CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH COURT NO.IV

EXCISE APPEAL NO. 50748 / 2020

[Arising out of Order-in-Appeal No. 02/ CE/DLH/2020 dated 02.03.2020 passed by the Commissioner (Appeals 1), Central Excise and CGST, New Delhi]

M/s. HINDUSTAN ENTERPRISES **APPELLANT**
B-165, Saraswati Vihar, Pitampura
Delhi 110034.

Vs.

COMMISSIONER OF CENTRAL GOODS AND SERVICE TAX, DELHI NORTH
C R Building, I P Estate, New Delhi 110109 **RESPONDENT**

APPEARANCE:
Shri S S Dabbas, Consultant for the Appellant
Ms Tamanna Alam, Authorised Representative for the Department

CORAM:
HON'BLE MRS RACHNA GUPTA, MEMBER (JUDICIAL)

DATE OF HEARING: November 10, 2021
DATE OF DECISION: 28-12-2021

FINAL ORDER No. 52105 /2021

PER RACHNA GUPTA

The appellant herein are engaged in the manufacture of 'Khaini'. Acting on an intelligence that they were clearing their goods without payment of duty that the factory premises of appellant were searched by the officers of Central Excise on 18.07.2006 in the presence Mr. Abhishek Nandwani, partner of the appellant and two other independent witnesses. Certain incriminating records were resumed from the said search. It was thereafter the statement of Shri Abhishek Nandwani was recorded on the date of search itself and thereafter on 31.07.2006 also. After recording the statement of Shri Brajesh Singh, Manager of the appellant and Shri H K Nandwani, proprietor of M/s. Deepak Exports and partner with the appellant that the show cause notice No. 2336 dated 7.10.2008 was served upon the appellant proposing the demand of duty amounting to Rs. 28,01,819/- along with interest and penalty. The imposition of penalty was also proposed upon Shri Abhishek Nandwani and Shri H K Nandwani, both the partners of the appellant and also of M/s. Rohit Trading Co. The said proposal was initially confirmed by Order in Original No. 01/2014 dated 31.1.2014. The appeal thereof was rejected vide Order dated 30.10.2014. The said order was earlier assailed before this Tribunal consequent whereupon vide Final Order No. 57092/2017 SM(BR) dated 12.09.2017 the matter was remanded back to the Commissioner (Appeals) for deciding the appeal on the basis of documents available before him after observing that the merits of the case have not been discussed by Commission (Appeals). The Commissioner (Appeals) was also directed to afford the opportunity of hearing to the appellant before deciding the issue afresh. Pursuant to said directions that Order in Appeal No. 02/2020 dated 02.03.2020 has been passed. Still being aggrieved, the present appeal has been filed by the appellant.

2. I have heard Shri S S Dabbas, learned Consultant appearing for the appellant and Ms Tamanna Alam, learned Departmental Representative appearing for the Revenue.

3. It is submitted on behalf of the appellant that earlier there had been the order of this Tribunal on 12.09.2017 directing the cross examination of Shri Brajesh Singh, the employee of the appellant responsible to maintain and look after the quality of the products. The said request has never been considered. Learned Counsel impressed upon the same to be violation of section 9D of Central Excise Act, 1944 and as such the denial of natural justice to the

appellant. It is submitted that said Shri Brajesh Singh was the technical person who had no knowledge of sale and purchase. Accordingly his cross examination was utmost crucial as far as the defence of the appellant is concerned. The denial thereof is alleged to be unreasonable and unrational. He relied on the following case laws:

1. J & K Cigarettes Ltd. vs. CCE
   [2009 (242) ELT 189 (DEL)];

2. Basudev Garg vs CC
   [2017 (48) STR 427 (DEL)];

3. Ambika International vs Union of India
   [2018 (361) ELT 90 (P&H)];

4. Flevel International vs. CCE
   [2016 (332) ELT 416 (DEL)]; and

5. Hi Tech Abrasives Ltd. CCE & CC, Raipur
   [2018 (362) ELT 961 (Chhattisgarh)]

4. It is submitted that the demand has been confirmed based upon the certain note books recovered by the Investigating team. However, the said note books have been denied to pertain to the appellant. The letter dated 9/15.5.2018 as written by the appellant to Superintendent has been impressed upon. It is submitted that there is no clandestine removal as alleged and confirmed by the Department. The submission of Shri H K Nandwani and Shri Abhishek Nandwani are also alleged to be inadmissible inevidence for proving the clandestine removal for want of corroborative evidence and non compliance of Section 9D of Central Excise Act. Following decisions have been relied upon :

1. Kuber Tobacco Products Ltd. vs CCE Delhi
   [2013 (290) ELT 545 (Tri-Del)];

2. CCE & C, Nashik vs. R K Patel & CO.
   [2018 (16) GSTL 73 (BOM)];

3. Continental Cement Co. vs UOI
[2014 (309) ELT 411 (All)]

5. The order under challenge is accordingly prayed to be set aside.

6. Per contra it is submitted by the Department that it has clearly been held by the Commissioner (Appeals) that non cross examination of Shri Brajesh Singh has no apparent bearing upon the findings. The Commissioner (Appeals) has minutely discussed the evidence as available on record which is sufficient to prove the alleged clandestine removal. Appeal is accordingly prayed to be dismissed.

7. After hearing the rival contentions, I observe and hold has follows:

The main contention of the appellant is the denial of opportunity of hearing and denial to cross examine Shri Brajesh Singh. In this context, I observe that pursuant to the directions of remand vide Final Order No. 57092/2017 dated 12.9.2017, the original adjudicating authority had given the opportunity to cross examine Shri Brajesh Singh. The notice was served to the parties on three different occasions. It was served on available address but were returned by the postal authorities as undelivered. The appellant himself at the time of personal hearing on December 13 had acknowledged that said Shri Brajesh Singh was untraceable. The said Brajesh Singh was the appellants' ex-employee but got untraceable due to which the appellant were neither able to contact him nor were in position to provide his alternative address. The department also reflected its inability to trace said Brajesh Singh. It is under said circumstances that the Original Adjudicating Authority proceeded to decide the matter on merits, in compliance of the directions of remand. The said conduct has duly been appreciated by the Commissioner (Appeals) in Order under challenge. Perusal of these facts is held sufficient for him to hold that alleged violation of section 9D of Central Excise Act by the Original Authority is not sustainable. In the given circumstances, it was the duty of the appellant to make said Shri Brajesh Singh available or at least Shri Abhishek Nandwani and Shri H K Nandwani for their cross examination. But the appellant, apparently had not taken any such step. These circumstances, in my considered opinion, amounts to sufficient compliance of the aforesaid provision on the part of the authorities. The absence of the cross examination of the person from whom the incriminating documents were recorded and those whose statements were recorded cannot diminish the evidentiary value in the given circumstances, thus has to read against the appellant. Evidentiary value of the notebooks recovered at the time of search, these being prepared by Shri Brajesh Singh and Shri H K Nandwani therefore, cannot be denied Accordingly it is held that the Commissioner (Appeals) has rightly relied upon the same and has rightly relied upon the decision in the matter of **Shalini Steels Pvt. Ltd. vs. CCE, Hyderabad** reported as **[2010 (258) ELT 545 (Tri-Bang)].**

Further, it is observed that only defence taken by the appellant to challenge the recovered notebook based whereupon the demand has been confirmed is that Shri Brajesh Singh, was preparing those notes at the instance of the appellant's competitor i.e. M/s. Kuber Group, I find no irrationality in the order of the Commissioner (Appeals) in para 12.3 of the Order under challenge while not accepting the said submission. There is no apparent denial for the entries on those private note books to not to have been accounted in the books of accounts of the appellants nor any other such document is produced by the appellants which may prove that the entries of those Notebooks do not pertain to the appellant's day today business. There is no retraction of the statements by Shri Abhishek Nandwani and Shri H K Nandwani. The statements recorded rather have clear admission that entries in the note books as were seized are with respect to such transactions which were not regularly entered in books of accounts and for which the transactions generally were in cash. Hence I do not find any infirmity in the Order under challenge. The entire case law relied upon by the appellant is held not applicable to the facts and circumstances of the present case. Resultantly, The order under challenge is upheld and appeal is hereby dismissed.

(Pronounced in the open Court on 28-12-2021)

(RACHNA GUPTA)
MEMBER (JUDICIAL)

ss