CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No.2, R. K. Puram, New Delhi.

Date of hearing/decision: 24.08. 2017

Excise Appeal Nos. 1126 & 1128 of 2010 – SM
(Arising out of order-in-appeal No. 53 – 54/CE/D-II/2010 dated 17.02.2010 passed by the Commissioner (Appeals), Central Excise, Delhi-II).

M/s Rapid Engg. Co. Pvt. Ltd. Appellant
Sh. Ajit. Gupta, M.D.

Vs.

CCE, Delhi-II Respondent

Appearance:

Ms. Reena Khair & Sh. Shreya Dahiya, Advocates for the appellant
Sh. K. Poddar, AR for the respondent

Coram:

Hon'ble Mr. Ashok Jindal, Member (Judicial)

Final Order Nos. 56332 – 56333/2017

Per: **Ashok Jindal**:

The appellants are in appeal against the impugned order demanding duty on account of clandestine removal of goods alongwith interest and penalties thereof.

2. Brief facts of the case are that the appellants are engaged in the manufacture of Microfine polythene powder (MPP), Polyester resin for powder coating and epoxide resin for power coating and investigation was conducted with M/s Durga Plastics on 25.09.1999. Statement of Sh. Subhash Gupta, the Prop. and M/s Durga Plastics was recorded on 25.09.99 wherein he has stated that they have purchased MPP from the appellants without payment of duty. Statement of M.D. of the appellant was also recorded. On the basis of diary recovered from M/s Durga Plastics and various statements during the

investigation was recorded, the case was made out against the appellant that they were engaged in the manufacture of excisable goods and clearing the same clandestinely without payment of duty. The matter was adjudicated, duty was demanded alongwith interest and penalty on both the appellants. Aggrieved from the order, appellants are before me.

3. Ld. Counsel for the appellants submits that during search diary and certain goods were seized from M/s Durga Plastics and statement of Sh. Subhash Gupta was recorded. During the course of investigation reliance on the statement of Sh. Ajit Gupta was misplaced in view of retraction on the very next day with details explaining the reasons for retraction. Further, during the course of investigation, nothing incriminating found from the appellant and they are not manufacturing finished goods. She also submits that during the course of adjudication, the appellant sought cross examination of Sh. Subhash Gupta whose statement and diary has been made the basis for demand in the impugned proceedings but no cross examination was granted. The appellant also raised certain grounds like no epoxide resin found in their factory, therefore statement cannot be relied, therefore, the impugned order is required to be set aside. It is also contended that no evidence brought on record for manufacturing clandestinely and clearance of the said goods. No evidence has been brought on record how inputs were procured & how goods were cleared. Therefore, it is prayed that impugned order is required to be set aside.

4. On the other hand, ld. AR opposed the contention of the ld. Advocate and submits that while granting the stay to the appellant, this Tribunal has considered all the arguments in detail thereafter prima facie case was made out and appellant made a deposit of Rs. 3.5 lakhs. The retraction statement was

considered by this Bench while granting the waiver of pre-deposit. Moreover, on the basis of the statement of the Director, the appellant has admitted that they were manufacturing MPP and cleared the same clandestinely to M/s Durga Plastics.

5. Heard the parties considered the submissions.

6. On careful consideration of the submissions made by both the sides, I find that the prime duty of the adjudicating authority is to follow the principles of natural justice as laid down under Section 9D of the Central Excise Act, 1944 which is as under-

> “9D. *Relevance of statements under certain circumstances – (1) A statement made and signed by a person before any Central Excise Officer of a gazetted rank during the course of any inquiry or proceeding under this Act shall be relevant, for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which it contains,-*
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> *(a) when the person who made the statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse partly, or whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable; or*
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> *(b) when the person who made the statement is examined as a witness in the case before the Court and the Court is of opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interests of justice.*
>
> *(2) The provision reading of sub-section (1) of Section 9D of the Act makes it clear that clauses (a) and (b) of the said sub-section set out the circumstances in which a statement, made and signed by a person before the Central Excise Officer of a gazetted rank, during the course of inquiry or proceeding under the Act, shall be relevant, for the purpose of proving the truth of the facts contained therein*”.

7. As per the provision of 9D, the adjudicating authority is required to call the witnesses whose statement and documents recorded from him has been relied upon and to get examined in chief and thereafter the adjudicating

authority has to make his mind that statement recorded during examination in chief from the witness is correct and to allow further cross-examination of the witness to the appellant. Thereafter, he has to pass an appropriate order in accordance with law.

8. Admittedly, in this case, the procedure laid down under Section 9D has not been followed and the Hon'ble High Court of Punjab and Haryana in the case of ***Jindal Drugs Pvt. Ltd. vs. Union of India – 2016 (340) ELT 67 (P&H)*** after going through the provision of Section 9D of the Act remanded the matter to the adjudicating authority to follow the procedure laid down under Section 9D of the Act. The same view was taken by this Tribunal in the case of ***Kuber Tobacco Ltd***.

9. In these circumstances, the impugned order deserves no merit. Accordingly, the same is set aside and matter is remanded back to the adjudicating authority to follow the procedure laid down under Section 9D of the Act and thereafter consider the other issues raised by the appellant and pass an appropriate order in accordance with law.

10. In these terms, both the appeals are disposed of by way of remand, keeping all issues open.

(Dictated and pronounced in the open Court).

(Ashok Jindal)
Member (Judicial)

Pant