

FAX : 011-26108426

REGISTERED / AD

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK NO.2, R.K.PURAM, NEW DELHI-110066
EXCISE APPEAL BRANCH**

Dated: 23/11/2012

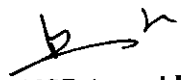
To

Appellant as per address in table below

Respondent as per address in table below

Final Order No. A/1319-1321/2012-EX[DB] dated 22/11/2012

I am directed to transmit herewith a certified copy of order passed by the Tribunal under section 35-C(1) of the Central Excise and Salt Act, 1944.


Asstt. Registrar(EXCISE Appeal Branch)

Application	Appeal	Name and Address of Appellant
1	E/4885/2004	THERMOTECH G-68, Masjid Moth, Greater Kailash-II, New Delhi
2	E/4886/2004	SHRI PRADEEP KHANNA, H/O SMT. NEERA KHANNA
3	E/4903/2004	R/O G-68, Masjid Moth, Greater Kailash- II, New Delhi M/S. FLEVEL INTERNATIONAL, NARAINA INDDL. AREA, PHASE-I, N. DELHI-28
4		Name and Address of Respondent C.C.E. DELHI-I C.R. BUILDING, I.P. ESTATE, N. DELHI

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Other Appellants and Respondents as per Annexure

Copy To

5 Advocate(s) / Consultant(s):

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6 Bar Association, CESTAT, Delhi

7 Director Publications, Customs, Excise. I.P. Estate, Delhi

8 M/s Centax Publications Pvt. Ltd., 1512-B, Bhishm Pitamah Marg, New Delhi-3

9 Company Law Institute of India Pvt. Ltd., No.2 (old no.36), Vaithyaram Street, T. Nagar, Chennai-17

- 10 Taxmann Allied Service Pvt. Ltd., 59/32, New Rohtak Road, New Delhi-110005
- 11 Easy Service Tax Online Dot Com Pvt. Ltd., 407A, Iscon Mall, Satellite Road, Ahmedabad-15
- 12 LAWCRUX Advisors Pvt. Ltd., LAW House, 1-8, Sector-10, Faridabad 121003 (Haryana)
- 13 TaxIndiaOnline.com Pvt. Ltd., 2nd Floor, Vasant Arcade, Vasant Kunj, New Delhi - 110070
- 14 Mark Professional Services Pvt. Ltd., 108, Everest Block, Aditya Enclave, Hyderabad – 38
- 15 C.D.R. 16 Office Copy 17 Guard File


Asstt. Registrar(EXCISE Appeal Branch)

**CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL,
West Block No. 2, R.K. Puram, NEW DELHI**

COURT No. III

**Excise Appeal No.4885-4886 of 2004 &
No.4903 of 2004**

Date of Hearing: 12.03.2012.

(Arising out of Order-in-Original No.CCE/ADJ/04-09/04, dtd. 15/22.01.04, in appeal No.4885-4886 of 2004, passed by CCE, Delhi and Order-in-Original No.ADJ/1/3/2004, dtd.14.01.04 in appeal No.E/4903 of 2004 passed by CCE, New Delhi)

For approval and signature:

Hon'ble Ms. Archana Wadhwa, Judicial Member
Hon'ble Mr. Rakesh Kumar, Technical Member

1	Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	No
2	Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	Yes
3	Whether Their Lordships wish to see the fair copy of the Order?	Seen
4	Whether Order is to be circulated to the Departmental authorities?	Yes

M/s Thermotech
M/s Flevel International
Shri Pradeep Khanna
Versus
CCE, Delhi

Appellants

Respondent

Coram: Hon'ble Ms. Archana Wadhwa, Judicial Member
Hon'ble Mr. Rakesh Kumar, Technical Member

Present for the Appellants - Shri Naveen Mullick, Advocate
Present for Respondent - Shri R.K.Varma, DR

Misc Order No. 550/2012-EX (DB) Dated : _____
FINAL order No. A/1318-1321/2012-BE (BR)
Per Ms. Archana Wadhwa: _____

All the three appeals, though arising out of two different orders, are being disposed of by a common order as they are interconnected and issue involved is identical.

Appeal No.4885-4886 of 2004

2. Vide Order-in-Original No.CCE/ADJ/04-09/04, dtd. 15/22.01.04, in appeal No.4885-4886 of 2004, Commissioner has held as under:-

- (i) confirmed demand of duty of Rs.83,60,821/- against M/s Thermotech under section 11A of Central Excise Act,1944;
- (ii) imposed penalty of identical amount under Rule 173Q of Central Excise Rules;
- (iii) imposed penalty of Rs.8.50 lakhs on Shri Pradeep Khanna, Proprietor, M/s Thermoking under Rule 209A of the Central Excise Rules;
- (iv) confiscated 5 air conditioners with an option to the appellants to redeem the same on payment of redemption fine of Rs.30,000/- and on payment of appropriate amount of Central Excise duty.
- (v) confiscated 2 air conditioners from M/s Kashi Electricals (dealer) with an option to them to redeem the same on payment of redemption fine of Rs.50,000/-; and
- (vi) confiscated excisable goods, semi-finished goods and raw material seized from the factory premises of M/s Thermotech with a redemption fine of Rs.1 lakh and payment of appropriate duty of excise.

2. While dealing with said set of appeals, it is seen that M/s Thermotech are engaged in the manufacture of washing machines, room air conditioners, cooler trolleys with cooler. The said unit was floated in March, 1990 with Ms. Neera Khanna being sole proprietor of the same. It is also seen that earlier proprietary unit of Ms. Neera Khanna under the name of M/s Jass Kann International, was closed in December, 1989. There is another unit of Shri Pradeep Khanna husband of Ms. Neera Khanna, engaged in the manufacture of air conditioners under the name and style of M/s Thermoking. The said unit of M/s Thermoking is operating from the year 1977 onwards. Another unit under the name and style of M/s Flevel International, is also engaged in the manufacture of air conditioners since 1986.

3. The cases against the said appellants M/s Thermotech originated with the interception of one vehicle loaded with three room air conditioners with grill and filter (Kirloskar compressor) and two room air conditioners with Shreeram compressors. The said vehicle was intercepted on 27.02.92 and the driver of the vehicle produced invoice dtd. 27.02.92 issued by M/s Thermotech. As there was no duty paying documents accompanying the said goods, the officers detained the goods along with vehicle. In a follow up action, the premises of M/s Thermotech were put to search. Two room air conditioners in packed and ready to dispatch condition, one air conditioners in packed and ready to dispatch condition, one air conditioner in semi-assembled condition and 15 washing machines in

semi-finished condition along with other raw material like sheet metal, bodies of washing machine etc. were found and seized. Various records kept by the said appellants in the ordinary course of their business were also resumed. Further investigations were conducted and the statements of various persons were recorded. Based upon the scrutiny of various documents, year-wise sales of the manufactured goods effected by M/s Thermotech on the basis of invoices issued by them was arrived at. Inquiries were also conducted at the various dealers of the said appellants. It was also found that all the three units of Ms. Neera Khanna, i.e., M/s Thermotech, M/s Jass Kann International and M/s Flevel International located in Sector-III, Noida, Sector-IV, Noida and Naraina Industrial Area, Phase-I, New Delhi, were availing the benefit of SSI exemption. It was also found that the appellants were using the brand name of Thermoking in respect of various goods manufactured by them. Revenue entertained a view that in as much as the said brand name Thermoking was the brand name of the unit owned by Shri Pradeep Khann husband of Ms. Neera Khanna, the appellants were not entitled to the benefit of SSI Notification. The denial of small scale benefit was also on the ground that the clearances of all the four units including the unit of her husband are to be clubbed, in which case clearances exceed the eligibility criteria of R1.50 crore Rs.2 crores so as to debar the assessee from availing the exemption during the next financial year.

4. Based upon the above investigation, proceedings were initiated against the appellants by way of issuance of a show cause notice (SCN), dtd. 25.08.92 proposing clubbing of clearances of all the four units, raising demand of duty against the appellants on the said ground to the extent of Rs.83,60,821/-; proposing imposition of penalty upon them; and proposing imposition of penalty on Shri Pradeep Khanna under Rule 209A of Central Excise Rules. Notice also proposed confiscation of the various goods seized either in transit or from the said factory of appellants.

5. In their defence pleadings, the appellants submitted that all the three units owned by Ms. Neera Khanna are independent units having independent existence. In fact it was pleaded that M/s Jass Kann International stopped manufacturing activities in the year 1989 itself. The appellants started manufacturing washing machines, room air coolers, cooler trolleys from 1990 onwards and the goods were being cleared by them after availing the benefit of Notification No.175/86. The appellants contended that earlier similar charges of clubbing of clearances among all the manufacturing units were initiated against M/s Jass Kann International proposing the denial of benefit of Notification No.175/86 and such proceedings against M/s Jass Kann International were adjudicated by the Commissioner who vide his Order-in-Original No.CCE/ADJ/JDS/02, dtd. 30.09.02 held that the clearances of M/s Thermoking which is a proprietary unit of Shri Pradeep Khanna cannot be clubbed with the other three units owned by Ms. Neera Khanna. Accordingly, Commissioner extended

the benefit of Notification No.175/86 to M/s Jass Kann International. It was their contention that the entire facts were in the knowledge of the Revenue and as such it was not open to the Revenue to initiate the same very proceedings against the same appellants, on the same very ground.

6. They also contended that the clearances effected by M/s Jass Kann International have been held to be falling within the SSI Notification, and the issue on the clubbing stands decided by the Commissioner, the benefit of Notification cannot be denied to the present appellants. They also contended that while proposing the clubbing of clearances of M/s Jass Kann International, M/s Flevel International and M/s Thermotech to the clearance of the appellants, no SCN stands issued to the other units, whose clearances are proposed to be clubbed. In as much as the notice has not been issued to the other units, their clearances cannot be clubbed with the clearances of the appellants without putting the other parties to notice. For the above proposition, they relied upon various decisions of the higher authorities. Ld.Advocate further clarified that if the clearances of M/s.Thermoking are taken out of consideration. The cumulative clearances of all the remaining units would meet the eligibility crieteria.

7. Otherwise also, the appellants submitted that all the units are separate legal entities, registered separately under various statutory laws like sales tax, income-tax, etc. The same are having complete machinery to manufacture the goods and are registered separately with the Central Excise department. In fact all the units are located

at different places, two being at Noida and one at Delhi. Similarly M/s Thermoking is a separate entity owned by husband of Ms. Neera Khanna and the clearances of the same cannot be held to be the clearances of the other three firms. They also contended that there is no financial flow back between the three units and as such no mutuality of interest was there. Reference in this regard is made to para 38.3 of the Commissioner's order. The contention of the Id. Advocate appearing for the appellants is that merely because Shri Pradeep Khanna was visiting the units owned by his wife, by itself cannot be taken as a factor to arrive at a finding of mutuality of interest between the three units. As regards, the use of brand name of Thermoking, it is submitted that even if the Revenue's contentions are accepted to be correct, such use of brand name of Thermoking will not disentitle them from the benefit of SSI Notification No.175/86 in as much as during the relevant period, Thermoking was itself entitled to the benefit of Notification. He further submits that the cross examination of the deponent of the various statements has revealed that Thermotech was not having sufficient installation of power required for manufacture of air conditioners as such the Revenue's contention that the appellants were also manufacturing air conditioners, cannot be accepted. As regards the manufacturing and clearances of washing machines (609 in no.), confirming demand of Rs.3,18,946/-, Id. Advocate draws our attention to the cross examination of Shri Rajesh Kumar laying down that the all the goods were cleared on proper invoices. As regards the allegation of manufacture of air conditioners, he submits that Revenue has

proceeded on the ground that the description given by them in their invoices relates to the air conditioners. He clarifies that they have cleared room air coolers and the description RAC in their invoices relates to room air coolers whereas Commissioner has held that the same are room air conditioners. By referring to the value as reflected in the invoices, he submits that it is not possible to clear air conditioners at such a low value as reflected in the invoices. Further, there is no evidence of any customer who has received air conditioners from the appellants.

8. As against the above argument, Id. AR Shri R.K.Varma appearing for the Revenue submits that admittedly M/s Thermoking which is a proprietorship concern of Ms. Neera Khanna was using the brand name of Thermoking which admittedly belongs to M/s Thermotech, a proprietor unit of Shri Pradeep Khanna husband of Ms. Neera Khanna. The above fact is not disputed by the appellants and the various evidences discussed by the adjudicating authority reveal that though M/s Thermotech is proprietorship concern of Ms. Neera Khanna, Shri Pradeep Khanna was actively involved right from the time of allotment of plot in the name of Ms. Neera Khanna and in the management, production, sale and procurement of raw material. The activities regarding procurement of compressors for all the units were centralized in the hands of Shri Pradeep Khanna. He submits that various statements refer to only one fact that Shri Pradeep Khanna was found to be controlling the sales of these firms. He submits that as discussed by the Commissioner, it is not the single factor of registration of units under various tax laws or mutuality of interest

which can be taken as sole criteria to decide the clubbing issue, but the overall facts have to be examined in each and every case.

9. In a clubbing dispute of two units, one is owned by husband and another by wife, the Tribunal upheld department's proposition of clubbing of clearance despite units having independent registration under the Sales Tax and Income Tax law (Refer Quality Steel Industries vs. CCE - 1989(43)ELT775 which was upheld by the Supreme Court vide 1999(107)ELTA61. In United Chemicals vs. CCE - 1998(103)ELT551(CEGAT), the clubbing of the clearance was upheld when the control of management, production and sales of the 3 units was found in the hands of one person only, though there were no evidences of financial flow back. In this respect the observation of Hon'ble Tribunal in CCE vs. Element Industries 2000(120)ELT1989CEGAT) would be most appropriate. In this case, the Hon'ble Tribunal observed that facts in totality have to be seen. While financial flow back could be one important consideration, it could not be made sole basis for arriving at the decision this way or that way. With reference to isolated facts, the units may appear to be distinct and separate, but when the facts and circumstances are seen in totality, seemingly distinct and separate units may turn out to be one common manufacturing entity. Thus the guiding factor has to be a careful consideration of all the facts and circumstances of the individual case.

10. Ld. AR further submits that the fact that three units were owned by Ms. Neera Khanna and the fourth was owned by Shri

Pradeep Khanna husband of Ms. Neera Khanna and the fact that all were manufacturing more or less same type of goods, would be a relevant criteria to club the clearances of all the four units. The special relationship cannot be ignored for the purpose of Notification No.175/86. In as much as the total clearances from all the four units have exceeded the eligibility criteria of Rs.1.50 crores or Rs. 2 crores, the benefit of Notification is required to be denied.

11. As regards the allegation of clearance of air conditioners, he submits that the appellants' contention that the same were manufactured on job work basis, cannot be accepted. The job work bills of some of job workers produced by the appellants, in support of their contention reveal that all of them have been prepared by one person in one sitting and there is no variation in the style and tenure of writing. Even at the time of investigation, neither Shri Pradeep Khanna nor Ms. Neera Khanna had ever mentioned about these documents. Further in the sale bills issued by M/s Thermoking to M/s Thermotech, there is a mention of words "against firm C" whereas no such form stands produced by the appellants. He further submits that M/s Thermotech got itself registration with the sales tax department of Noida. In the list of finished goods attached to the registration certificate, they have provided 13 items which include room air conditioners, split air conditioners and air conditioning appliances. They also got themselves registered with the U.P. Directorate of Industries for manufacturing/processing of water coolers, heat convectors and washing machines as such he submits

that the appellants' plea that they were not fully equipped to manufacture air conditioners cannot be accepted. He further submits that the appellants' stand that RAC stands for room air coolers and not air conditioners, cannot be accepted in as much as the term desert type coolers has been used for coolers whereas the invoices which were raised for air conditioners described the goods as RAC 1.5 tonne grill fil. The price range of the goods also reveal that the goods were air conditioners and not room air coolers. Similarly, the appellants contention that during the material period, they were trading in goods similar to one being manufactured by them cannot be accepted in as much as for trading in the same type of goods, permission in terms of Rule 51A is required to be taken.

12. As regards, the extended period plea, he submits that since the issue involved is illegal availment of Notification No.175/86, the same amounts to malafide on the part of the appellants, thus justifying invocation of longer period.

13. We have considered the submissions made by both the sides.

14. The demand stands confirmed against M/s Thermotech by clubbing the clearances of all the units. In as much as the total clearances from all the four units exceeded the eligibility criteria of Rs.1.5 crores or Rs.2 crores, the benefit of Notification No.175/86 stands denied to them during the next financial year. We find that admittedly M/s Jass Kann International stopped its manufacturing activities w.e.f. December, 1989 and M/s Thermotech came into

existence in the year 1990. Further M/s Thermoking which is a unit of Shri Pradeep Khanna was working continuously w.e.f. 1977 onwards. The Revenue proposing to club the clearances of M/s Thermoking which is a unit of husband of proprietor Ms. Neera Khanna of M/s Thermotech. The said clubbing has been done on the ground that Shri Pradeep Khanna was involved in the functioning of two units of Ms. Neera Khanna. The Commissioner in his impugned order has observed that Shri Pradeep Khanna was assisting other unit in procuring raw materials as also sale of the final products of these units. The profit sharing from all the units remained confined to husband and wife and nobody else. As such, he has observed that there remain no room for doubt that the entire operation of the four units has to be seen as a special relationship which cannot be ignored for the purpose of benefit of Notification No.175/86.

15. We find no merits in the above reasoning of the adjudicating authority. Admittedly he has nowhere referred to any mutuality of interest between the units of husband and units owned by wife. He has observed that lack of mutuality of interest or financial flow back can be only one of the important consideration but cannot be made sole basis for arriving at the decision. Merely because the two owners of the units were husband and wife and the profits earned by them came into same household, does not mean that clearances of all the units is required to be clubbed. We really fail to understand the above reasoning of the adjudicating authority. If the husband is helping his wife in running of any business activity and rendered

assistance, the same cannot be made the basis for clubbing the clearances of all the units. For doing so, Revenue is expected to produce evidence to show that all the units were facad and were not complete units independently manufacturing the goods in question. If the reasoning adopted by Commissioner is accepted, the same would result in legal chaos in as much as the clearance of units being run by wife's, independent of their husband's units would lead to clubbing issues, irrespective of the fact that finances of wife and husband are being separately managed by them.

16. Apart from above, we note that all the units were separately registered with income tax as also sales tax authorities. Their locations of business were at separate places. In fact one of the unit was located in Delhi itself. There was no financial inter-twining and all the units were working with their own independent financial resources. There is no evidence on record to show that there was any mutuality of interest between the units except for the fact that Shri Pradeep Khanna was sometimes looking after the affairs of the units belonging to his wife which, as already discussed by us, cannot be made the basis for clubbing the clearances of the units owned by husband and wife.

17. We further note that identical case was made out against M/s Jass Kann International proposing the clubbing of clearances of M/s Thermoking with their clearances. Such charges were dropped by Commissioner vide his order dtd. 30.09.02, who held that clearances of M/s Thermoking under the proprietorship of Shri Pradeep Khanna

cannot be clubbed with the clearances of M/s Jass Kann, a unit owned by his wife. In such a scenario to restart the identical proceedings in respect of another unit of Ms. Neera Khanna, i.e., M/s Thermotech, proposing clubbing the clearance of M/s Thermoking cannot be appreciated.

18. We further note that the appellants have taken a strong objection to the fact that while show cause notice (SCN) proposed clubbing of clearances of M/s Thermoking, M/s Flevel International and M/s Jass Kann International with the clearances of M/s Thermotech, no SCN stands issued to the other units. The said objection of the appellants stands not accepted by the Commissioner by observing that as all the units are owned either by wife of Shri Pradeep Khanna or by Ms. Neera Khanna, issuance of separate notice to the other units was not required.

We find no merits in the above arguments. Admittedly all the units were working separately and the Revenue is proposing the clubbing of clearances with the clearances of M/s Thermotech. The minimum legal requirement is to put the other units on notice. Mere fact that the said other units were under the proprietorship of Ms. Neera Khanna or under the ownership of husband of Ms. Neera Khanna cannot absolve the Revenue from putting the other units to notice. It is well settled law that in case of clubbing of clearances of various units, the notices are required to be issued to all, in as much as the clearances of other units is sought to be clubbed with clearances of a particular unit. To club the clearances of other units with M/s. Thermotech without even putting the other units on notice

and without even letting them know about the same is against the settled principle of law.

19. In view of our foregoing discussion, we hold that the findings arrived at by the Commissioner holding that the clearance figures of all the units is required to be clubbed and in as much as the same exceeds eligibility limit stipulated in Notification No.175/86, M/s Thermotech is not eligible to exemption in terms of the said units, are unsustainable. We accordingly set aside the confirmation of demand of duty of Rs.83,60,821/- confirmed against M/s Thermotech along with penalty of identical amount imposed upon them.

20. As regards the confiscation of five air conditioners (out of which three seized from the vehicle and two seized from premises), we find that the appellants has taken a categorical stand that they were not engaged in the manufacture of air conditioners but were either doing the trading in the same or were getting the same manufactured from the job worker out of the compressors purchased by them. It has come on record that the appellants' power installation was not sufficient to manufacture the air conditioners. This has come on record during the cross examination of the employees of M/s Thermotech. As regards the description of the goods in the invoices, the appellants have taken a stand that the same were in respect of room air coolers and not air conditioners. The confirmation of demand of Rs.3,18,946/- on the said ground is not sustainable in as much as Shri Rajesh Kumar during the course of his cross examination has very clearly deposed that all the goods

manufactured by the appellants were being cleared on proper invoices and they do not have sufficient installation of power required for manufacture of air conditioners. The Revenue has not placed any evidence on record to reflect upon the fact that RAC referred to room air conditioners and not room air coolers. We note that even the value reflected in the invoices is not corresponding to the value of the air conditioners. We note that the Revenue has not approached any of the buyers to substantiate the allegation that RAC referred to room air conditioners. In the absence of any evidence to reflect upon the said issue, the demand cannot be confirmed on the basis of doubts. Similarly the job work challans produced by the appellants cannot be dismissed lightly on the basis of mere visual examination that all of them stands made by one person. Help of no writing expert has been taken by the Revenue to establish the above fact. As such, we note that confiscation of air conditioners is not called for. We accordingly set aside the same.

21. Similarly confiscation of the excisable goods, semi finished goods and the raw material seized from the factory premises of the appellants M/s Thermotech with an option to them to redeem the same on payment redemption fine of Rs.1 lakh, is not called for in as much as the goods were still in the factory premises and were admittedly either in the semi finished stage or still raw material. Even where the goods were finally packed, i.e., room air conditioners, we have already accepted the appellants' contention that the same were not manufactured by them and were either being traded or got

manufactured from other workers. We accordingly set aside the confiscation of the same.

22. Further the imposition of penalty on Shri Pradeep Khanna under Rule 209A of Central Excise Rules is required to be set aside as we have already set aside the duty demand and imposition of penalty in respect of M/s Thermotech. His appeal is accordingly allowed.

Appeal No.4903 of 2004

Vide Order-in-Original No.ADJ/1/3/2004, dtd. 14.01.04 in appeal No.4903 of 2004, Commissioner has held as under :-

- (i) confirmed central excise duty of Rs.61,98,465/- against M/s Flevel International under Rule 9(2) of Central Excise Rules read with Section 11 of the Act on the findings of clandestine removal;
- (ii) confirmed duty of Rs.12,80,542.50 by denying the benefit of Notification No.75/87-CE, dtd. 01.03.87;
- (iii) confirmed central excise duty of Rs.3,16,800/- on 24 air conditioners alleged cleared by the appellants on 27.02.92 without payment duty under Rule 9(2) of Central Excise Rules read with section 11A of the Act;
- (iv) imposed penalty of Rs.77,95,808/- on M/s Flevel International under Rule 173Q of Central Excise Rules; and
- (v) confiscated seized 60 air conditioners, 4 fans and 4 deep freezers with an redemption fine of Rs.1 lakh and on payment of central excise duty.

23. The said appellant M/s Flevel International is engaged in the manufacture of air conditioners, washing machine, geysers, heat convectors. Their factory was visited by the officers on 28.2.92 who found 36 numbers of air conditioners totally valued at Rs.7,92,000/- lying in the factory. In addition 281 compressors valued at Rs.47,77,000/- and four fan motors and four deep freezers were found in the factory. Inasmuch as the officers entertained a view that such 36 numbers of air conditioners have not been entered by the appellant in their RG-1 register, they were seized alongwith seizure of other goods found in the factory premises. Subsequently the residential premises of Shri Pradeep Khanna, Proprietor, M/s Thermoking and husband of of Ms. Neera Khanna, proprietor of M/s Flevel International were put to search and 24 numbers of air conditioners were seized from the said premises on the reasonable belief that the same were manufactured by the appellant and cleared clandestinely. However, it is seen that on subsequent production of records, 281 compressors detained on 28.2.92 were released by the department unconditionally.

24. The statement of Shri Pradeep Khanna was recorded on 28.2.92 wherein he deposed that 24 air conditioners recovered from the residential premises were manufactured by the appellant and cleared by them without payment of duty. However, the said statement was subsequently retracted and it was deposed that 24 air conditioners recovered from the residential premises were in fact cleared from the factory of Shri Pradeep Khanna who was also

engaged in the manufacture of air conditioners. It was disclosed that the said manufacturing were got done through a contractor, Shri Devender Oberoi, proprietor of M/s.Nikhil Refregeration. A copy of the contract entered into by M/s.Nikhil Refregeration was also put on record.

25. On the above basis, show cause notice dt.26.8.92 was issued proposing confiscation of the 36 air conditioners valued at Rs.7,92,000/-, 4 fan motors valued at Rs.1600/- and 4 deep freezers valued at Rs.41,500/- on the ground that the same were not entered in the RG-1 register. 24 air conditioners recovered from the residential premises were also proposed to be confiscated alongwith confirmation of duty of Rs.3,16,800/-. The notice also proposed confirmation of duty of Rs.12,80,542.50 by denying the benefit of Notification No.75/87 on the ground that on clubbing the clearances of all the three units under the proprietorship of Smt.Neera Khanna, the same exceeded the eligibility criteria of the said notification, the demand of Rs.58,44,825/- was proposed to be confirmed for the period 1988-99 to 1989-90 on the allegation of clandestine removal of 606 air conditioners. The said notice culminated into an order passed by the Commissioner, confirming the demands, imposing penalties and confiscated seized goods as detained above.

26. Dealing with confiscation of 36 air conditioners, 4 deep freezers and 4 fan motors, we find that the same stand confiscated on the ground of their non entry in the RG-1 register. The appellant had taken a stand that the visit of the officers was on 28.2.92, and it was

a budget day. All the records were taken by their employees to Range office for filing budget declaration. The said budget day declaration included 36 numbers of air conditioners lying inside the factory. The show cause notice in fact does not dispute that such air conditioners were duly included in the budget day declaration. The RG-1 registers were produced subsequently, which revealed that the entry of 36 numbers of air conditioners was available in the same.

27. The above stand does not stand accepted by the adjudicating authority on the ground that the appellant could not produce RG-1 registers at the time of visit of the officers. The fact that such registers were sent to their Range office for filing budget day declaration was not revealed by the appellant in their various statements recoded on the spot. The report of Shri Ram Singh, sector in charge of the appellant unit informed that pre budget day declaration of Flevel was filed by Shri Dhram Veer, a part time employee and had no excise register was produced by him alongwith the said declaration.

28. We find that admittedly 28.2.92 was a budget day and Central Excise assessee were required to file budge day declaration. The said declaration was indeed filed by the appellants. The appellant's stand that the RG-1 registers were taken to Range office cannot be doubted on the sole ground that the report of Ram Singh, range in charge is to the effect that the said registers were not produced before him. It may be possible that the registers were taken alongwith a budget declaration on the belief that the same are also required to be

produced before the Range office. The same might not have been produced before him. However, the appellants have produced subsequently such RG-1 registers wherein the entry of 36 numbers of air conditioners was there. As such, by extending the benefit of doubt to the appellants, we set aside confiscation of the said 36 air conditioners. However, the duty on the same if not been paid the appellants at the time of clearance, they are directed to enter the said air conditioners in RG-1 registers on the release and clear the same on payment of duty, if not already paid.

29. As regards, 4 fan motors and 4 deep freezers, the appellants have taken a stand that the basement of the appellants' factory was temporarily taken by M/s.Thermoking on rent and the said goods were manufactured on behalf of M/s.Thermoking, by a contractor. It is a fact that at the time of visit by the officers, a contractor, Devender Oberoi was found engaged in fabrication of deep freezers and the statement recorded on the spot revealed that he was working for M/s.Thermoking. The Commissioner has observed that no permission to shift factory premises temporarily to the basement of the factory of M/s.Flevel International was taken by M/s.Thermoking. We are of the view that the same may be reason for imposition of penalty for non obtaining permission but cannot lead to conclusion that said the deep freezers and fan motors were manufactured by the appellants. As such, we set aside the confiscation of the same.

30. As regards confiscation of the 24 air conditioners seized from the residential premises of Shri Pradeep Khanna husband of Ms.

Neera Khanna it is seen that initially Shri Pradeep Khanna in his statement recorded on 28.2.92 deposed that the said air conditioners were cleared from the factory of M/s.Flevel International without cover of proper gate pass. However, the said statement was subsequently retracted by him on 8.3.92 and he claimed that the said air conditioners found from his residential premises were in fact manufactured by his factory Thermoking who got it manufactured from Nikhil Refrigeration. In his subsequent reply dt.4.2.02, it was submitted that the compressors used in the air conditioners were purchased by Sriram Refrigeration and M/s.Kirloskar Brothers and the same were used in air conditioners manufactured by Nikhil Refrigeration.

31. The Commissioner has observed that from where the said air conditioners had been recovered were not manufacturing place but the same were recovered from the basement of residential premises of husband and wife. He has chosen to rely on initial statement of Shri Pradeep Khanna on the ground that usually normal person tells the facts truthfully in his first statement. As such, he has observed that the statement of Shri Pradeep Khanna has a higher evidentiary value than the subsequent statement made by him and the appellants' stand that incorrect/false statement was made under the pressure and mental tension does not stand accepted by the Commissioner.

32. We find apart from the retracted statement of Shri Pradeep Khanna, there is no other evidence on records to support the

Revenue's charge that the air conditioners recovered from the residential premises were manufactured by the appellant and cleared clandestinely by them. Admittedly Shri Pradeep Khanna has got nothing to do with the factory of Flevel International and is not related to said manufacturing unit except for the fact that he is the husband of proprietor of M/s.Flevel International.

33. There is no statement of Smt. Neera Khana, proprietor of the unit, and other employees of the units indicating that the said air conditioners were manufactured by their unit. Subsequently, Shri Pradeep Khanna has claimed that the said air conditioners were manufactured by Thermoking through one Shri Devender Oberoi, a contractor. He has produced a copy of the contract entered into with Shri Devender Oberoi, proprietor of Nikhil Refrigeration. The above evidence of the appellant stands rejected by the adjudicating authority on the ground that the address given in the agreement does not belong to Shri Devender Oberoi as reported by the enquiry conducted by the department. The appellant's contention is that they are not concerned with the correctness of the address given by Shri Devender Oberoi and the agreement executed between Thermoking and Nikhil Refrigeration is sufficient to reveal the fact that the air conditioners were got manufactured by ThermoKing through Nikhil Refrigeration.

34. We find that the allegation in respect of 24 air conditioners is clandestine removal of the same by the appellants. Apart from the statement of Shri Pradeep Khanna, there is no other evidence

reflected upon such activity. The said statement of Shri Pradeep Khanna stands retracted subsequently and alternative stand taken by them is supported by the agreement between Thermoking and Nikhil Refrigeration. His subsequent statement also stands corroborated by the fact that Shri Devender Oberoi was found in the factory on the date of visit of the officers. The Revenue's stand that Devender Oberoi, proprietor of M/s.Nikhil Refrigeration is non existent party cannot be accepted inasmuch as his statement was recorded by the Revenue wherein he admitted that he was fabricating goods for M/s.Thermoking on contract basis. There being no other evidence or record except the statement of Shri Pradeep Khanna, reflecting upon the procurement of raw material, manufacture of the ACs and their removal from the appellants' factory, the finding arrived at by Commissioner cannot be sustained. As such, we are of the view there is no sufficient tenable and positive evidence reflected upon the clandestine manufacture and clearance of 24 air conditioners from the appellant's factory. Accordingly, confiscation of the same and demand of duty in respect of the same is set aside.

35. The demand of Rs.12,80,542.50 stands confirmed against the appellant on the ground that when clearances of all the 3 units belonging to Mrs.Neera Khanna are clubbed, they exceed the eligibility criteria of Notification No.75/87-CE dt.1.3.87.

36. The appellants' contention is that the value of the geysers, compressors and washing machines seized is not to be included in

the total clearance value while examining the benefit of Notification No.75/87. On the other hand, it is the contention of the Id. SDR that while computing the aggregate value of clearances in terms of the said Notification, clearances of all excisable goods have to be taken into consideration.

37. We find that para 2 of the Notification No.75/87 reads as follows :-

*"the aggregate value of the clearances of **all excisable goods** for home consumption **by a manufacturer from one or more factories** or from a factory by one or more manufacture, does not exceed Rs. 50 lakhs in the preceding year."*

38. As is clear from the above, it is the aggregate value of clearances of all excisable goods for home consumption by a manufacturer from one or more factories have to be taken into consideration. In as much as all the three units were owned by one proprietor Ms. Neera Khanna, the aggregate value of all the units which admittedly exceeds Rs.50 lakhs in the preceding financial year are required to be taken into consideration. We also note that it is the availability of Notification to M/s Flavel International which is being examined for the purpose of Notification No.75/87 and as such the fact that no notices were given to the other two units cannot act as a deterrent for examining the availability of exemption Notification to the present appellants.

Accordingly, we note that the appellants have taken a stand that the clearances of the seized goods have also been taken into consideration while computing the clearances of Rs.50 lakhs. Otherwise also, we find that some of the demands stands confirmed against the appellants in the findings of the clandestine manufacture stands dropped by us. It is not clear whether such clearances have been taken into consideration or not? Accordingly we direct the Commissioner to examine the said aspect and arrive at a total figure of clearances of Ms. Neera Khanna for the purposes of extending the benefit of Notification. Needless to say that the appellants would be given an opportunity to putforth their case.

39. We further note that the demand of Rs.58,44,825/- stands confirmed against the appellant on the finding of clandestine manufacture of 606 ACs and clearance of the same without payment of duty during the period 1988-89 and 1989-90. The said finding are based upon the entries made in the ledger account maintained by the appellant. It was alleged that the payments as reflected in the ledger were on account of ACs manufactured and cleared by the appellant and the appellant's claim of trading in compressors cannot be accepted. It was also alleged that M/s. Thermoking who was procuring compressors under chapter X procedure without payment of duty, was diverting the same to Flevel International, instead of utilization of the same in their factory for further manufacture of ACs. Further certain payments have been made by person and credited in the books of accounts but no bill number being mentioned against the

said receipts and debit column of ledger are kept blank. It was further alleged that the appellants had raised bills for the materials sold and the amounts stands debited to various parties but there are no entries against such debit and amounts had been shown at the end of year 1988-89.

40. It is seen that the entire demand on account of allegation of clandestine removal stands made on the basis of entries in the ledger account. Inasmuch as there are no corresponding entries in the central excise records, the Revenue has held that the said difference is on account of clandestine removal of the ACs. The appellants have categorically taken a stand that they have sold compressors and not ACs as alleged by the department. We find that the price range of the goods as reflected in the ledger account is the price range of compressors. But the adjudicating authority has held that the said price as reflected in the ledger account has been intentionally kept close to the values compressors. He also relied upon the statement of one Shri Pradeep Bhargava recorded on 30.4.92 that compressors were being received by Thermomking under chapter X procedure from Shri Ram Refrigeration and Kirloskara Brothers but he had never seen manufacturing activities of water coolers in which compressors were to be used in Thermoking's premises. In his subsequent statement which was recorded on 1.5.92, he has deposed that such compressors obtained by Thermoking were diverted to Flevel International who manufactured air conditioners out of the same. However, the said statements were retracted by Shri Bhargava

subsequently. The appellants have contented that the Shri Bhargava had grudge against Thermoking as he was convicted for an embezzlement of Rs.50,000/-. Inasmuch as he did not turn up for cross examination. The appellants' contention is that his statement has to be excluded.

41. The Commissioner has strongly relied upon the statement of Shri Bhargava. However, we find that apart from the said statement as also the statement of representative of Kirlosakar Brothers that the compressors were being sold to Thermoking, there is no direct evidence of manufacture of such huge quantity of ACs in the appellant's factory. No doubt for trading in the identical type of goods permission under Rule 51A of Central Excise Rules is required. However, the fact of non obtaining permission cannot lead to conclusion that the goods traded in the market were not compressors but the ACs which were manufactured by the appellants and cleared clandestinely.

42. It is also seen that the appellants had given a list of their buyers to whom the compressors have been sold alongwith value. The said value relate to the value of compressors and not that of ACs. The Adjudicating authority has not given any credence to such list provided by the appellants by simply observing that these bills were in the names of Sir Names of the persons whose very existence is, ex facie, doubtful. He has accordingly observed that he is not inclined to give any credence to them or the arguments advanced on the basis of same. We do not find favour in the above contention.

Admittedly, the Commissioner has rejected the buyers list and stand taken by the appellants in the absence of any direct evidence on records to indicate that such buyer's did not exist. Merely because the details of buyers' address is not given and the bills are in the names and sir names of the persons cannot held to be doubtful and lead to the inevitable conclusion of the clandestine manufacture and clearance of air conditioners.

43. We find that the allegations against the appellants are of clandestine manufacture and removal on the ground that some entries which according to the appellant belonged to the sale of compressors have been held to be clearance of ACs. We find that there is virtually no evidence on records establishing that there was clandestine manufacture and clearance. There is no evidence of procuring excess raw materials required for production of such huge number of ACs. The statement of any employee has not been recorded. There is no incriminating statement of proprietor of the units or any of the authorized representatives. No buyers of ACs stands identified by the Revenue. It is well settled law in case of clandestine removal; the department is required to produce positive evidence to establish the same. We find that the entire case in the present matter is made out on the basis of doubt and not on evidence on records. The demands cannot be made on presumption and is required to be made on the actual evidence available on record.

44. At this stage, we may refer to the recent decision Hon'ble High Court of Gujarat in the case of Nissan Thermoware Pvt. – 2011 (266) ELT 45 (Guj.) wherein it was held in para 16 as under:-

"In the absence of any tangible evidence which would indicate that there was clandestine manufacture and clearance of the goods from the factory premises of M/s VTPL, in the peculiar facts and circumstances of this case, we hold that the impugned order which confirms the demand on the appellant M/s VTPL and imposes penalty on them is not sustainable and is liable to be set aside and we do so."

In a recent decision of the Tribunal in the case Kuber Gutkha, it would be relevant to reproduce some paragraphs from the order dictated by third member:-

*"25. I find that the Hon'ble President has correctly relied on the judgment of Hon'ble Supreme Court in the matter **Nagubai Ammal and Others vs B. Shama Rao, AIR 1956 SC 593** wherein it was held that- "an admission is not conclusive as to the truth of the matters stated therein. It is only a piece of evidence, the weight to be attached to which matters depends on the circumstances under which it is made. I am unable to find these retracted oral testimonies as credible piece of evidence to sustain the charge against the Appellant Company.*

*26. It would be necessary to analyze whether the evidences, other than the retracted oral evidences, are credible for being used as corroborative evidence. The Hon'ble Supreme Court in case of **Sitaram Sao v. State of Jharkhand - (2007) 12 SCC 630**, pithily encapsulated the idea of "corroborative" evidence, in the following words :*

"34. The Word 'corroboration' means not mere evidence tending to confirm other evidence. In DPP v. Hester - (1972) 3 All ER 10.16, Lord Morris said:

"The purpose of corroboration is not to give validity or credence to evidence which is deficient or suspect or incredible but only to confirm and support that which as evidence is sufficient and satisfactory and credible; and corroborative evidence will only fill its role if it itself is completely credible....."

There can be, therefore, no "corroboration" of evidence, which is itself unworthy of credence.

29. In the entire records of proceedings, there is no evidence to indicate that there was clandestine manufacturing. There is no independent tangible evidence on record of any clandestine purchases or receipt of the raw materials required for the manufacturing of the alleged quantity of finished goods for its clandestine removal from the factory. In the entire notice and the order there is no satisfactory and reliable independent evidence as regards the unaccounted manufacture and or receipt of the huge quantities of raw materials. The quantities of the alleged bags dispatched from the factory would require some transportation arrangement for delivery from the factory. However, any reliable evidence about any vehicle coming to or going out of the factory without proper entries is not forthcoming. There is also no cogent evidence about any freight payment for any such movement.

30. I do not find cogent evidence of disproportionate and unaccounted receipt and consumption of the basic raw materials and packing material, required for manufacturing alleged quantity of unaccounted finished goods. I do not find tangible proof of unauthorized payment for procuring such unaccounted raw material and packing material. I do not find cogent

evidence of disproportionate power consumption, capacity utilization and labour employed, or any cogent evidence of clandestine manufacture of unaccounted quantity alleged as clandestinely removed. I find that unaccounted production in the factory of the appellant company has not been established.

31. *My above views are fortified by a recent case in the case of Viswa Traders Pvt.Ltd. & others Vs. CCE Vadodara being Final Order No.A/1846-1851/WZB/AHD/2011, dt.01.11.2011, a similar issue of clandestine removal was decided by co-ordinate Bench of Tribunal in Ahmedabad, wherein it is held that unless clandestine manufacturing is brought on record, there cannot be any allegation of clandestine clearances, un-corroborated with evidences."*

45. From the above discussion, we find that there is virtually no evidence available on records indicating clandestine manufacture of 606 ACs. As such, we find no reason to confirm the demand against the appellants on the said ground. In the absence of confirmation of demand, no penalty is liable to be imposed.

46. In view of the foregoing discussion, the appeals of M/s Thermotech and Shri Pradeep Khanna are allowed. The appeal of M/s Flavel International is partially allowed and partially remanded as indicated in the orders.

(Pronounced in the open court on _____)

(Archana Wadhwa)
Judicial Member

(Rakesh Kumar)
Technical Member

RK-I

Per. Rakesh Kumar :-

47. I have gone through the order proposed by my learned sister. While I agree with the order in respect of appeal No. E/4885—4886/04, I do not agree with her conclusions, in respect of the following points in the order in respect of appeal No. E/4903/04 –

(i) liability to confiscation of 24 room air conditioners seized from the residential premises of Shri Pradeep Khana/ Mrs. Neera Khana and duty demand of Rs. 3,16,800/- in respect of the same from M/s Flevel International.

(ii) duty demand of Rs. 58,44,825/- in respect of alleged clandestine manufacture and clearance of 606 air conditioner during 1988-1989 and 1989-1990.

48. Coming first to the question of duty demand in respect of 24 air conditioners seized from the residential premises of Shri Pradeep Khana/Mrs. Neera Khana and confiscation of the same, it is seen that -

(a) during the period of dispute, admittedly it is Shri Pradeep Khana, husband of Mrs. Neera Khana, Proprietor M/s Flevel who was managing the affairs of M/s Flevel; and

(b) Shri Pradeep Khana, in his statement dated 28/2/92 recorded under Section 14 of the Central Excise Act, 1944 has clearly stated that these air conditioners had been manufactured in the factory of M/s Flevel and had been cleared from there without payment of duty ; and

(c) though Shri Pradeep Khana, subsequently on 8/3/92 retracted his statement dated 28/2/92 and claimed that these 24 air conditioners had been manufactured by M/s Thermoking through a contractor – M/s Nikhil Refrigeration out of the compressors purchased from M/s Shriram Refrigeration and M/s Kirloskar Brothers, no evidence has been produced by Shri Khana that his statement dated 28/2/92 had been obtained under threat, coercion, pressure or inducement, and on inquiry, the address of M/s Nikhil Refrigeration given in the contract of M/s Thermoking with M/s Nikhil Refrigeration was found to be false.

48.1 Under Section 14 (2) of Central Excise Act, 1944, a person summoned by an empowered Central Excise officer for conducting inquiry under Section 14 (1) – “shall be bound to state the truth upon any subject respecting which he is examined”. Under Section 14 (3), every inquiry conducted under Section 14 shall be deemed to be “judicial proceeding” within the meaning of Section 193 and 228 of the Indian Penal Code, 1860. Section 193 of IPC provides for punishment for intentionally giving false evidence in any stage of a judicial proceeding. Since a person who has given a statement before an investigating officer under Section 14, unless contrary is proved, is presumed to be not guilty of offence punishable under Section 193 of IPC, the statement given by him has to be presumed to be his true statement voluntarily given – the only exception would be the situation where he produces evidence from which it appears to the court that he was forced, threatened, coerced or induced by the investigating officers to give certain statement implicating

himself and/or others and in such a situation, in term of the provisions of Section 24 of the Evidence Act, the statement would not be admissible as evidence. It is in view of this, that the Apex Court in a series of judgments -

- (a) **Naresh J. Sukhawani vs. Union of India** reported in **1996 (83) E.L.T. 258 (S.C.)**
- (b) **Surjeet Singh Chhabra vs. Union of India** reported in **1997 (89) E.L.T. 646 (S.C.)**
- (c) **K.I. Pavunny vs. Asstt. Collr. (HQ.), C. Ex. Collectorate, Cochin** reported in **1997 (90) E.L.T. 241 (S.C.)**
- (d) **Asstt. Collr. Of C. Ex., Rajamundry vs. Duncan Agro Industries Ltd.** reported in **2000 (120) E.L.T. 280 (S.C.)**,

has held that statement recorded by a gazetted officer of Customs under Section 108 of Customs Act, 1962 (identical to the provisions of Section 14 of the Central Excise Act, 1944) is not hit by the provisions of Section 25 of the Evidence Act and the same is admissible as evidence, if it has been made voluntarily and is not vitiated on account of any threat, inducement etc. envisaged in Section 24 of the Evidence Act. For invoking the provision of Section 24, there must be evidence from which it appears that the factor mentioned in it exist, without which, a bald retraction of the statement has to be rejected as an after thought.

48.2 Applying the above criteria, the retraction of statement dated 28/2/92 by Shri Pradeep Khana has to be dismissed as an

after thought and his statement dated 28/2/92 has to be treated as his true, correct and voluntary statement. In this regard, non recording of the statement of his wife Mrs. Neera Khana, Proprietor of M/s Flevel does not affect the correctness of Shri Pradeep Khana's statement dated 28/2/92, as it is he who, admittedly, was managing the affairs of M/s Flevel. Shri Khana's statement retracting his statement dated 28/2/92 and claiming that the 24 air conditioner seized from his residential premises was got manufactured by him from M/s Nikhil Refrigeration on job work basis is difficult to accept when the address of M/s Nikhil Refrigeration, on inquiry was found to be a non-existent. No evidence regarding any payments having been made to M/s Nikhil, movement of compressors and other raw material to M/s Nikhil and movement of ACs to M/s Thermoking has been produced. It is also seen that Shri Devender Oberoi, claimed to be the Proprietor of M/s Nikhil, is an employee of M/s Flevel and therefore no credibility can be attached to the so called contract between M/s Thermoking and M/s Nikhil Refrigeration, produced by Shri Pradeep Khana. On the other hand, statement dated 9/6/92 of Shri Shiv Prasad, Manager, M/s Kirloskar Brothers and statement dated 26/4/92 of Shri K.V. Subba Rao, Deputy Manager, M/s Shri Ram Refrigeration indicate that M/s Flevel were engaged in the manufacture of Air conditioners. In view of this, I uphold the Commissioner's finding that the 24 air conditioners, seized from the residential premises of Shri Pradeep Khana/ Mrs. Neera Khana had been manufactured by M/s Flevel and had been clandestinely removed without payment of duty.

Accordingly, the confiscation of these air conditioners, duty demand of Rs. 3,16,800/- in respect of them and imposition of penalty on this count under Rule 173Q is upheld.

49. The duty demand of Rs. 58,44,825/- in respect of 606 ACs, alleged to have been manufactured by M/s Flevel during 1988-1989 and 1989-1990 and cleared clandestinely without payment of duty is based on -

(a) entries in the ledger account of M/s Flevel regarding payments received from certain customers ;

(b) statements dated 30/4/92 and 1/5/92 of Shri Pradeep Bhangara of M/s Thermoking that the compressors were being received by M/s Thermoking under Chapter X procedure from M/s Shree Ram Refrigeration and M/s Kirloskar Brothers for manufacture of water coolers, but the same were being diverted to M/s Flevel who manufactured air conditioners out of the same.

49.1 There also statements of the representatives of M/s Shree Ram Refrigeration and M/s Kirloskar confirming sale of compressor to M/s Thermoking. From the records, it appears that a separate show cause notice dated 30/7/92 has been issued to M/s Thermoking for demand of duty on illicitly diverted compressors, as the compressor had been received at concessional rate of duty under Chapter X procedure for use in the manufacture of water coolers. According to M/s Flevel, the entries in the ledger are regarding sale of compressors as such, not sale of Air conditioners. According to Department, however,

the price of the goods sold indicates that the goods sold were Air Conditioners, not compressors and the compressors illicitly diverted by M/s Thermoking were used by M/s Flevel in manufacture of ACs.

49.2 In my view the statements of Shri Pradeep Bhangara, which are key evidence in support of the allegation of unaccounted manufacture and clearance of air conditioner by M/s Flevel out of compressors diverted from the husband's unit M/s Thermoking, cannot be disregarded just because these statements have been retracted as there is no evidence from which it would appear that these statements are hit by Section 24 of the Evidence Act. As discussed in para 48.1 above, the statement of a person, recorded under Section 14 of the Central Excise Act, 1944 can be discarded only if it is hit by the provisions of Section 24 of the Evidence Act. Moreover, the statements of Shri Bhangara stand corroborated by the facts that

- (a) receipt of compressor at concessional rate of duty by M/s Thermoking from M/s Shree Ram Refrigeration and M/s Kirloskar, for manufacture of water cooler is not denied ;
- (b) there was no manufacture of water coolers by M/s Thermoking and the compressors received for which a separate show cause notice dated 30/7/92 has been issued to M/s Thermoking; and
- (c) the prices of the goods sold by M/s Flevel, correspond to the price of ACs, not of compressors.

Moreover, as per the statement of Shri Shiv Prasad of M/s Kirloskar as per his company's policies, the OEM buyers were not permitted to trade in the product i.e. compressor and therefore M/s Flevel could not sell the compressor purchased by them from M/s Kirloskar and M/s Shree Ram. In absence of any complaint from M/s Kirloskar and M/s Shree Ram in this regard against M/s Flevel, it has to be presumed that M/s Flevel have not traded in compressors received by them for M/s Kirloskar and M/s Shree Ram. All this evidence points to receipt of compressors, illicitly diverted by M/s Thermoking, by M/s Flevel who manufactured ACs out of the same and cleared the same clandestinely. Moreover for trading in compressors they also required permission from the Department under Rule 51A of Central Excise Rules which admittedly has not been obtained. This shows that they were not trading in compressors and their claim in this regard is just an after thought.

49.3 A tax dispute – the proceedings against an assessee for alleged non-payment of tax is a civil dispute (**page 92, Salmond on Jurisprudence, Twelfth edition, by P.J. Fitzgerald**). The standard of evidence in a civil dispute is preponderance of probability, not the proof beyond any reasonable doubt. In my view, the evidence on record in this case is sufficient to establish the preponderance of probability in support of the allegation of duty evasion of Rs. 58,44,825/- by M/s Flevel by clandestine clearance of 606 air conditioner without payment of duty.

50. I, therefore, -

(a) uphold the confiscation of 24 air-conditioners seized from the residential premises of Shri Pradeep Khana/Mrs. Neera Khana on 28/2/92, the duty demand of Rs. 3,16,800/- in respect of the same and imposition of penalty on M/s Flevel under Rule 173Q (1) for removal of these air-conditioners without payment of duty ; and

(b) uphold the duty demand of Rs. 58,44,825/- against M/s Flevel in respect of clandestine clearance of 606 air-conditioners during 1988-1989 and 1989-1990 and also imposition of penalty on M/s Flevel for this under Rule 173Q (1).

On the remaining points of dispute in these appeals, I agree with the order proposed by my learned sister.

(Rakesh Kumar)
Member (Technical)

51. Since in respect of appeal No. E/4903/04 of M/s Flevel, there is difference between Member (Technical) and Member (Judicial) on certain points, the Registry, in accordance with the provisions of Section 129C (5) of the Customs Act, 1962, as made applicable to Central Excise matters by Section 35D (1) of the Central Excise Act, 1944, is directed to place this matter before Hon'ble President for either deciding himself or nominating a third Member for decision, the following points of dispute -

(1) Whether there is sufficient evidence on record to uphold the confiscation of 24 air-conditioner seized from the premises of Shri Pradeep Khana/Mrs. Neera Khana on 28/2/92 and also uphold the demand of duty in respect of the same and imposition of penalty on M/s Flevel under Rule 173Q (1) of the Central Excise Rules, 1944?

(2) Whether there is sufficient evidence on record to uphold the duty demand of Rs. 58,44,825/- against M/s Flevel in respect of 606 air-conditioners alleged to have been manufactured and cleared by them during 1988-1989 and 1989-1990?

(Pronounced in the open court on 15-5-2012.)

(Archana Wadhwa)
Member (Judicial)

(Rakesh Kumar)
Member (Technical)

PK

52. I have gone through the records of the case, the differing opinions recorded by the two Members of the Bench which originally heard the matter and also the arguments on both sides during hearing before me.

53. My views are required to be recorded on the following two matters:

- (1) Whether there is sufficient evidence on record to uphold the confiscation of 24 air-conditioners seized from the premises of Shri Pradeep Khana/Mrs. Neera Khana on 28.2.92 and also uphold the demand of duty in respect of the same and imposition of penalty on M/s Flevel under Rule 173Q(1) of the Central Excise Rules, 1944?
- (2) Whether there is sufficient evidence on record to uphold the duty demand of Rs.58,44,825/- against M/s Flevel in respect of 606 air-conditioners alleged to have been manufactured and cleared by them during 1988-1989 and 1989-1990?

Matter of 24 air-conditioners seized.

54. There is another firm namely M/s Thermoking which was also involved in the matter. This was a proprietorship firm of Shri. Pradeep Khanna husband of Mrs. Neera Khanna who was the proprietress of M/s Flevel International. M/s Flevel International was a manufacturing firm of Mrs. Neera Khanna. Both were manufacturing air-conditioners. The defense of the appellant is that the goods seized from residence of the Khannas were got manufactured by M/s Thermoking through M/s Nikhil Refrigeration and were not manufactured by M/s Flevel International.

55. The fact that the goods were seized from the residence of the Khannas is not disputed. It was also stated by Shri. Pradeep Khanna on 28-02-92 that the goods were manufactured at C-106/1, Naraina, New Delhi on 27-02-92 and cleared without

payment of duty. It is admitted that the premises at C-106/1 was the usual manufacturing premises of M/s Flevel International.

56. On 08-03-92 Mr. Khanna sent a letter under the letter head of M/s Thermoking informing that the 24 air conditioners were purchased from Nikhil Refrigeration. In this letter he stated that since the goods were not manufactured at his factory at C-106/1, Naraina Industrial Area the question of payment of Central Excise duty does not arise.

57. The defense that the basement of the premises at C-106/1, Naraina was taken on rent by M/s Thermoking was taken by Shri. Khanna in his statement dated 17-03-92. The pleading during hearing before me was that M/s Thermoking had taken the basement of C-106/1, Naraina on temporary possession because the regular manufacturing premises of M/s Thermoking at A-24, Naraina Industrial Area was under renovation.

58. These submissions are contradicting each other. If the goods were manufactured by M/s Nikhil Refrigeration there is no case of goods being manufactured at C-106/1, NIA at the basement of the premises of M/s Flevel International. The fact that these air conditioners were kept at the residence of the Khannas on the budget eve when there was a practice of checking of stock by excise officers, gives basis for a prima facie case, that is to say the burden to prove the duty paid nature of the goods was heavily on the Khannas because it was a residential premises. If the goods were genuinely duty paid then the explanation along with duty paying documents would have been forthcoming quickly. That was not the case here. It was after 8 days that Shri. Khanna came up

with the argument that the goods were manufactured by Nikhil Refrigeration. After another two months or so he came up with argument that the goods were manufactured at the basement of C-106/1 Naraina taken on rent from Flevel International. All these factors clearly indicate that the goods were manufactured by M/s Flevel International and on which applicable excise duty was not paid.

59. I note that one point taken note of by Member (Judicial) is that the departmental officers did not record the statement of Mrs. Khanna, the proprietor of M/s Flevel International during the investigation stage and hence the investigation is flawed. What I find from para 8.1 and 8.2 of the Show Cause Notice is that Shri. Pradeep Khanna was holding it to be a partner in M/s Flevel International at the early stages of investigation. It is seen from para 10 of the Show cause Notice that only at a much later stage it is unearthed that the firm is a proprietorship concern of Mrs. Neera Khanna. When the search took place at the residence of the Khannas they should be aware as to what is the constitution of the firm to which the goods belong. The case cannot be thrown out for the reason that the true position known to the appellant was not disclosed by them at that stage and only after many months. By that time the relevance of any statement to be recorded had gone and it was sufficient that the appellant was given opportunity to defend the case through issue of Show Cause Notice. If participation in investigation is by hide and seek there is no reason to give benefit to the tax evader. The facts of this case do not justify giving such benefit.

60. So I agree with the view taken by Hon. Member (Technical) in the matter of 24 air conditioners seized from the residence of the Khannas.

In the matter of 606 Air-Conditioners cleared during the period 1988-89 and 1989-90.

61. During the relevant time there was a concessional rate of duty for compressors used for manufacture of water coolers. A case made out by Revenue that 1022 compressors bought by M/s Thermoking, under concessional rate of duty, subject to proper end-use for manufacture of water coolers, were diverted for manufacture of air-conditioners by M/s Flevel International is pending in appeal by M/s Thermoking. The present proceeding is in respect of 606 air-conditioners manufactured by M/s Flevel International. The summary of the demand is as under:

S. No.	Type of realization in ledgers which are alleged to relate to clandestine removals	For 1988-89	For 1989-90
1	Total number of compressors sold for which an amount of Rs. 7700 to 8800 was booked in the ledger	182	121
2	Total Number of Air Conditioners sold for which an amount of Rs. 12000 to Rs. 18000 has been booked in the ledger but not entered in central excise records	153	90
3.	Total number of air conditioners sold for which an amount of Rs. 12000 to Rs. 18000 has been booked in the ledger and which are still being shown as in continued debit or credit	21	39
	Total	356	250

62. This demand is based on the figures from sales ledger of M/s Flevel International. Also investigations were conducted with a few buyers of the goods. During such investigations it was seen that M/s Flevel International was sometimes billing just for the compressor, while they were selling air-conditioners and taking the difference amount in cash. This may be seen from results of investigations recorded in para 17 of the Show cause Notice as under:

- (1) One A.C. was found to be installed at the residence of Mr. Praveen Sabarwal of A-I/25, Paschim Vihar, New Delhi. This A.C. had been assembled by M/s Flevel International and they had been rendering after sales services. He had paid Rs.300/- towards service charges for next year. It is noticed from the statement that the A.C. was cleared from M/s Flevel International in the guise of compressor and bill was raised only for compressor for an amount of Rs.8,800/-.
- (2) One A.C. has been found to be installed at the residence of Shri Sanjiv Sheti, V-224, Rajouri Garden, New Delhi, Shri Sanjiv Sethi in his statement dated 26.5.92 deposed that he had purchased a compressor for an amount of Rs.8,000/- by bill No. 76 dated 21.5.89. Out of which an amount of Rs.8,000/- was paid through cheque No. 013732 dated 28.4.89 and remaining was paid through cash. The compressor was delivered by representatives of M/s Flevel International. The A.C. was assembled by the same mechanic in his workshop. The mechanic who

assembled the A.C. also installed it in the premises. The scrutiny of ledger for 1988-89 reveals the aforesaid cheque was accounted for in the accounts of Shri Anupam Sethi and this payment has been received without indicating any bill. In the account of Sanjiv Sethi the cash payment of Rs.8,800/- has been mentioned. It means that Anupam Sethi is a fictitious person and Mr. Sanjiv Sethi has paid Rs.16,800/- as the price of A.C. to M/s Flevel International and such A.C. has been cleared in the guise of gas compressor.

- (3) Shri S.K. Duggal, r/o 33-B, Pt-II, Mayour Vihar, Delhi in his statement dated 22.5.92 had stated that one compressor was bought by him from M/s Flevel International on 22.4.89 against party's bill No. 23 for Rs.8,800/- which was paid by cheque No. 586075 dated 23.4.89. M/s Flevel International later on manufactured air-conditioners for Shri Duggal, S.K. and fitted the compressor sold to him in the said air-conditioner for which Rs.6,300/- was charged from him. The said M/s Flevel International did not issue any central excise gate pass for the air-conditioner manufactured and cleared for Mrs. S.K. Duggal."

63. Further the statements given by the following persons also are relied upon as evidence:

- (i) Statements of Shri. Pradeep Bhargava who was an accountant looking after matters relating to accounts,

excise, banking, sales tax and income tax matters of M/s Flevel Industries;

- (ii) Statement of Shri. Shiv Prasad Manager of M/s Kirloskar Brothers, who were supplying compressors to the appellants.

64. The Counsel for appellant submits the following arguments:

- (i) the department is trying to charge excise duty on sales of compressors treating it as sales of air-conditioners manufactured by them without any evidence these are cases of sales of compressors and not cases of sales of air-conditioners.
- (ii) Shri. Pradeep Bhargava was caught in a case involving embezzlement of Rs. 50,000/- from the appellant during Jan 89 and a police case was booked against him. So he had a grouse against the appellant. So his statement should not be relied upon. The Cross-Examination of Shri Pradeep Bhargava was sought by the Appellant and he did not turn up to face Cross-Examination.
- (iii) The statement of Shri Pradeep Bhargava does not name the Appellant. Such alleged statement refers to the premises at C-106/1, Naraina Industrial Area, Phase-I, New Delhi. This statement subsequently retracted by Shri Pradeep Bhargava.
- (iv) At no stage of investigation, the proprietor Mrs. Neera Khanna or any other person whose statement was recorded was ever confronted with the statement of Shri Pradeep Bhargava or even towards alleged diversion of 1022 compressors of Thermoking if diverted to C-106/1, Naraina Industrial Area, Phase-I. No statement of the workers of the Appellant was ever recorded even in respect of such alleged diversion or for alleged clandestine manufacture of 606 numbers of

Air-Conditioners. It is only on issuance of Show Cause Notice that such an allegation of alleged manufacture and clearances of 606 numbers of Air-Conditioners was leveled against the Appellants.

- (v) The Commissioner of Central Excise, in his impugned order at para 43 held about the Confirmation of Demand on 606 numbers of Air-Conditioners was only way of inference. It is settled that in Excise Matters there has to be Tangible-Evidence and no demand can be confirmed on Presumption and Surmises.
- (vi) The Appellants maintained that they not only manufactured Air-Conditioners but also manufactured Washing Machines, Geysers etc. and for which they produced their records duly certified by the officers of Central Excise. The Commissioner of Central Excise even in his order has not disputed the correctness of such records including manufacturing of various electrical appliances by the Appellants.
- (viii) Para-19 of Show Cause Notice fixed the price of Air-Conditioner from Rs.12,000/- to Rs.18,000/- and taking into consideration the total receipts or entries in ledger accounts, the price works out to Rs.8,000/- to 10,000/-. This cannot be the price of Air-Conditioner as per the yardstick drawn of Air-Conditioners to be from Rs.12,000/- to Rs.18,000/-.
- (ix) The claim of the Appellants of having traded in Compressors has not been accepted by the Commissioner (Adj) and also by Hon'ble Member (T) on one of the grounds that the statement of Shri Shiv Prasad recorded on 9.6.1992 (Manager of M/s Kirloskar Brothers appearing at page 176 to page 181 of the paper book) states that the O.E. are not required to trade in compressors. It is submitted that at page 178 of the paper book, Shri Shiv Prasad stated as under :-

"However if any, O.E.M. is trading in Compressors, we do not have any control on them".

The above portion of the statement of Shri Shiv Prasad has not been appreciated and even overlooked therefore, statement of Shri Shiv Prasad cannot become a ground in denying trading. In any case such trading is in respect of compressors which the Appellants themselves bought as per para-20 of Show Cause Notice. This accounts for 303 numbers.

- (x) As per para-41 of the order of the Commissioner the trading is only prohibited under Rule 51A of the Central Excise Rules from the factory in respect of similar goods as being manufactured in the factory. Compressor is not manufactured by the Appellants. Therefore, trading in compressors had no Restrictions under erstwhile Rule 51A of Central Excise Rules, 1944.

65. The Ld. A. R. for Revenue submits that the case is made on the basis of entries in the books of accounts of the appellant and not based just on statements. The appellant is a manufacturer of air conditioners. The manufacturers of compressors were selling compressors to the appellants treating them as an Original Equipment Manufacturer and not as a dealer in compressors as evidenced from statement of Shri. Shri. Shiv Prasad Manager of M/s Kirloskar Brothers. According to him it is very clear from the facts and circumstances of the case as brought out by the investigation the appellant was manufacturing air-conditioners and selling them and accounting realization of the cost of compressors

only in many cases. When there are authorized dealers for compressors the defense set up that the appellant were selling compressors to individuals is not a story which can be given any credence.

66. I have considered arguments on both sides. It is argued that the manufacturers of compressors could not have imposed any restriction regarding trading by the appellant. Here the issue is not whether the manufacturer could have legally enforced such restriction. There are other forces at work. When there are dealers appointed by the manufacturers with appropriate price margins who are engaged in such trading activity, an OEM could not have indulged in parallel sales of such large number of compressors because of the market forces and if they indulge in such activity it would have come to the notice of the manufacturer and the representative of the manufacturer testifies that no such trading had come to their notice. So this claim of trading in compressors is a very weak defense.

67. Further compressors were needed by other manufacturers and not by individuals. Since compressors are shown as sold to individuals it is obvious that this was only a method to undervalue the air-conditioners sold. Wherever a few buyers could be located such fact was proved. So the case made out by Revenue is correct and the demand is maintainable.

68. The fact that Shri. Pradeep Bhargava was caught by the appellant in an embezzlement (sometime in January 1989) cannot be reason to discard his statement given in April 92. Quite often such grudge results in disclosure of truths which are not pleasant to the person who alleges embezzlement.

69. The statement of Shri. Bhargava has to be seen with reference to other corroborative evidences. When the statement of Shri. Bhargava is seen in conjunction with the statement of Shri. Shiv Prasad and the facts that the sales of compressors were to individuals and not to other manufacturers it is very obvious that the appellants were selling air-conditioners and showing such sale as sale of compressors.

70. If the statement of Shri Bhargava about diversion of compressors meant for manufacturing water coolers for manufacturing air-conditioners was not true it would be easy to demonstrate the actual sale of water-coolers at least in majority of those cases. Of course evidence in this regard is to be adduced by M/s Thermoking, the firm of the husband, Shri. Pradeep Khanna. But it is to be noted that since the affairs of both the firms were being managed by Shri. Pradeep Khanna it was easy to take this defense, if only it was true, rather than take a technical defense that the matter does not concern the appellant.

71. It is claimed by the appellant that they were manufacturing other items like geysers, washing machines etc and therefore all

realizations of unaccounted money cannot be considered as due to clearance of air-conditioners. What I notice is that the demand for 303 numbers of air-conditioners are in cases where compressors are shown to be sold. Since geysers and washing machines do not require compressors, this defense is of no avail for 303 numbers. In 243 cases the demand relates to price realization in the range of Rs. 12000 to Rs. 18000 which is the price range for air-conditioners and not geysers and washing machines made by the appellant. The remaining 60 also is shown to be in respect of sales of air-conditioners where money is received but supplies are not recorded or where supplies have been made but money not received. No specific instances to create a doubt in favor of the appellant has been demonstrated in any of these instances. So I do not see much merit in this argument.

71. After appreciating the overall evidence presented by Revenue I am not able to agree with the contention of the appellant that the case is made on assumptions and surmises. Every case is to be decided based on inference to be drawn by a prudent judge from the evidence available. This process of reasoning is well explained by the Apex Court in the case of **State of West Bengal vs Mir Mohammad Omar & Ors-2000 (8) SCC 382**. The Court was appreciating evidences in a murder case. For sake of brevity the facts of the case are not being recounted here. However the following observations are to be kept in mind before throwing out any case concluding that the case is based on

assumptions, presumptions or surmises. The Court made the following observations:

"The pristine rule that the burden of proof is on the prosecution to prove the guilt of the accused should not be taken as a fossilised doctrine as though it admits no process of intelligent reasoning. The doctrine of presumption is not alien to the above rule, nor would it impair the temper of the rule. On the other hand, if the traditional rule relating to burden of proof of the prosecution is allowed to be wrapped in pedantic coverage the offenders in serious offences would be the major beneficiaries, and the society would be the casualty.

In this case, when prosecution succeeded in establishing the afore narrated circumstances, the court has to presume the existence of certain facts. Presumption is a course recognised by the law for the court to rely on in conditions such as this. Presumption of fact is an inference as to the existence of one fact from the existence of some other facts, unless the truth of such inference is disproved. Presumption of fact is a rule in law of evidence that a fact otherwise doubtful may be inferred from certain other proved facts. When inferring the existence of a fact from other set of proved facts, the court exercises a process of reasoning and reach a logical conclusion as the most probable position. The above principle has gained legislative recognition in India when Section 114 is incorporated in the Evidence Act. It empowers the court to presume the existence of any fact which it thinks likely to have happened. In that process court shall have regard to the common course of natural events, human conduct etc. in relation to the facts of the case."

72. The standard of proof required for proving evasion of taxes is of a much lesser degree as held in the following cases:

- (i) Collector Vs. D. Bhoormal-1983 (13) E.L.T. 1546 (S.C.)
- (ii) Dewan Chand Builders & Contractors Vs. UOI-2011 (274) E.L.T. 161 (S.C.)
- (iii) Peacock Industries Ltd. Vs. CCE.- 2008 (228) E.L.T. 353 (Raj.)

73. I have also considered the observation of Member (Judicial) that no evidence regarding clandestine removals, procurement of all the raw materials required, power consumption man-power deployed etc has not been adduced by Revenue. This is not the factual position. The seizure of 24 air-conditioners manufactured by Flevel and stored at the residence of the Khannas is first held to be manufactured by somebody else to arrive at this logic. Further sales realizations are accounted in the ledgers. Many of the persons to whom goods were sold could not be located But where a few could be located it was found that sale of air-conditioners were involved. Secondly the major raw material required is compressors for which Revenue has shown the source. In a clandestine activity, it is not possible to unearth every piece of evidence and such standard of proof is not required for proving evasion of tax. So I do not agree with the finding of Member (Judicial) in this matter.

74. I have also considered the objection raised that the statement of Smt. Neera Khanna was not recorded at any stage of the investigation. I have already examined this issue in the context of the seizure of the 24 air-conditioners from the residence of the Khannas and the same view point applies here also. After not having disclosed for initial few months that M/s Flevel International was a proprietorship firm of Mrs. Neera Khanna, when her husband Mr. Pradeep Khanna, who was managing the affairs of Flevel International, was being examined in the matter, Revenue cannot faulted for not having recorded statement of Mrs. Khanna. At any rate full opportunity to rebut allegation is given by issue of Show Cause Notice. So I do not see any merit in this argument. In this context I would like to further quote from the judgement of the Apex Court in the case of State Of West Bengal vs Mir Mohammad Omar & Ors (supra) as under:

"Castigation of investigation unfortunately seems to be a regular practice when the trial courts acquit accused in criminal cases. In our perception it is almost impossible to

come across a single case wherein the investigation was conducted completely flawless or absolutely foolproof. The function of the criminal courts should not be wasted in picking out the lapses in investigation and by expressing unsavoury criticism against investigating officers. If offenders are acquitted only on account of flaws or defects in investigation, the cause of criminal justice becomes the victim. Effort should be made by courts to see that criminal justice is salvaged despite such defects in investigation. Courts should bear in mind the time constraints of the police officers in the present system, the ill-equipped machinery they have to cope with, and the traditional apathy of respectable persons to come forward for giving evidence in criminal cases which are realities the police force have to confront with while conducting investigation in almost every case. Before an investigating officer is imputed with castigating remarks the courts should not overlook the fact that usually such an officer is not heard in respect of such remarks made against them. In our view the court need make such deprecatory remarks only when it is absolutely necessary in a particular case, and that too by keeping in mind the broad realities indicated above."

75. In the facts and circumstances of the case and having regard to the standard of proof that is required in such matters, I have no hesitation in holding that Revenue has proved their case in respect of 606 air-conditioners held to be cleared without payment of duty by the appellant and thus I agree with the view expressed by Member (Technical) in this regard.

76. Thus both the issues referred for my opinion is answered affirmatively that is against the appellant.

(Pronounced on 15-11-12)

Mathew John
(Technical Member)

76. The matter may be place before the Bench which heard the matter originally for issue of final order.

Mathew John
(Technical Member)

FINAL ORDER

In view of the majority order, the three appeals are disposed of as under:-

- (i) Appeal No.4885-4886/04 filed by M/s Thermotech and Shri Pradeep Khanna are allowed in totality.
- (ii) Appeal No.4903/04 filed by M/s Flevel International is allowed partially as under :-
 - (a) Confirmation of duty of Rs.12,80,542.50 which was confirmed by denying the benefit of Notification No.75/86 is set aside along with setting aside of penalty.
 - (b) Confiscation of 60 airconditioners, 4 fans and 4 deep freezers with redemption fine of Rs.1 lakh and payment of central excise duty stands set aside.
 - (c) Demand of duty of Rs.58,44,825/- stands confirmed along with imposition of penalty by upholding the findings of clandestine removal of 606 airconditioners.
 - (d) The confiscation of 24 airconditioners seized from the residential premises of Shri Pradeep Khanna is upheld along with duty demand of Rs.3,16,800/- and imposition of penalty under Rule 173Q.

All the appeals are disposed of in above terms.

(~~Archana~~ Wadhwa)
Member(Judicial)

(Rakesh Kumar)
Member(Technical)

RK-I

FAX : 011-26108426

REGISTERED / AD

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK NO.2, R.K.PURAM, NEW DELHI-110066
EXCISE APPEAL BRANCH

To

Dated: 31/07/2013

Appellant as per address in table below

Respondent as per address in table below

Misc Order No. MO/58507/2013-EX[DB] dated 19/07/2013

I am directed to transmit herewith a certified copy of order passed by the Tribunal under section 35-C(1) of the Central Excise and Salt Act, 1944.

Asstt. Registrar (EXCISE Appeal Branch)

Application	Appeal	Name and Address of Appellant
1	E/ROM/55835/2013 E/4885/2004	THERMOTECH G-68, Masjid Moth, Greater Kailash-II, New Delhi
2		Name and Address of Respondent C.C.E. NOIDA C-56/42, Sector-62, Noida-201307

Copy To

3 Advocate(s) / Consultant(s):

Naveen Mullick
B-388, Mera Bagh,
New Delhi
Delhi
110063

- 4 Bar Association, CESTAT, Delhi
- 5 Director Publications, Customs, Excise. I.P. Estate, Delhi
- 6 M/s Centax Publications Pvt. Ltd., 1512-B, Bhishm Pitamah Marg, New Delhi-3
- 7 Company Law Institute of India Pvt. Ltd., No.2 (old no.36), Vaithyaram Street, T. Nagar, Chennai-17
- 8 Taxmann Allied Service Pvt. Ltd., 59/32, New Rohtak Road, New Delhi-110005
- 9 Easy Service Tax Online Dot Com Pvt. Ltd., 407A, Iscon Mall, Satellite Road, Ahmedabad-15
- 10 LAWCRUX Advisors Pvt. Ltd., LAW House, 1-8, Sector-10, Faridabad 121003 (Haryana)
- 11 TaxIndiaOnline.com Pvt. Ltd., 2nd Floor, Vasant Arcade, Vasant Kunj, New Delhi - 110070
- 12 Mark Professional Services Pvt. Ltd., 108, Everest Block, Aditya Enclave, Hyderabad - 38
- 13 C.D.R. 14 Office Copy 15 Guard File 16 Second Folder

Asstt. Registrar (EXCISE Appeal Branch)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX
APPELLATE TRIBUNAL, NEW DELHI
PRINCIPAL BENCH, COURT NO. III**

**Excise ROM Application No. 55835/2013
Excise Appeal No. 4885 of 2004**

M/s. Thermotech

Appellants

Vs.

Commissioner of Central Excise
NOIDA

Respondent

Appearance:

Shri Naveen Mullick, Advocate for the Appellants
Shri Sanjay Jain, DR for the Respondent

CORAM:

Hon'ble Ms. Archana Wadhwa, Member (Judicial)
Hon'ble Mr. Rakesh Kumar, Member (Technical)

Date of Hearing/decision : 19.07.2013

ORDER NO .MO/ 58 507 /2013-Cus(Br)

Per Archana Wadhwa (for the Bench):

The present application for rectification of mistake in respect of final order No. A/1319-1321/2012 EX(Br) dated 22.11.12 . There was originally

difference of opinion between two Members on certain disputed issues which was resolved by a third Member. The final order accordingly stand passed in view of the majority order. The mistakes pointed out by the Revenue are in respect of Final Order so recorded.

2. We have heard both sides. Inasmuch as the mistake pointed out by the Revenue are not relatable to the merits of the case and are technical in nature which also stand accepted by the learned advocate Shri Shri Naveen Mullilck, we rectify the same as under:-

(i) In Final Order, para (ii) relating to Appeal No. 4903/2004 filed by M/s. Flevel International records as under:-

- (a) *Confirmation of duty of Rs.12,80,542.50 which was confirmed by denying the benefit of Notification No. 75/86 is set aside along with setting aside of penalty.*
- (b) *Confiscation of 60 airconditioners, 4 fans and 4 deep freezers with redemption fine of Rs.1 lakh and payment of central excise duty stands set aside.*
- (c) *Demand of duty of Rs.58,44,825/- stands confirmed along with imposition of penalty by upholding the findings of clandestine removal of 606 airconditioners.*
- (d) *The confiscation of 24 airconditioners seized from the residential premises of Shri Pradeep Khanna is upheld along with duty demand of Rs.3,16,800/- and imposition of penalty under Rule 173 Q.*

As is seen from the above said para (ii)(a) has set aside the confirmation of duty of Rs.12,80,542.50 whereas both the Members, after declaration of law on the point, remanded the matter to the lower authorities for computation of clearances. Similarly in para (ii)(b) confiscation of ³⁶ ~~60~~ ^{AL} airconditioners was required to be set aside inasmuch as there was a seizure of total 60 airconditioners out of which the confiscation of 24 airconditioners stand upheld by the Majority order. We accordingly, rectify the said mistakes and pass the following final order:

- (a) confirmation of duty of Rs.12,80,542.50 which was confirmed by denying the benefit of notification No. 75/86 is set aside and matter is remanded for fresh computation of clearances in the light of observations made by us.
- (b) Confiscation of 36 airconditioners, 4 fans and 4 deep freezers with redemption fine of Rs.1 lakh and payment of central excise duty stands set aside.
- (c) Demand of duty of Rs.58,44,825/- stands confirmed along with imposition of penalty by upholding the findings of clandestine removal of 606 airconditioners.

(d) The confiscation of 24 airconditioners seized from the residential premises of Shri Pradeep Khanna is upheld along with duty demand of Rs.3,16,800/- and imposition of penalty under Rule 173 Q.

3. ROM application filed by the Revenue is allowed in the above terms.

(Dictated and pronounced in the open court)

(Archan~~na~~ Wadhwa)
Member(Judicial)

(Rakesh Kumar)
Member(Technical)