicals* reveal mutuality of interest and financial flow so as to profit only one unit. In the case before us, we do not find that only BPKG was receiving the income and that other units did not receive any income at all.

22.2 The Hon'ble High Court of Rajasthan, at Jaipur Bench in the case of *Ranu Tandon Vs UOI* - 1993 (66) ELT 375 (Raj.) held that value of clearances of two units cannot be clubbed together and the two units cannot be treated as one unit merely because of proximity of relationship or the situation of the two factories or because there are some common employees. There should be clear evidence of mutuality of interest and have common funding and financial flow back.

22.3 The facts in the case of *CCE & ST Hyderabad Vs Beaver Engineering Corporation* - 2017 (353) ELT 126 (Tri.-Hyd) was that clandestine removal of goods to three job workers was alleged by department. It was held that as all three job worker units were separate legal entities registered with statutory authorities including central excise department. The units were located in different places, having separate machineries, independent accounts and doing job work for their parties, the exemption of SSI benefit (earlier notification 16/97-CE dt. 1.4.1997) cannot be denied.

22.4 In the case of *CCE Vs Saron Mechanical Works* - 2016 (332) ELT 80 (P&H), it was held that clubbing of clearances cannot be done without declaring one unit as the dummy unit. The unit which was already working for almost six to seven years could not be said to be a dummy of another unit which is yet to come into existence. Mere quoting of statements of proprietors and employees was not enough. Also use of common electricity connection, accountant, store room for raw materials could not be reason for clubbing of clearances.

22.5 The Tribunal in the case of *Associated Engineering Projects Vs CCE & ST Meerut-I* - 2019 (370) ELT 756 (Tri.-All.) had occasion to consider the issue of clubbing of clearances. It was held that merely because the units are run by some family members and books of accounts maintained by accountant in one common office it cannot be held that there is mutuality of interest or financial flow back. In absence of such evidence, the clearances cannot be clubbed.

23. With this background, let us now proceed to examine the facts and evidence of the case before us. The three issues analysed by the adjudicating authority to arrive at the conclusion to club the clearances of all units is already noticed in para 7.1 of this order. In fact, all the eleven units are held to be dummy units by the department and the demand of duty is raised against a new unit i.e. BPKG run and operated by GTP. The unit BPKG has three partners viz. Smt. R. Rukmani, V. Nagaraj & Sri A. Subbiah. As per the statement given by Smt. R. Rukmani that her husband is looking after the business of the firm, the department has removed her from the partnership of BPKG. Needless to say, that there can be partners in a partnership firm who are not actively involved in the business of the firm. The law considers them as sleeping partners. Such sleeping partner shares profits and losses of the firm and cannot be disregarded or removed from rights and responsibilities of the firm. Smt. R. Rukmani is the Proprietor of Balaji Industries Pack (BIP). Smt. N. Devaki w/o Sri V. Nagaraj is a Partner in BPI which is a duty paying unit. Smt. R. Rukmani and Smt. N. Devaki are considered as dummy partners by department as per the table given in para 10.1.2 of the SCN dt. 27.03.2014.

23.1 The adjudicating authority, in para 7.1 and 7.2 of the impugned order dt. 13.07.2016 has discussed the arguments put forward by assessee against the creation of a new entity (GTP) consisting of Shri K. Ravichandran, V. Nagaraj & Sri A Subbiah. The

assessee has strongly opposed to such attempt of the department to create a new entity and disturb the partnership firms constituted by partners under the Indian Partnership Act, 1932. It is not disputed that all these firms including the trading firms are registered with the Commercial Tax Authorities. They are paying VAT under State law, filing returns etc. They are registered under TNGST Act, Central Sales Tax Act, Labour laws. They are filing separate income tax returns and are complying with TDS. The unit, BPI has obtained central excise registration and is paying excise duty for the clearances. It is thus argued by the Ld. Counsel for assessee that these units are separate legal entities and their partnership concern cannot be disturbed by reconstituting a new entity of three persons by the department. The discussion made by adjudicating authority in this regard is as under :

“07.01..... Their arguments appear to have strong force when viewed with the provisions of Partnership Act alone. But a business concern is not regulated by a single Act such as Partnership Act, Companies Act, Labour Act. On the other hand, each activity of it is governed by one or more laws to confer certain rights on it while vesting certain responsibilities to be fulfilled by it. Each law requires it to conform/comply with certain requirements to enjoy the rights conferred by it. It is thus clear that if one desires to enjoy certain rights conferred by a law, one needs to comply with its requirements or discharge of responsibilities imposed by it. Also in this case, the SCN, based on the investigation conducted has proposed to deny the SSI exemption availed by the group units in respect of the Corrugated Cartons and Pads accounted as their manufacture or got manufactured on job work basis by treating the proposed GTP consisting of S/Shri.K. Ravichandran, V.Nagaraj, and A.Subbaiah as the actual manufacturer of the goods and to assess them accordingly to the duty payable under the Central Excise Act. In view of the legal position explained above, I consider that there is nothing wrong in the proposal made in the Notice and the noticees are bound to meet the charges framed against them in order to enjoy the privileges conferred by the SSI exemption Notification and thus I over rule their preliminary objection and hold the same as not maintainable”.

23.2 The discussion is continued in para 07.03 and 07.04 wherein the adjudicating authority has relied upon the decision of Hon'ble Apex Court in the case of *New Horizons Ltd. Vs UOI* - 1995 SCC (1) 478 (SC) and held that by the process of "lifting the veil" the law can go behind the corporate personality or ignore the separate personality of each company. The decision in the case of *Delhi Development Authority Vs Skipper Construction (P) Ltd. and Others* - 1996 AIR 2005 SC was also taken support to conclude that the creation of a new entity viz. the GTP by the department is sustainable. In para 07.03, the adjudicating authority concludes as below:

"In view of the above legal position, the exception taken by the noticees to the proposal of creation of a new entity viz., the GTP by the Notice is not sustainable and accordingly I hold it so."

23.3 All along, in the SCN, and in the impugned orders, the department has created a new entity as 'GTP' and has confirmed the demand of duty against this new entity. In the operative portion of the order it is held that 'BPKG which is run and operated by GTP' is liable to pay the duty. In fact, there is no entity in existence as BPKG run by GTP. The partners of BPKG are three, including Smt. R. Rukmini. The department cannot create a partnership or entity. It has to be constituted as per consent and agreement between the persons who form the partnership. We have to hold that this approach taken by the department is fallacious.

24. Be that as it may, it is seen that the sales turnover of the trading firms have been clubbed together with the manufacturing firms. Sri Andal Packaging (SAP) and Sri Padmavathi Packs (SPP) are admittedly trading firms. It is alleged that they do not have machinery and that the addresses shown in the registration certificate issued by CTA shows residential premises / wrong address etc. Interestingly, the sales turnover of these firms are compared with the electricity consumption data obtained from electricity department and various conclusions have been arrived to club the sales turnover with the clearances of the manufacturing firms. The Trading units do not come under SSI exemption limit. We do not understand why the sales turnover of trading units also have been clubbed with clearances of manufacturing units. In para 4.2.4 with regard to the discussions made on SPP, it is found that the corrugated cartons sold under the invoices of SPP, another trading firm, were manufactured by BPKG. There is no evidence of receipt of raw materials by these trading firms to manufacture corrugated boxes. Being trading firms they have raised invoices for the goods manufactured by other firms. When there is no machinery, workers, no receipt of raw material they cannot be treated as manufacturing units to club the sales turnover with manufacturing units.

25. The Ld. Counsel for assessee has relied on Board Circular No.6/92 dated 19.05.1992 issued under Section 37B of Central Excise Act, 1944 to argue that Board has given instructions that different firms have to be treated as different manufacturers for the purpose of SSI limit. The said circular reads as under :

“The question whether different partnerships having common partners, are treatable as separate manufacturers of the same manufacturer, would be a question of fact in each case to be determined on the basis of such factors among other, like composition of the partnership, existence of the factory, licence, nature of goods manufactured etc. Different firms will be treated as different manufacturers for the purpose of exemption limit. But if a firm consisting of certain partners say A.B. & C. has got more than one factory, all these factories should, of course, be combined. Limited companies whether public or private, are separate entities distinct from the shareholders composing it. Hence each limited company is a manufacturer by itself and will be entitled to a separate exemption limit. If there are two firms with only some of the partners in common, each firm is entitled to separate exemption limit and hence the question of distributing the exemption may not arise. If one firm or one individual owns several factories, he or it gets exemption only in respect of one lot and the manufacturer being only one entity, there will be no question of distributing the exemption. Whether or not in the expression ‘by or on behalf of a manufacturer’ the expression ‘from one or more factories’ is added, the effect would be the same if the manufacturer is also the same. The expression ‘one or more factories’ only further clarified that whether the factory is one or more, it is the clearances by or on behalf of the same manufacturer which is to be taken into consideration for purpose of interpreting the exemption Notification. The matter requires to be viewed accordingly.”

26. In the case before us, though there are partners common in these firms, the constitution of all firms are different. In other words, the pattern of partnership is not repeated in any of the firms. As per the circular, when there are firms with only some of the partners in common, each firm is entitled to separate exemption limit. The clarification though issued with regard to Notification No.175/86, the principle is applicable to the present notification 8/2003 also. The adjudicating authority has not applied the circular. The reason is discussed in para 7.4 that only when firms & companies maintain their status as separate legal entities and when amenable to piercing the corporate veil the circular will not be applicable. All these units are firms and not companies. We find the conclusion arrived by adjudicating authority to be untenable in law.

27. Another main allegation is that Sri Kasi Viswanath was the accountant common to all firms who was maintaining the accounts. So also that all firms had common office premises at BPI. It has been held in various decisions that merely because the accounts were maintained at a common office, or the workers were same, it cannot be said that there is mutuality of interest. To establish mutuality of interest there should be some evidence to show that the profits of all the firms are taken by one or few persons only. In the present case, all the units are filing sales tax return, income tax return etc. separately. We do not find any evidence indicating mutuality of interest.

28. The department has also alleged financial accommodation between the firms and that interest was not paid. The Ld. Counsel submitted that temporary loans were given by one unit to another in case of necessity which is nothing irregular. These loans have been properly accounted and paid back as reflected in their financial records. The non-collection of interest for temporary loans itself cannot be a ground to consider the units as dummy units. Except for the allegation that some financial accommodations were made by one unit to another for which no interest was paid, there is no allegation of major funds being transferred by way of routing the income from all units to a single unit.

29. The non-payment of job work charges is another allegation for clubbing the clearances. According to appellant Sri Easwari Pack / formerly known as Naga Packing of which K. Gopi is Proprietor is a job work unit. The Ld. Counsel submitted that, job working units were independent units doing job work to others as well. All the transactions

have been properly accounted. In terms of notification 83-84/1994 job work by one SSI unit to another SSI unit is permissible if properly accounted. The adjudicating authority has denied to apply the above notification only for the reason that undertaking as required was not filed. The counsel submitted that in the case of *Salem Weld Mesh Vs CCE Salem* - 2007 (218) ELT 405 (Tri.-Chennai) it was held that SSI exemption of supplier of raw material under notification 83/94-CE cannot be denied for non-fulfillment of a minor procedural condition.

30. From the discussions made above, we find that department has failed to establish the allegations raised in SCN for clubbing of clearances of the 11 firms. Further, the creation of a fictitious/deemed group (GTP) to be responsible for clandestine activities also does not find favor with us. As per the provisions contained in the Partnership Act 1932, persons can come together to form a partnership firm. Such a partnership can be terminated or dissolved only as per law. An external agency like the department cannot constitute or disturb the constitution of the partnership by removing certain persons for the purpose of casting duty liability. The department has, in fact, made all eleven units to be dummy units and created a new entity 'BPKG run and operated by GTP' to be responsible for the clandestine activities. The provisions of law do not permit the same.

31. From the foregoing we are of the considered opinion that the impugned order dt. 13.07.2016 cannot sustain and requires to be set aside which we hereby do. For the same reasons, the order passed by Commissioner (Appeals) dt. 31.01.2019 requires no interference. The same is sustained.

32. In the result, the appeal filed by assessee is allowed. The appeal filed by department is dismissed.

(Order pronounced in the open court on 01.09.2023)

sd/-

(M. AJIT KUMAR)
MEMBER (TECHNICAL)

sd/-

(SULEKHA BEEVI C.S.)
MEMBER (JUDICIAL)

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