

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

REGIONAL BENCH – COURT NO. III

(1) Excise Appeal No. 41693 of 2013

(Arising out of Order-in-Original No. 07/2013-CE dated 30.04.2013 passed by Commissioner of Central Excise and Service Tax, No. 26/1, Mahatma Gandhi Road, Nungambakkam, Chennai – 600 034)

Mr. K. Bose Karta

M/s. C.G. Industries,
No. 2/391A, Vijayapuram,
Chithalapakkam,
Chennai - 600 073.

...Appellant

Versus

Commissioner of GST and Central Excise

Chennai North Commissionerate,
No. 26/1, Mahatma Gandhi Road,
Nungambakkam,
Chennai – 600 034.

...Respondent

With

(2) Excise Appeal No. 41695 of 2013

(Arising out of Order-in-Original No. 07/2013-CE dated 30.04.2013 passed by Commissioner of Central Excise and Service Tax, No. 26/1, Mahatma Gandhi Road, Nungambakkam, Chennai – 600 034)

Mrs. B. Vasuki, Proprietrix

M/s. Golden Industries,
Plot No. 116/131,
Old No. 2/390/ New No. 2/91,
Chitlapakkam,
Chennai - 600 073.

...Appellant

Versus

Commissioner of GST and Central Excise

Chennai North Commissionerate,
No. 26/1, Mahatma Gandhi Road,
Nungambakkam,
Chennai – 600 034.

...Respondent

With

(3) Excise Appeal No. 41696 of 2013

(Arising out of Order-in-Original No. 07/2013-CE dated 30.04.2013 passed by Commissioner of Central Excise and Service Tax, No. 26/1, Mahatma Gandhi Road, Nungambakkam, Chennai – 600 034)

Mr. K. Bose, Proprietor

M/s. B.V. Industries,
Plot No. 115/Door No. 2/390A,
30 Feet Road,
Chitlapakkam,
Chennai - 600 073.

...Appellant

Versus

Commissioner of GST and Central Excise

Chennai North Commissionerate,
No. 26/1, Mahatma Gandhi Road,
Nungambakkam,
Chennai – 600 034.

...Respondent

And

(4) Excise Appeal No. 41709 of 2013

(Arising out of Order-in-Original No. 07/2013-CE dated 30.04.2013 passed by Commissioner of Central Excise and Service Tax, No. 26/1, Mahatma Gandhi Road, Nungambakkam, Chennai – 600 034)

M/s. Kaleesuwari Refinery Private Ltd.

53, Rajasekaran Street,
Opp. Kalyani Hospital,
Radhakrishnan Salai,
Mylapore,
Chennai – 600 004.

...Appellant

Versus

Commissioner of GST and Central Excise

Chennai North Commissionerate,
No. 26/1, Mahatma Gandhi Road,
Nungambakkam,
Chennai – 600 034.

...Respondent

APPEARANCE:

For the Appellants : Mr. N. Viswanathan, Advocate (Sl.No. 1-3)
Mr. R. Anish Kumar, Advocate (Sl.No. 4)

For the Respondent : Mr. R. Rajaraman, Assistant Commissioner / A.R.
Ms. Anandalakshmi Ganeshram, Assistant Commissioner / A.R.

CORAM:

HON'BLE MS. SULEKHA BEEVI C.S., MEMBER (JUDICIAL)

HON'BLE MR. VASA SESHAGIRI RAO, MEMBER (TECHNICAL)

DATE OF HEARING : 18.08.2023
DATE OF DECISION : 14.02.2024

FINAL ORDER Nos. 40158-40161 / 2024

Order :- [Per Mr. VASA SESHAGIRI RAO]

These four Excise Appeal Nos. 41693, 41695, 41696 & 41709/2013 have been filed assailing the Order-in-Original No. 07/2013 dated 30.04.2013 passed by the Commissioner of Central Excise, Chennai-III confirming the demand of Excise Duty of Rs.4,01,21,130/- for the period from 01.01.2007 to September 2011 and imposing penalty equal to duty confirmed in terms of Section 11AC of the Central Excise Act, 1944 and also imposing penalties under Section 26 of Central Excise Rules, 2002 on M/s. Kaleesuwari Refineries Private Limited (hereinafter referred to as the 'principal'), M/s. B.V. Industries and M/s. Golden Industries. As all these appeals involve connected issues, these are taken up together for disposal.

2.1 Briefly stated the facts in these appeals are that the Noticees, Mr. K. Bose Karta of M/s. CG Industries (CGI), Mrs. B. Vasuki, Proprietrix of M/s. Golden Industries and Mr. K. Bose, Proprietor of M/s. B.V.

Industries (herein after referred to as 'Noticees') were engaged in the manufacture of Tin Containers falling under Chapter 73 of Central Excise Tariff Act, 1985 for packing vegetable oils by various refineries. The Noticee was not registered initially with the central Excise but got themselves registered during the course of investigation by Directorate General of Central Excise Intelligence (DGCEI).

2.2 On the basis of Intelligence that the Noticee was engaged in unaccounted production and clandestine removal of Tin Containers without payment of duty, despite the fact of their aggregate value of clearances having exceeded the upper limit of Rupees Four Crores, the officers attached to DGCEI, Madurai conducted the search of the premises of the Noticee on 05.02.2010.

2.3 Detailed scrutiny of the documents recovered from the premises of M/s. C.G. Industries had revealed that tin sheets were received directly as a Consignee for the goods sold to various Principals viz. M/s. Kaleesuwari Refinery Private Limited, M/s. GMS Traders, M/s. Arun Oil Trade and M/s. SSD Oils Mills Company Limited. Besides, invoices for supply of Tin Sheets to M/s. Kishore Industries, M/s. Golden Industries and M/s. B.V Industries were also found. All

these invoices for supply of Tin Sheets were found to have been issued by M/s. Tata Steel Limited., through their Marketing Agent/Consignment Agents at Chennai viz M/s. Tin Plate Company of India Limited. Investigations revealed that the Noticee had undertaken the job work of converting the tin sheets, supplied by the principals, into Tin Containers as per specifications prescribed by the latter. For such conversion they had collected kuli charges from their Principals. However, the department entertained the view that the process of conversion, bringing a new product into existence, which is different in character, identity and nomenclature than the raw materials, amounted to manufacture and CGI was to be treated as a manufacturer of Tin Containers falling under Chapter 73 of CETA, 1985 and was liable to pay revised excise duty, provided the aggregate value of clearances exceeded the exemption limit prescribed under Notification No. 8/2003-CE dated 01.03.2003 as amended. Further, Department was of the view that CGI also indulged in the manufacture of Tin Containers from the sheets procured in the name of other entities Viz. M/s Kishore Industries, M/s Golden Industries (Proprietrix, B. Vasuki) and M/s B.V. Industries (Proprietor, K. Bose) and cleared Tin Containers under the invoices of those said entities.

2.4 From the scrutiny of records/ documents and subsequent investigations, it appeared to the Department that the Noticees had created a few more proprietary units for name sake and manufactured Tin Containers for supply to oil companies but raised only kuli bills. In view of the above, department was of the view that that the value of Tin Containers manufactured in CGI and out rightly sold in the name of M/s. Golden Industries, Kishore Industries and M/s. B.V Industries during the period from 19.01.2009 to 24.12.2009 were liable to be clubbed with the value of Tin Containers manufactured on job work basis at CGI and supplied to various principals.

2.5 It was also revealed that M/s. CGI failed to get themselves registered, assess and pay the Central Excise duty on the Tin Containers so cleared in violation of Rule 4, 6, 9, 10 & 11 of Central Excise Rules, 2002. Further, it was alleged that the Noticees have not adopted the correct value in terms of Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 in as much as they have raised Kuli bills which failed to include the value of Tin Sheets used and the element of excise duty payable thereon and appeared to have evaded payment of Central Excise duty to the tune of Rs.4,08,21,130/-.

2.6 Thus investigations conducted has revealed that:-

- i. The Noticee had a factory located at 2/391A, Vijayapuram, Chithalapakkam, Chennai - 600 073, manufacturing Tin Containers falling under Chapter heading No.7310 of Central Excise Tariff Act, 1986.
- ii. The Noticee had primarily undertaken job work of manufacturing Tin Containers out of Tin Sheets supplied by the Principals against the receipt of kuli charges from them.
- iii. The Noticee had installed sufficient power operated machinery periodically in the year 2006-2007 and increased the production capacity to an extent of producing 4000 tins per shift and on an average **3500 Tin Containers per shift** so that it could manufacture Tin Containers more than the requirement of the principals.
- iv. Shri K. Bose had been managing and controlling the entire business activities of M/s. Golden Industries with his wife Smt. B. Vasuki as a sole proprietrix. When the production of Tin Containers

in the Noticee's premises was very high, the production was stopped in Golden Industries but Tin Containers had been manufactured out of the Tin Sheets procured in the name of Golden Industries and cleared to various outside customers on Golden Industries Invoices.

- v. Further, Shri K. Bose, Proprietor of the noticee had started a new proprietary firm "BV Industries" at the address 1/28, A.A. Road, Rajaji Nagar, Virudhunagar and obtained sales Tax Registration Certificate (Tin No. 33515741435). This address was found to be the address of his own residence. B.V. Industries has no separate factory premises and the Tin Containers manufactured out of Tin Sheets purchased in this unit's name were sold on outright sale basis to his customers.
- vi. Similarly, Shri K. Bose, Proprietor of the Noticee had started a new proprietary firm "Kishore Industries" giving the address 2/391A, Vijayapuram, Chithalapakkam, Chennai-73 with his brother-in-law (Shri S. Sathishkumar) as the proprietor of the firm and obtained sales Tax Registration Certificate (Tin No. 33210945338). This address is nothing but the factory premises

of the Noticee and M/s. Kishore Industries has no other independent factory premises.

- vii. The Noticee has raised only kuli bills for the supply of Tin Containers to the Principals, which did not contain the value of the Tin Sheets used and the element of excise duty payable thereon.
- viii. In view of the above facts, the value of Tin Containers manufactured in the Noticee's premises and out rightly sold in the name of M/s. Golden Industries, M/s. B.V. Industries and M/s. Kishore Industries (during period 19.01.2009 to 24.12.2009) are liable to be clubbed with the value of the Tin Containers, manufactured on job work basis at the premises of the Noticee which were supplied to principals and value to be determined in accordance with the provisions of Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 and the duty payable thereon is demandable invoking sub section 4 of Section 11A of the Central, Excise Act, 1944.

3. In view of the above, a Show Cause Notice dated 14.03.2012 was issued to M/s. C.G. Industries,

Kaleesuwari Refineries Pvt. Ltd., M/s. Golden Industries,
M/s. B.V. Industries apart from others proposing to:-

- i. re-determine the value of Tin Containers manufactured on job work basis in terms of Central Excise Valuation Rules, 2000.
 - ii. club the value of Tin Containers manufactured in CGI with those of manufactured and cleared under the invoices of M/s. B.V. Industries, M/s. Golden Industries and M/s. Kishore Industries on job work basis for various Principals, considering K. Bose as the manufacturer of Tin Containers in more than one factory or CGI as the unit manufacturing Tin Containers in the name of different manufacturers, in terms of Para 2(v)&(vi) of Notification No. 8/2003-CE dated 01.03.2003 as amended and to demand an amount of Rs.4,08,21,130/- towards excise duty and cess as applicable.
 - iii. to impose Penalty under Section 11AC of Central Excise Act, 1944 and Rules 25 of Central Excise Rules, 2002 and levy applicable interest.
4. After due process of law, the Ld. Adjudicating Authority confirmed the above demand of excise duty on M/s. CG Industries and imposed equal penalty under

Section 11 AC, besides imposing penalties of Rs.2,00,000/- on M/s. Kaleesuwari Refineries Pvt Ltd., Rs.1,00,000/- each on M/s. Arun Oil Trade and M/s. GMS Traders and Rs.50,000/- each on M/s. Golden Industries, M/s. B.V. Industries and M/s. Kishore Industries.

5. Aggrieved by the above Order, the Noticees are on appeal before this forum.

6.1 Shri. N. Viswanathan representing all the Noticees has submitted that the issues involved in these appeals are related to denial of SSI exemption Notification and clubbing the value of clearances of the Noticees' job working units along with one other unit by name Kishore Industries belonging to the brother-in-law of one of the Noticees Mr. K. Bose.

6.2 The Ld. Advocate submitted that these small-scale coolie units undertaking job work were engaged by three major oil companies namely Kaleesuwari Refinery P Ltd., and its group companies viz. GMS Traders, Arun Oil Trade both from Sivakasi and SSD Oil Mill Company Ltd., Chennai for the manufacture of metal tins on job work basis used for packing of oils, manufactured by

these oil companies. The admitted fact as revealed in the Show Cause Notice is that these oil companies procured Tin Sheets from the reputed manufacturers on payment of appropriate duty of excise and supplied the same to the Noticees to undertake the manufacture of the tins on their behalf on payment of coolie of Rs.7.40/- per tin except for SSD Oil Mill Company Ltd., which paid Rs. 9/- per Tin. The above coolie charges paid covered all costs including the transportation charges.

6.3 The Ld. Advocate submitted that in spite of the investigation being carried out with the above oil companies and the supply of the duty paid nature of the tins by them verified and the above coolie only being paid to the Noticee, the quantification of the possible tins manufactured out of the said supply was computed based on the weight of the Tin Sheets supplied for sustaining the huge demand for duty on the Noticee which included the value of the duty paid Tin Sheets also. No proper financial verifications were carried out by the investigation in this matter even when it was clear to the investigation that the oil companies admitted themselves to be the principals engaging the Noticee units for the above job work and the financial benefit of the exemption accruing only to these oil companies namely suppliers of the principal raw materials requiring

these oil companies to be treated as the manufacturer of these goods as per Board's circular No. 56/56/1994-CX dated 14.09.1994 read with Notification No. 36/2001 CE [NT] dated 26.06.2001 whereas the Noticees who were coolie job workers were slapped with the huge demand and that too by unreasonably clubbing their value of clearances to deny the benefit of the SSI exemption.

6.4 The Ld. Advocate pointed out that Golden Industries, [GI], Virudhunagar a proprietrix firm owned by Mrs. Vasuki wife of Mr. Bose was admittedly the first of the clubbed units started in the year **1996** to engage in the manufacture of tins which was admitted by the investigation to have existed at Virudhunagar till September 2009 and later shifted to Chennai. This unit it is claimed had continued to use its address at Virudhunagar and the pre-printed invoices available with it showing Virudhunagar address. This unit admittedly existed along with the other units started later in the years 2006 and 2008. Mrs. Vasuki it is stated had rented out a new place at the address at Chennai for producing the tins by furnishing the copy of the lease deed dated 02.02.2008 which however was rejected as an afterthought by the Adjudicating Authority. The advocate pointed out that the notice claimed this unit as one created only for namesake during 2007-08 and was non-

existent since 2008-09 even while quantifying the manufacture and clearance of the said unit from 2006 onwards for clubbing with CG Industries. The Ld. Advocate referred to Paragraph 15.2 of the notice wherein it was recorded that assuming that Golden Industries had been manufacturing Tin Containers in the premises located at Virudhunagar the entire activities of the firm were controlled and managed by Bose as his wife did not know the activities of the firm as admitted to consequently claim that Bose can be considered as manufacturer manufacturing Tin Containers in more than one factory for the purpose of clubbing.

6.5 As regards M/S. B.V. Industries [BVI] of which Mr. Bose is the proprietor it was submitted that the said unit was started on 21.06.2006 by obtaining a registration at the residential house of Bose at 1/28 AA Nagar, Rajaji Road, Virudhunagar to be later moved to the address at Chennai without change of the address or the registration and had used the invoices pre-printed with Virudhunagar address. In support of this, a copy of the lease agreement dated **19.02.2008** was submitted which the adjudicating authority had rejected as an afterthought. The advocate stated that this unit which admittedly undertook outright sale of the Tin Containers was claimed to be a non-existent/dummy unit.

6.6 As regards M/S. Kishore Industries [KI] which was admittedly started by Mr. Sathishkumar, brother-in-law of Mr. Bose at 2/391 A, Vijayapuram, Chitalapakkam, Chennai and who admittedly obtained VAT registration and later moved to the premises at 2/880 Valluvar Nagar Chitalapakkam after developing enmity with his brother law and is independently carrying on business at the said premises in his own capacity. The said Sathishkumar who is suspected to be the defacto complainant against Mr Bose had given a statement that the goods were manufactured for only eleven months between 19.01.2009 to 24.12.2009 using his name by CG Industries was clubbed with the clearance of CGI by claiming that the said unit was non-existent only for the above short period even while admitting its independent existence after the said period.

6.7 M/S. C.G. Industries which is a HUF of which Mr. Bose is the Karta and which has an independent status on which the entire demand has been confirmed by the Adjudicating Authority was started on 21.06.2006 much later to Golden Industries. The Ld. Advocate pointed out that as per the notice the HUF is not different from the Proprietor of BV Industries on account of which clubbing of the clearances of BVI GI and KI were made because

Mr. Bose in his statement has admitted that he is the proprietor of CGI, even when the documents on record showed CGI to be a HUF only and was recognised as so by the IT Department.

6.8 The advocate in the light of the above admitted facts raised the objection that since the order passed had overlooked the admissions made in the notice and the consequent proposal made to record a totally different finding beyond the scope of the notice, the impugned order passed necessarily required to be set aside. It was pointed by the advocate that the notice dated 14.03.2012 had asked the 1st Noticee to show cause as to why the value of the Tin Containers manufactured in CGI cleared under the invoices of BV Industries, Golden Industries and Kishore Industries should not be clubbed with the value of the Tin Containers manufactured at CGI on job work basis for the principals *viz.* Kaleesuwari Refinery P. Ltd., Arun Oil Trade, GMS Traders and SSD Oil Mills company Ltd., by considering K. Bose as the manufacturer of the tin containers in more than one factory or CGI as the unit manufacturing tin containers in the name of the different manufacturers in terms of Paragraphs 2 [v] and 2 [vi] of Notification No. 8/2003-CE dated 01.03.2003 as amended. The Ld. Advocate argued that the invocation

of Paragraphs 2 [v] and [vi] in the notice evidences to the fact of existence of different manufacturers and different factories which the notice wanted to club as clearances from different factories by a manufacturer or from a factory by different manufacturers and never proposed as goods only manufactured by Bose the 1st Noticee from his factory only. Such an allegation or proposal according to the advocate was also not possible since the admitted facts on record showed that GI was in existence much before the existence of CGI and KI was claimed to be owned by one Satish who also took out registration and later claimed to have moved out to a new premises and continued to carry on the business leaving no room for treating the said units as dummy or camouflaged. It is therefore the submission of the advocate that in the above admitted position when each of the unit existed separately, even if for the sake of argument it is admitted that from 2008 the eligibility of the SSI exemption notification is to be decided by computing the aggregate value of previous years clearances it can only result in denial of the exemption to each of the units and for the consequent demand from each of the units and could not have been made only on GGI.

6.9 The Ld. Advocate further contended that this basic anomaly in the notice admitting to the existence of different manufacturers and factories but making the demand on one of the Noticees viz., CGI by proposing to club the clearance of all the units on the ground that GI which was owned by the wife of Mr. Bose is controlled and managed by him only and that for CGI Mr. Bose is the Karta and just for eleven months KI owned by Mr. Sathishkumar functioned at CGI without considering the well settled principles of law permitting the clubbing of units only if shown that the units were dummy or camouflaged or there is flow back of finance from the units to the unit in whose name the clearances are proposed to be clubbed, which is not the case of the revenue warrants the setting aside of the demand on this sole ground alone. The Ld. Advocate submitted that in spite of the above admission and proposal made in the notice the respondent adjudicating authority had traversed beyond the scope of the notice to record in the last Paragraph of para 31 of her order that the investigation established that:-

*"the management of the entire affairs of GI by the Noticee and floating of KI in the premises of the Noticee and the non-existence of BVI; These facts clearly suggest the manufacture of the specified goods by the Noticee Therefore I am of the reasoned view that all the clearances of the specified goods accounted in the different units **had been manufactured in the premises by the noticee and therefore the noticee is the manufacturer of the specified goods.**"*

This conclusion drawn by the adjudicating authority is contrary to the very proposals made in the show cause notice for the clubbing of clearances of all the units invoking Paragraphs 2 [v] and [vi] of the SSI notification which require the impugned order to be set aside.”

6.10 The Ld. Advocate has further argued that the finding recorded by the adjudicating authority in para 29 in support of clubbing of the clearances of GI even while accepting to its independent existence for the only reason that its affairs are managed by Mr. Bose the husband of the proprietrix and that she has no knowledge or control over the unit expose the height of prejudice and improper application of law contrary to the settled positions of law. Reasoning recorded in Paragraph 28 of the impugned order to club the clearances of KI on CGI for the only reason it was floated by the K. Bose and functioned at the premises of CGI for a short period of eleven months even when the statement of Sathishkumar claimed that he started the unit and obtained VAT registration and commenced production in January 2009 do not approve of the said finding. Similarly, the refusal to accept the documentary evidence produced in the form of lease deed for the existence of Golden Industries and BV Industries on the pretext that it was introduced at the later stage is not

legally acceptable. Again, the finding of the respondent to deny the claim of the 1st Noticee that as the Karta of the HUF owning M/s. C.G. Industries and in his capacity as the proprietor of M/s. B.V. Industries are separate entities eligible for the small-scale exemption independently is contrary to the Section 2(31) of the Income Tax Act and the decision of the Hon'ble Tribunal in the cases of (a) *Commissioner of Central Excise Vs. Suchita Steels (India) Ltd. [2015 (327) ELT 378]* and (b) *Commissioner of Central Excise Vs. Arbuda Industries [2008 (230) ELT 159]*. The clubbing of the clearances of BVI with CGI by relying upon the decision of the Tribunal in the case of Vikrama Engineering Co., which only related to the concept of related persons under Section 4 of the Act is not proper or correct.

6.11 The Ld. Advocate submitted that it is settled in law that to maintain the allegation that one unit is the dummy of the another and to propose the clubbing of the clearances of both the units the revenue is under the statutory obligation to establish financial flow back, interdependence, pervasive financial and management control as per the decision of the Hon'ble Rajasthan High Court in the case of *Renu Tandon Vs. UOI [1993 (66) ELT 375]* which was affirmed by the Apex Court in the case of *Commissioner of Central Excise Vs. Electro*

Mechanical Engg. Corporation [2008 (229) ELT 321] and which ratio was followed in umpteen number of judicial decisions including in the cases of

- i. *Ghaziabad Organics Ltd., Vs. Commissioner of Central Excise, Ghaziabad [2016 (344) ELT 965 (Tri.-All.)]*
- ii. *Commissioner of Central Excise Vs. Vaspar Concepts P Ltd., [2006 (196) ELT 95 (Tri.-Bang)]*
- iii. *Commissioner of Central Excise Vs. Saron Mechanical Works [2016 (332) ELT 80 (P&H)]*
- iv. *B.K. Office Needs (P) Ltd. [2015 (318) ELT 288]*
- v. *Commissioner of Central Excise Vs. Poona Radiators and Oil Coolers [2017 (347) ELT 320]*
- vi. *Commissioner of Central Excise Vs. Agarwal Rubber Pvt. Ltd. [2009 (238) ELT 336]*
- vii. *Shree Nirmal Spinners Vs. Commissioner of Central Excise [2014 (300) ELT 469]*
- viii. *Associated Engineering Products [2019 (370) ELT 756 (Tri.-All)]*
- ix. *Commissioner of Central Excise, Kanpur Vs. Sharad Industries [2013 (294) ELT 561 (Tri.-Del.)]*
- x. *Alpha Toyo Ltd., Vs. Commissioner of Central Excise, New Delhi [1994 (71) ELT 689 (Tribunal)]*

The Ld. Advocate has put forth that even a whisper of any financial flow back of funds or common control or financial control to warrant the clubbing proposed has been unravelled by the investigation.

6.12 Further, the Ld. Advocate submitted that the other units whose value of production and clearance are sought to be clubbed with the value of clearances of the 1st Noticee have their own PAN, filed Income Tax and VAT Returns, Electricity charges as shown in the Show Cause Notice itself besides some of the units having been functioning before CGI which clearly evidenced to their independent existence as separate legal entities and hence clubbing the value of clearances of M/s. B.V. Industries, M/s. Golden Industries and M/s. Kishore Industries is not legal or correct. In support of this contention the advocate relied on the decisions in the cases of (a) *Associated Engineering Projects Vs. Commissioner of Central Excise [2019 (370) ELT 756]* and (b) *Commissioner of Central Excise Vs. S.C. Patel [2011 (264) ELT 414]*.

6.13 The advocate adverting to the tacit view recorded in the show cause notice that all the units except for BVI had supplied their products only to the three customers namely the three major oil companies to hold that they are dummy units to warrant the clubbing of their value of clearances is also not correct by citing the decision of the Hon'ble Tribunal in the case of *Balsara Hygiene Products Ltd. Vs. Commissioner of Central Excise [2012 (278) ELT 526]* which was affirmed

by the Apex Court in *Commissioner of Central Excise Vs. Balsara Hygiene Products Ltd.* [2015 (321) ELT A146].

6.14 The Ld. Advocate without prejudice to any of the foregoing grounds further pointed out that as per the notice the intelligence said to have been received by the authorities which necessitated the investigation was that C.G. Industries [CGI] was suppressing its production and was engaged in clandestine removal of the containers without payment of the duty despite its value of clearance being more than 4 Crores, whereas during their cross examination admitted that no stock taking or verification of manufacture either by the Noticees or by the other units or by other contractors was carried out and no attempt was made to quantify the production based on any records, for the reason that that there was no documents available to undertake such quantification except for the cooli bills besides admitting that manufacturing operations were in progress at the premises but the officers did not ascertain whether it was carried out by the contractors or workers employed. It was submitted that the finding recorded by the respondent in para 27 of the impugned order to rule out that the contractors who worked at the premises of CGI are not manufacturers of the goods on fact or law by merely relying upon the statement obtained from the 1st

Noticee that those persons supervised the work of the labourers employed under them even when the investigation has not examined or ruled out the said issue on fact or by law renders the said finding bad in law.

6.15 The Ld. Advocate further submitted that apart from the notice admitting to the existence of the above units at different points of time with each of the units registering with the VAT authorities and filing the statutory returns and also the IT returns which the officers obtained during investigation, no attempt was made to verify those documents obtained whereas the income and expenditure accounted by GI & KI have showed expenditure towards manufacture and CGI had shown expenses towards sub-contracting in their respective financial records which were obtained and examined by the investigation but no weekly or monthly production of the units was ascertained. The case of the revenue for clubbing was built on the multiple statements obtained from Mr. K. Bose only without proper examination of the documents obtained during investigation and without considering the much-needed financial investigation even though the three oil companies admitted to engaging Mr. K. Bose in their capacity as a principal. The advocate further submitted

that the Adjudicating Authority herself admitted to the non-ascertaining of the weekly or monthly production of the units in the impugned order but had supported the case of the revenue by approving and confirming the demand based on the statement obtained from Mr. Bose concerning a day's production only and that too pertaining to the end of the period of demand namely on 23/24.5.2011 and on the presumed figures adopted by the investigation based on the possible number of tin sheets that were used, by relying upon a customs judgment relating to pre-ponderance of probability and onus of proof has no application whatsoever to the case of the Noticees. The whole case was made out by the revenue on conjectures and surmises as to the purchase of the other raw materials required, the consumption of electricity and the non-production of the proof for the transportation of the alleged manufactured goods from the Noticee end to customers' end by merely placing reliance on the so-called voluntary depositions obtained, hearsay as well as retracted depositions.

6.16 The advocate in support of his above contention relied upon the following judicial pronouncements *viz.*:-

- (a) *Commissioner of Central Excise Vs. Mittal Pigment Pvt. Ltd.* [2018 (16) GSTL 41]
- (b) *Alphine Panels Vs. CCE* [2014 (311) ELT 754]
- (c) *Manubhai u. Patel Vs. CCE* [2002 (142) ELT 53]

- (d) *A R Shanmuga Sundaram Vs. CCE [2016 (333) ELT 158]* affirmed by the Hon'ble Madras High Court in *A R Shanmuga Sundaram Vs. CESTAT [2022 (380) ELT 151]*; and
- (e) *CCE Vs. SVA Steel Rolling Mills Ltd. [2018 (362) 411] [MAD.HC]* holding that 'The burden to prove clandestine manufacture and removal is on the revenue. Direct evidence of clandestine removal would rarely be available and the standard of proof has to be necessarily based on preponderance of probabilities. Conjunctures and surmises cannot be the basis of proof, when clandestine removal is alleged and for establishing the said charge, there should be positive evidence. Therefore, when the department alleges clandestine production and removal of goods, without due proper accounting in the records and without payment of duty, the burden of establishing the allegation lies heavily on the department. In the case on hand, the department, has not discharged the burden'.

6.17 The Ld. Advocate further pointed out that as per the investigation 'the machineries installed at CG Industries were operated with the aid of power since 2008' as per Paragraph 4/2 [b] of the notice whereas as per Paragraph 10.1, the installed machinery operated with aid of power progressively since 2006, leading to self-contradiction. The advocate has further argued that in such a case, there should have been a quantum jump in the quantity of Tin Containers alleged to have been manufactured by the Noticees from the year 2008 compared to that of previous years. However, as per the Show Cause Notice itself the containers alleged to have been manufactured by the Noticees in the year 2007-08 was 8.09 lakhs and in 2008-09 it was only 9.04 lakhs and in 2009-10 it was 10.7 lakhs only and in 2010-11 it was only 9.58 lakhs which clearly showed that there was no quantum jump in the manufacture due to

electrification, which makes the allegation that the Noticees himself manufactured the entire quantity of tins is far from truth. On the other hand, the advocate pointing to the admission made in the notice that it is possible to manufacture the tins by hand operated machines also there is every possibility of the other units manufacturing the tins on job work basis at their respective places or by engaging the contractors which cannot be ruled out in the absence of any admissible and justifiable evidences brought on record that these goods were only manufactured by the principal manufacturer to be clubbed for the purpose of denial of the SSI exemption since the said proposal is based on a presumption in the light of the admitted fact that most of the units were in existence at different points of time.

6.18 The Ld. Advocate also submitted that the impugned order omitted to consider that for the manufacture of the Tin Containers requires the use of 'tin sheets, handle, copper wire, oil, lead, plastic rope, solutions, lid'. However, there is nothing on record to even to suggest, that the said raw materials *viz.*, handle, copper wire, oil, lead, plastic rope, solutions, lid were indeed procured and used by the Noticees at their factory for manufacture of impugned Tin Containers. The Ld. Adjudicating Authority even though takes note of the fact that there was no documentary proof for the

movement of the raw materials namely Tin Sheets from Chennai to Virudhunagar failed to consider that equally there was no documentary proof for the movement of the finished goods also and therefore the contrary findings recorded by the said authority based on the said fact is not correct. In other words, it is argued that when it is alleged that the coolie included the freight element, for transportation of the manufactured tins, the Noticees would have necessarily engaged transporters for transporting the tins from Chennai to the customers' premises (oil companies) whereas nothing was brought on record to show that there was any outward movement of the finished goods from the Noticees premises at least even one testimony from any one of the transporters identified by the investigation. Therefore, also the above findings recorded by the Adjudicating Authority are not sustainable.

6.19 It is the further contention of the advocate that the coolie of Rs.7.40 included electricity charges of Rs.0.40 per container. Hence, for the alleged manufacture of 42,38,710 containers, the Noticees ought to have paid Rs.16,95,484/- toward electricity charges. However, there is nothing on record to show that the Noticees had paid the said amount or at or about electricity charges except the allegation that the Noticees had 'two service connections in its premises

viz., SC No.629 with load of 0.72 KW and S.C.No.764 with load of 10KW' and the electricity consumption 'showed an increasing trend of consumption a vague allegation to claim that it proves the progressive/periodical installation of machinery functioning with aid of power'. However, there is nothing on record in the Show Cause Notice to support the allegation of 'increasing trend' of power consumption and the so-called increase in trend of power consumption whether consumed in proportionate to the increase in the manufacture of Tin Containers.

6.20 The Ld. Advocate further submitted that the use of the common premises for the storage of raw materials by SSI units for the logistic purposes should not have been viewed so as to make them ineligible for the SSI exemption and certainly the clubbing of their clearances is not permissible on that account as has been held in the plethora of judgments.

6.21 The Ld. Advocate also without prejudice to any of the above contentions on merits referring to the quantification of the duty demand submitted that the same is erroneous and incorrect besides contending that the invocation of the extended period under Section 11A(4) of the Central Excise Act to the admitted facts of this case is not proper or correct.

6.22 The Ld. Advocate concluded that since the revenue had not established their case for the proposed clubbing, the impugned order sustaining the demand with interest and the penalty on CGI needs to be set aside.

6.23 As regards the order imposing the penalty under Rule 26 of the Central Excise Rules on the 2nd and 3rd Noticee it is the contention of the advocate that the same is also not sustainable both on merits and on the ground that the allegation made in Show Cause Notice does not meet the express provisions contained in Rule 26 *ibid*.

6.24 He accordingly prayed for allowing the appeals by setting aside the common order with consequential benefits.

7. The Ld. Authorised Representative Shri R. Rajaraman representing the Department reiterated the findings of the lower Adjudicating Authority. He has submitted that the investigation has conclusively proved that the Noticee *viz.*, Bose was conducting all the manufacturing of Tins in different units which are namesake firms and dummy units to split the production to misuse the SSI exemption.

8. Heard both sides and carefully considered the submissions and evidences on record especially the Show Cause Notice dated 14.03.2012 and the impugned Order-in-Original No. 07/2013-CE dated 30.04.2013.

9. The main issues for consideration in these appeals are :-

- i. Whether M/s. C.G. Industries, M/s. Golden Industries and M/s. B.V. Industries are to be treated as independent manufacturers of Tin Containers or as job workers of the principals viz., M/s. Kaleesuwari Refinery Private Ltd. and others who have supplied Tin Sheets for their conversion into Tin Containers on payment of coolie charges per Tin Container basis considering the facts of these appeals?
- ii. Whether the clubbing of clearances of Golden Industries, B.V. Industries and Kishore Industries with the clearances of M/s. C.G. Industries in terms of Para 2(v) and 2(vi) of Notification No. 8/2003-CE dated 01.03.2003, is justified or not considering the evidence unravelled by the investigation?

- iii. Whether valuation of Tin Containers manufactured on job work basis for various principals determined in accordance with the provisions of Valuation (Determination of Price of Excisable Goods) Rules, 2000 is legally justified?

10.1 It is evident from the facts obtaining in these appeals that the Noticees are receiving the Tin Plates as the consignees whereas the payment for Tin Plates has been made by the principals. Thus, the Noticees have undertaken the job work of converting Tin Sheets supplied by the principals into Tin Containers as per their prescribed specifications. The Noticees are being paid coolie charges for such conversion. The Tin Containers are cleared to the principals *viz.*, M/s. Kaleesuwari Refinery Products Pvt. Ltd. and others without any valid invoices but under delivery challans and coolie bills. A mere reading of the Show Cause Notice clearly indicates that the Noticees were undertaking job work of manufacturing Tin Containers out of Tin Sheets supplied by the principals for coolie charges. The coolie bills raised for the supply of Tin Containers did not include the value of Tin Sheets or an element of Excise duty paid or payable thereon. The principals had periodically inspected the raw-materials as a part of

supervision of the process of manufacture to ensure the quality of the Tin Containers manufactured.

10.2 Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 also refers to the job worker as a person engaged in the manufacture or production of goods on behalf of a principal manufacturer, from any inputs or goods supplied by the said principal manufacturer or by any other person authorised by him. The Board Circular No. 56/56/1994-CX dated 14.09.1994 has considered the terms "raw material supplier" and "job worker". 'Raw material supplier' includes a person who supplies raw material to a job worker to manufacture a product or to undertake any process incidental or ancillary to the completion of a manufactured product or to do anything which is specified under the Central Excise and Salt Act, 1944, in relation to any goods, as amounting to manufacture. 'Job Worker' includes a person or a manufacturer who manufactures a product or undertakes any process incidental or ancillary to the completion of a manufactured product or does anything which is specified under the said Act, in relation to any goods, as amounting to manufacture from the raw material supplied by the other person. Job work has been defined under Rule 2(n) of the CENVAT Credit Rules, 2004 to mean processing or working upon of raw

material or semi-finished goods supplied to the job worker, so as to complete a part or whole of the process resulting in the manufacture or finishing of a product. In order to determine whether the job worker has undertaken the manufacturing on his own or on behalf of the raw-material supplier, it is important to examine the relationship between the raw-material supplier and the job worker. Whether such an activity has been carried out on principal to principal basis or not will depend upon the relevant facts and circumstances of each case. This relationship could be ascertained with reference to the facts such as whether the job worker has received any financial assistance from the supplier of the raw material, whether the supplier of the raw material exercises any control over the management of the affairs of the job worker and whether the job worker is an independent entity and not merely a dummy or an agent of the raw material supplier has to be ascertained. It is evident that there is no written agreement between the job workers and the raw-material suppliers. Raw-materials were supplied to the Noticees which cost is borne by the principals and the Noticees were asked to manufacture Tin Containers and supply at a piece rate i.e, on payment of coolie charges. All the above details of the transactions between the Noticees and the principals very clearly indicate that the Noticees were undertaking mostly the work of converting the Tin

Sheets into Tin Containers on payment of coolie charges and clearing under delivery challans and invoices raised for coolie charges. As the Noticees have not borne the cost of the raw-materials supplied, it appears to us that the Noticees are only mere job workers and the principals are the manufacturers. In the manufacture of Tin Containers, cost of raw-material accounts for more than 90% and job work charges come to only around 10%. The principals are purchasing the Tin Sheets which are supplied to the Noticees at their cost and reportedly exercising control over the raw-material usage and quality of Tin Containers. Principals are the only buyers of these containers and it is not in dispute that only payment of coolie charges or conversion cost was being paid to these job workers.

10.3 It is the contention of the Ld. counsel for the Noticees that when the show cause notice had alleged that the Noticees only carried out job work for the principals by accepting the supply of materials and charging only the coolie charges as brought out in the allegations contained in Para 11 of the notice and when the whole benefit of the exemption was availed only by the suppliers of the raw materials it was incumbent on the part of the revenue to have treated the said suppliers / principals who have supplied Tin Sheets as

the manufacturers of these goods as per Board's Circular No. 56/56/1994-CX dated 14.09.1994.

10.4 In the instant case, we are of the opinion that the Show Cause Notice has not properly examined the parameters set out in the referred Circular in determining whether the relationship between the Noticees and the various Principals who are suppliers of Tin Sheets, was on Principal-to-Principal basis or not, to arrive at the conclusion whether the Noticees are the manufacturers or mere job workers. There was an apparent failure to correctly interpret the implications of above circular, issued in the light of the judgement of the CEGAT in Kerala State Electricity Board Vs. Collector of Central Excise which was also affirmed by Hon'ble Supreme Court. Further, the impugned order has failed to discuss the circumstances which exempts manufacturers from the operation of Rule 9 of Central Excise (No.2) Rules, 2001 as laid down *vide* Notification No. 36/2001 when alleging that CGI, the job worker is the eventual manufacturer of Tin Containers and there was a failure to take registration or to file a declaration regarding manufacture of Tin Containers. As the allegation itself does not sustain, the question of re-determination of value in terms of Central Excise (Determination of Price of Excisable Goods) Rules, 2000 is far-fetched and uncalled for. In this regard, we also

find that the impugned Show Cause Notice has determined the eventual assessable value by unreasonable methods applying Rule 8 of Central Excise (Determination of Price of Excisable Goods) Rules, 2000 which reads as under:-

"RULE 8.[Where whole or part of the excisable goods are not sold by the assessee but are used for consumption by him or on his behalf in the production or manufacture of other articles, the value of such goods that are consumed shall be one hundred and ten per cent of the cost of production or manufacture of such goods.]"

We have carefully studied the Central Excise (Determination of Price of Excisable Goods) Rules, 2000, as applicable to the facts obtaining in these appeals and adoption of Rule 8 of Central Excise (Determination of Price of Excisable Goods) Rules, 2000 when the Tin Containers were consumed by the principals and not by the job workers is questionable.

10.5 In the instant case, the principal is the actual consumer and even assuming that the goods viz. Tin Sheets are consumed by CGI in the production or manufacture of tin cans, we find that the Show Cause Notice has not prudently determined the Cost of Production as per accepted Cost Accounting practices in vogue by duly accounting for cost of other raw-materials used in the manufacture like lid, handles, etc., cost of overheads and the wastage, but simply applied

unconventional methods in arriving at the COP as revealed in the Annexures to the Show Cause Notice. Further, the application of SSI exemption to arrive at the net duty liability in Annexure D of the Show Cause Notice, adopting unscientific methods basing on the average assessable value per day is not legal and proper and cannot be sustained. In this regard, it is further observed that CGI even assuming that it is the manufacturer, is otherwise eligible to avail the CENVAT Credit of inputs/raw-materials utilised in the manufacture of tins for which records are not maintained by CGI as the same are available only with the principals responsible for supplying the Tin Sheets. The above issue of eligibility of CENVAT Credit has been discussed in the impugned order but not considered by the Adjudicating Authority.

11.1 The Show Cause Notice dated 14.03.2012 proposes to club the value of clearances of C.G. Industries with that of Golden Industries, B.V. Industries and Kishore Industries and also to re-determine the value of clearances in terms of provisions of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000. We find that in the instant case tin sheets are supplied by various principals like M/s. Kaleesuwari Refineries Pvt. Ltd. and other principals to

M/s. CG Industries for conversion in to Tin Containers which are used as primary packing materials for the oil manufactured and cleared by the principals. It appears that M/s. Golden Industries, owned by Smt. Vasuki, wife of Mr. Bose had commenced business in 2006 and was filing VAT and IT returns till September 2009 and later got shifted to Chennai. It was alleged that the entire activity of this unit was controlled and managed by Mr. Bose and so sought to club the value of its clearances with M/s. CG Industries which started functioning much later in Chennai. M/s. B.V. Industries in which Mr. Bose was the Proprietor was reportedly started on 02.06.2008 at Virudhunagar and engaged in outright sale of Tin Cans to various Customers. Alleging that BV Industries was a non-existent / dummy unit, the clearances of the said entity were also sought to be clubbed with that of M/s. CG Industries. Further, the clearances of M/s. Kishore Industries, owned by Shri Satish Kumar, brother-in-law of Bose was sought to be clubbed with the clearances of M/s. CG Industries by alleging that the said entity was a dummy/ non-existent unit for a part of the disputed period.

11.2 We find that Notification No. 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 which is subject to certain conditions. The relevant Paragraphs of which are extracted below:-

"2 (v) where a manufacturer clears the 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;

2(vi) where the specified goods are cleared by one or more manufacturers from a factory. the exemption shall apply to the aggregate value of clearances mentioned against each of the serial numbers in the said Table and not separately for each manufacturer;

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 three hundred lakhs in the preceding financial year."

Para 2 (vi) details the situation where the specified goods are cleared by one or more manufacturers from a factory. Para 2(vii) speaks about the threshold limit of the value of aggregate clearances of manufacturer who clears goods from one or more factories or by one or more manufacturers from a single factory. The exemption is available if the aggregate value of clearances does not exceed Rs.4 crores (at the material period of time) in the preceding financial year. The Show Cause Notice alleges that CGI, the Noticee is the manufacturer carrying out clearances from various other units such as M/s. Golden Industries, M/s. Kishore Industries and M/s. B.V Industries.

11.3 As per Annexure C4 (i) to (iv) of the Show Cause Notice, it is seen that the value adopted for computation of duty payable in respect of Golden Industries, B.V. Industries and Kishore Industries for the period 2007-2008 to 2010-2011 was either the invoice value for job charges or the value of income reflected in the Income Tax returns, whichever is higher. The total value of income for the said 3 units for each year has been arrived at in Annexure C(iv). The assessable value for computation of duty in Annexure C5, has been arrived at by summing up 110% of Cost of Production of Tin Containers supplied by CG Industries to various principals plus the value arrived at in C(iv) above. The duty liability has been arrived at in Annexure D which is based on the presumption of average assessable value per day which has been extrapolated to arrive at after the date of crossing of exemption which is a highly unrealistic and unreasonable mode of computation and is so clearly questionable. The Ld. counsel for the Noticee averred that that M/s. Golden Industries, M/s. B.V. Industries and M/s. Kishore Industries were filing VAT returns and Income Tax returns separately, for all the units, which is not in dispute considering the fact that the said filings formed the basis for arriving at the value as per Annexure C(iv) to the Show Cause Notice as referred to above. Further, the fact that M/s. Golden Industries was in existence from 1996 before CG

Industries started functioning is also an accepted fact. The invoices were being raised with the address of Golden Industries at Virudhunagar for Job work charges and later on shifted to new premises reportedly from 2008-2009 and the Ld. Advocate has submitted a copy of Lease deed for new premises at Chennai which was not considered by the Adjudicating Authority. Further, it is an admitted fact that there was no stock taking or verification of manufactured tins done in the job working units and no attempt was made to quantify the production based on records for the very reason that there were no records or documents available to undertake such quantification except for the bills raised for job charges and hence the investigation adopted questionable methods in arriving at the duty liability as the same was based on a days' production. Such a computation cannot be supported.

11.4 The Ld. counsel for the Noticees has placed reliance on a catena of judgements passed by various judicial forum against clubbing of value of clearances by various units which have been analysed below.

12.1 We find that C.G. Industries was owned by a HUF for which Mr. Bose is the Karta. Under Hindu Law, an HUF is a family which consists of all persons lineally descended from a common ancestor and includes their

wives and unmarried daughters. An HUF cannot be created under a contract and it is created automatically in a Hindu Family. Hindu Undivided Family ('HUF') is treated as a 'person' under Section 2(31) of the Income-Tax Act, 1961. HUF is a separate entity for the purpose of assessment under the Income Tax Act. M/s. C.G. Industries being owned by a HUF is a separate and distinct legal entity for the purpose of assessment under Income Tax and income of no other entity like Proprietorship, Partnership or Company could be clubbed with the HUF income since its assessment is separate under the Income Tax law. Further, the Show Cause Notice had not alleged that the business of other entities was sourced with the funds of the HUF which owns M/s. C.G. Industries. We further find that apart from the related persons being owners in the above three business concerns, no financial flow back of funds was alleged between the units. We find that in the case of *Commissioner of Central Excise Vs. Suchita Steels (India) Ltd. [2015(327) ELT 378]* Tribunal held as follows:

" 8. When department recognise Suchita Steels was a different concern formed from the year 1992 it was not brought out that the fund of HUF was invested either in Suchita Steels, Mohali from 1992 or Suchita Steels, Mohali from 1998. Therefore, there was absence of investment by the Karta therein on behalf of the HUF. That brought out distinction to this case. So also there was no investment of the fund by Mohali Chandigarh for day-today carrying on the business by two Mohali units except that there was sharing of infrastructure and using

of common utilities as well as availing service of manpower. There is nothing on record to show that late Shri Avdesh Garg was controller of these two Mohali units making the proprietors thereof as well as partner of M/s Suchita Steels, Mohali dummy. Nothing is on record to show that late Avdesh Garg was the financial controller as well as beneficiary of the three units. In absence of inextricable link between Avdesh Garg showing his vested interest in Mohali units, so also no pecuniary interest of Chandigarh unit in two Mohali units was proved. Therefore the adjudication cannot be approved.

9. In the result, the appellate order is maintained and Revenue appeal is dismissed"

12.2 Similarly, in the case of *Commissioner of Central Excise Vs. Arbuda Industries [2008 (230) ELT 159 (Tri.-Ahmd.)]* it was held that clubbing of clearances of two units, one owned in individual capacity and other as Karta of HUF, is not appropriate, when there is no evidence showing that the two units were not having independent existence found- both the units having separate income Tax PAN no. separate sales tax, etc. which could establish their independent identity. The relevant portion of the above order has been reproduced below:

"4. *On appeal against the above order, Commissioner allowed the same by observing as under:-*

"I find from the records there is nothing on records in the form of statement or evidence which establishes with reasonable certainty that manufacturing activity was or had been carried out exclusively in the factory premises of M/s. Arbuda Industries only. If the department was sincerely concerned to hold that M/s. Arbuda Enterprise was a dummy unit of M/s. Arubda Industries or was underveil or was a cover only then in that case they ought to have investigated deeply and could have gathered the material evidences on which the person of

ordinary intelligence and prudence could be led to believe that M/s. Arubda Enterprise had been created as a facade or is a farce unit. It is worth mentioning that in their written submission before the undersigned the appellants have filed reliable, material evidences which clearly discloses their independent identity and a separate legal entity of M/s. Arbuda Enterprises. In their written submission they have submitted that both the units are having other set of machineries for the purpose of manufacturing. That both the units have separate Income Tax PAN No., separate sales tax registration, separate professional tax registration, separate electricity meters etc. While examining this case on legal frame, I find that the law is well settled by the Apex Court which is that in cases where there are allegations of clubbing of clearances, mutuality of interest and financial flow back is required to be established.”

As such, by relying upon the various decisions of the Tribunal laying down that where one unit owned by same person in his individual capacity and the other unit as karta of HUF, their clearances could not be clubbed. Inasmuch as in the instant case, the revenue has not come up in any evidence to show that the two units were not having independent existence, the clubbing of clearances is not appropriate.”

12.3 The Hon’ble High Court of Rajasthan, at Jaipur Bench in the case of Renu Tandon (*supra*) 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. The above judgement was also affirmed by the Hon’ble Supreme Court.

12.4 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 *Commissioner of Central Excise, 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.

12.5 The Tribunal in the case of *Associated Engineering Projects Vs. Commissioner of Central Excise & Service Tax, Meerut-I [2019 (370) ELT 756 (Tri.-All.)]* while considering the issue of clubbing of clearances 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.

"5. We find in the present case that the individual manufacturing appellants have independent identities since the Revenue could not establish that their books of accounts are common, that their bank accounts are common, that their registration with Income Tax, Sales Tax are common and that there is common funding and that there is mutuality of interest and that there is financial flowback and that the units which were held to

be dummy did not have any manufacturing facility. In the absence of any such evidence, we hold that the manufacturer units are independent units and therefore, their clearances could not be clubbed together. We, therefore, hold that denial of benefit of SSI Exemption to the manufacturer appellants is not sustainable and therefore, demands confirmed against them are not sustainable.

6. *We, therefore, set aside the impugned order and allow all the appeals with consequential relief, as per law."*

12.6 In the case of *Commissioner of Central Excise 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.

12.7 In the case of case of *Commissioner of Central Excise Vs. S.C. Patel [2011 (264) ELT 414 (Tri.- Ahmd.)]* SSI Exemption it was held that Clearances of units having proximity, common passage and storage of raw materials, and inter-relationships between their partners with no evidence of flow back between units, both units

having separate income/sales tax, import and export code numbers, bank accounts *etc.* cannot be clubbed.

12.8 The Tribunal in the case of *Commissioner of Central Excise Vs. Balsara Hygiene Products Ltd. – [2012 (278) ELT 526 (Tri.- Ahmd.)]* which was later affirmed by the Hon'ble Supreme Court held that mere fact of management control or grant of interest free loan not sufficient to hold the units as a dummy unit in absence of any money flow back and/or profit sharing and total control on another unit and there is no reason for said units to be considered as dummy unit and that Clubbing of two units cannot be made on the premise that assessee sold/cleared their entire production to other units.

13. We have examined the present case in the backdrop of the judicial precedents discussed above. The Impugned order has confirmed that all the clearances of specified goods had been manufactured in the premises of the main Noticee (CGI) basing on the fact that there is no evidence of movement of raw materials to the premises of M/s. Golden Industries, M/s. B.V. Industries and sub-contractors and for movement of finished goods to the principals back; that denial of the manufacture of the specified goods by the sub-contractors; that there was progressive consumption of electricity by the main

Noticee; that the management of entire affairs of M/s Golden Industries by CGI and floating of Kishore Industries in the premises of the Noticee and non-existence of M/s BV Industries. In this regard, Ld. Advocate's contention that there is nothing on record in the impugned Notice to support the allegation of 'increasing trend of power Consumption proportionate to the increase in processing of Tin Containers. On Perusal of the impugned SCN itself it is evident that there is no quantum jump in the production of Tin Containers by the Noticee as the production during 2007-2008, 2008-2009, 2009-2010 and 2010-2011 was respectively 8.09 Lakhs, 9.04 Lakhs, 10.7 Lakhs and 9.58 Lakhs which shows that there is no quantum jump in the processing work of Tin Containers. Further, it is not disputed that M/s. Golden Industries commenced business in 2006 and was filing VAT and IT returns till September 2009 and then shifted to Chennai. The Lease deed copy was produced evidencing that M/s. Golden Industries got shifted to Chennai. The impugned order has failed to discuss whether manufacturing was carried in the premises of the main Noticee by its employees or by its sub-contractors. The reason for not conducting stock verification at C.G. Industries to ascertain whether Tin Sheets pertaining to other concerns were stocked there or not and whether finished goods got manufactured in the names of other concerns is inexplicable. No

enquiries were conducted with the employees whether they are the sub-contractors or employees of other concerns. It is recorded that there are no production records available and so the investigation is compelled to compute the number of Tin Containers and the value of these on the basis of the quantum of Tin Sheets supplied by the principals and the amount of coolie bills settled. Further, the impugned order has failed to consider that Mr. K. Bose, Proprietor and as Karta of HUF have two PAN cards and Income Tax returns being filed separately. Similar is the case with M/s. Golden Industries and M/s. Kishore Industries who have Sales Tax registration, making of separate financial statements, filing Income Tax return, etc. Further, the impugned order failed to take the expenditure reflected in the financial records of the other alleged dummy units viz. M/s. Golden Industries, B.V. Industries and Kishore Industries to ascertain whether any expenses towards sub-contracting were incurred by them when only their income have been clubbed with the income of CGI by taking into reckoning the coolie charges reported in the VAT returns of the so-called dummy units. Further, having alleged that Coolie charges included freight element, for the transportation of manufactured tins, no relevant documentary evidence was brought on record to support such outward transportation. Though from the various statements recorded from persons concerned as

to production of Tin Containers accepting that Mr. Bose is exercising pervasive control on the management of affairs of the Noticees for most part of the disputed period, the evidence unearthed is not sufficient enough to conclusively justify to club the clearances of all these four units. There is evidence that on certain occasions, M/s. B.V. Industries and M/s. Golden Industries purchased Tin Sheets on their own account and effected sales of these containers to the principals. It is on record that manufacture of Tin Containers can be carried out without the aid of power and also through sub-contractors. The Ld. Advocate has put forth that there is no bar from the principals or otherwise for manufacture of Tin Containers through sub-contractors.

14. In view of the foregoing, we find that, in the instant case, without establishing financial flow back and mutuality of interest between the various units, clubbing of value of clearances of various units has been resorted to by revenue which is not just and fair. Moreover, the re-determined value of clearances of CG Industries owned by a HUF, which is a distinct and separate legal entity and which is engaged in Job Work for various principals is sought to be clubbed with others without complete justification. If the so called re-determined value of clearances of CG Industries is ignored, then the

value of clearances of the other units are below the threshold limit as per Notification No. 08/2003 as discussed above. Hence, in the light of judicial pronouncements as above, we are inclined to hold that, the job work of CGI Industries cannot be clubbed with that of other entities. Not enough evidence exist to call these units as dummy units or created fictitiously to justify the clubbing of job work of all these units.

15. In view of the above detailed reasoning, there is no need to discuss about invocability of extended period in this case. The demand raised pertains to the period from 2007-2008 to 2011-2012 whereas the Show Cause Notice was issued on 14.03.2012. In complying with the judicial decisions cited *supra*, we are of the considered opinion that there was not enough evidence unearthed for clubbing of clearances and also for raising of demand of demand of excise duty. Therefore, the impugned Order-in-Original dated 30.04.2013 in respect of confirmation of duty in the case of M/s. C.G. Industries the main Noticee and imposition of penalties on M/s. Golden Industries and M/s. B.V. Industries along with M/s. C.G. Industries cannot be sustained and so, ordered to be set aside.

16. However, regarding imposition of penalties on the principals viz., M/s. Kaleesuwari Refinery Pvt. Ltd., M/s. Arun Oil Trade and M/s. GMS Traders who have purchased the Tin Sheets and supplied to the Noticees for the conversion into Tin Containers which are used for packing of the oil manufactured, it is evident that the units were under the excise control and they were aware of the excise rules and procedures including the liability to pay excise duty on any manufactured goods. The Original Adjudicating Authority has held in the impugned Order-in-Original No. 07/2013-CE dated 30.04.2013 that the value of their materials had far exceeded the value limits of the clearance of the specified goods prescribed in the SSI exemption Notification and these principals were under the excise control and the raw-materials supplied and their utilization for conversion into Tin Containers, the quality of manufactured Tin Containers and there is some sort of agreement which may not be in writing for payment of piece rate of conversion charges between the principals and the Noticees, make them liable for penalty under Rule 26 of the Central Excise Rules, 2002. The modus operandi adopted by the Noticees is fully supported by the principals. However, we find except M/s. Kaleesuwari Refinery Pvt. Ltd. who have come on appeal *vide* Appeal No. E/41709/2013 and other principals viz., M/s. Arun Oil Trade and M/s. GMS

Traders are not in appeal before us. In view of the above, the penalty imposed on M/s. Kaleesuwari Refinery Pvt. Ltd. is upheld.

17. In the result, the appeals filed by Mr. K. Bose Karta of M/s. C.G. Industries, Mrs. B. Vasuki, Propietrix of M/s. Golden Industries and Mr. K. Bose, Proprietor of M/s. B.V. Industries are allowed, as above whereas the appeal filed by M/s. Kaleesuwari Refinery Private Ltd. against the imposition of penalty is rejected being devoid of any merit.

(Order pronounced in open court on 14.02.2024)

Sd/-
(VASA SESHAGIRI RAO)
MEMBER (TECHNICAL)

Sd/-
(SULEKHA BEEVI C.S.)
MEMBER (JUDICIAL)

MK