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

Excise Appeal No. 1364 & 1784 of 2011

[Arising out of Order-in-Appeal No 43(DKV)/CE/JPR-I/2011 dated 8.03.2011 passed by the Commissioner of Central Excise (Appeals I), Jaipur.]

Commissioner of Central Excise Jaipur I — **Appellants**

Vs.

M/s. Man Serve Pharma — **Respondent**

AND

M/s. Man Serve Pharma — **Appellants**

Vs.

Commissioner of Central Excise Jaipur I — **Respondent**

Appearance:

Shri G R Singh, DR, for the Appellant Revenue
Shri Bipin Garg, Advocate for the assessee- Respondent

CORAM:

Hon'ble Shri Ashok Jindal, Member (Judicial)

Date of Hearing : 28.08.2017
Date of decision : 01.09.2017

FINAL ORDER NO.56402-56403/2017

Per Ashok Jindal:

Both sides are in appeal against the impugned order. the assessee is manufacturer of PP Medicines and they are maintaining record of raw material, finished goods as per the provisions of Central Excise as well as Drug Control.

2. On intelligence that appellant is clearing goods clandestinely, the Anti-Evasion officers visited the factory premises of the appellant on 20.7.2007 as well as premises of M/s. Natani Medical Hall, M/s. Zymex Pharmaceuticals, M/s. Mangleshwar Pharma and residential premises of assessee. Their stocks was physically counted and it was found that there is shortage of manufactured medicines valued at Rs.6,29,119/-. During the course of investigation, one register maintained by Shri Ram Anugrah Singh, Chemist was found in which he has made entries of raw material received for production and finished goods produced. Statement of Shri Sanjay Sharma, Computer operator, Shri Sudhir Natani, partner and Shri R.A. Singh, were recorded and relied upon. On the basis of investigation, it was alleged against the assessee that during the period September, 2004 to July, 2007, the assessee was engaged in clandestine clearance of Medicines without payment of duty. It is pertinent to mention here that the assessee was availing SSI exemption for goods manufactured by them in their own brand but paying duty on the manufactured

forothers under the brand name of others. The major basis of evidence to allege clandestine clearance of goods is the register maintained by the Shri R A Singh, chemist wherein the entries mentioned as ‘MSP’ and ‘MSP (P)’. Entries mentioned in record as regards ‘MSP’ were cleared against the invoices but entries mentioned as ‘MSP(P)’ goods were cleared without invoices. On the basis of these entries made as MSP(P), it was alleged that same has been cleared clandestinely and if same is included in the total turnover, then the value of turn over shall cross the SSI exemption limit under Notification No. 8/2003 CE dated 1.3.2003. Therefore, the assessee is liable to pay the duty on the clandestinely clearance of the manufactured goods. The adjudicating authority confirmed the demand on the basis of statement of various persons and register recovered from the chemist maintained by him as proposed in the show cause notice and equivalent amount of penalty was also imposed. The said order was challenged by the assessee before the learned Commissioner, who held that on the basis of said register also, the assessee is entitled for benefit of SSI exemption for the period 2004-2005 and 2007-2008 as total turn over remains within the exemption limit of SSI exemption Notification No. 8/2003 dated 1.3.2003 if the clandestine clearance be taken in consideration. But for the period 2005-2006 and 2006-2007, he confirmed the demand to the tune of Rs.36,42,502/-. Aggrieved from the order of confirmation of demand by learned Commissioner (Appeals) for the period 2005-2006 and 2006-2007, the assessee is in appeal and against the dropping of demand of 2004-2005 and 2007-2008, the Revenue is in appeal. Hence, these appeals are before me.

3. Learned Counsel for the appellants submits that the whole demand is confirmed on the basis of one register maintained by Shri R. A Singh, Chemist and it has been observed that clandestine clearance has been admitted by the persons whose statement has been recorded. It is his submission that Shri Sudhir Natani in his statement has submitted that the goods have been removed without payment of duty. This allegation is totally wrong and he has not admitted as such that the clearance without payment of duty but explained in detail giving reasons for clearance without payment of duty. He further explained that there was batch repeat and it reprocessing of rejected / defective goods. It is his submission that certain documents have been relied upon but these documents pertain to the period 2007-2008 whereas the demand for this period has already been dropped by the learned Commissioner (Appeals) and these documents cannot be relied upon for the clearances prior to that period. He also submits that Revenue has relied on the statement of Shri R A Singh, Chemist. The said statement has been mis-interpreted as nowhere he has stated that the above said goods were manufactured / produced / prepared. But in fact, he explained that the non-maintenance of certain quantity can

manufacture specific quantity of finished goods. But he has never admitted that such quantity of goods have been manufactured. Therefore, the said statement in toto cannot be relied upon. He also submits that the statement of Shri Ramswaroop Natani is only related to the period 2007-2008 and with regard to the statement of Shri Sudhir Natani, it is alleged that he has stated that 'whenever a sign of 'P' is marked, medicines of that batches were cleared without payment of duty. It is his contention that same is related to the goods cleared after reprocessing. He also submitted that the duty has been demanded on the clearances on the basis of figures taken from the register maintained by Chemist, Shri R A Singh, taking the quantity entered in RG 1 and remaining quantity was treated as suppressed production. This register cannot be relied on for clandestine clearance. To that effect, he contended that there are discrepancies and objection raised. Therefore, he stated that the register maintained by Chemist is a rough register and cannot be said that entries made against 'P' are cleared clandestinely. There is no authenticity of the said register. To support this contention, he relied on the decision of ***CCE, Surat vs. Tulsi Polymers Pvt. Ltd. [2009 (247) ELT 223 (Tri-Ahmd)].***

4. He further submitted that the learned Commissioner (Appeals) has given finding only on presumption basis as he has observed that "I admit that although the MSP 'P' challans and requisition slip for issue

of raw material resumed by the officers covered a short period relating to the period 2007" but he relied on the same and confirmed the demand for the period 2005-2006 and 2006-2007 for clandestine clearance. He further submits that Shri Sanjay Sharma in his statement dated 20.7.2007 has stated that the daily stock register and raw material register of excise were maintained by Shri Shakeel Ahmed who left the firm three to four months back. This fact was confirmed by Shri Sudhir Natani in his statement dated 14.8.2007 but no investigation was conducted from Shri Shakeel Ahmed who was looking after the Central Excise record. He further submits that whole case is based upon assumption and presumption and there is no evidence on record with regard to clandestine clearance. He further submits that the sole statement of the Director /staff cannot establish the guilt of the assessee as burden lies on Revenue and is required to be discharged effectively. To support this contention, he relied on the decision of ***Davinder Sandhu Impex Ltd. vs. CCE [2016 (337) ELT 99 (Tri)]*** He further submitted that appeals filed by the Revenue are liable to be rejected as learned Commissioner (Appeals) has given the benefit of SSI exemption after considering the clandestine clearance of goods. Therefore, the appeal filed by the Revenue is to be dismissed.

5. In view of the above, it is his submission that impugned order qua demand of duty on clandestine clearance of goods and imposition of penalty is to be set aside.

6. On the other hand, learned AR opposed the contention of the learned Counsel and submits that Shri R A Singh, Chemist was looking after the activity of manufacture of medicines. He was maintaining the production record with him and on the basis of production register, the case has been made out as part of the entries were entered in the statutory records. Moreover, during the course of investigation, various statements have been recorded and in his the statement, Shri Sudhir Natani has admitted clandestine clearance of the goods. Therefore, the Revenue has proved clandestine clearance of goods by the assessee. Therefore, the impugned order qua dropping the demand is to be set aside. With regard to appeal filed by the Revenue, it is his submission that it is an admitted fact that appellant was engaged in the activity of clandestine clearance of the goods, therefore, the learned Commissioner (Appeals) has erred in giving benefit of SSI exemption for the period 2004-2005 and 2007-2008. Therefore, the impugned order qua the said findings is to be set aside.

7. Heard both sides. Considered the submissions.

8. On careful consideration of the submissions made by both sides, I find that the assessee is engaged in manufacture and clearance of medicines and availed the benefit of SSI exemption for the goods manufactured by them in their own name and paying duty on the goods manufactured by them on behalf of others. The case of the Revenue is

based on rough register maintained by Chemist Shri R A Singh. Although statement of Shri R A Singh was recorded but Shri R A Singh was never asked the question what 'MSP(P)' denotes for. Infact the author of the register is only and only, Shri R A Singh and it is an admitted fact that he was never questioned about what the word 'P' represents for what ? In the defence submissions filed by the assessee, it is explained that the word 'P' represents for the goods received back from the buyers as rejected and for reprocessing. In the absence of any corroborative evidence to that effect, the said defence cannot be discarded. Moreover, the entries made by Shri R A Singh, it has been explained that from raw material of particular quantity specific quantity of finished goods can be manufactured but he nowhere admitted that such quantity has been manufactured or produced. Therefore, the presumption taken by the revenue that such quantity has been produced is without any positive evidence. Further, I find that demand has been confirmed against the assessee based on Annexure D to the show cause notice which shows that entries made in the register as well as entries made in RG 1 register and difference thereof is demanded.

9. I have gone through the register and found certain discrepancies. Samples are as under:

(a) Against the date 24.2.2005, 25,000 paracold, against batch No. 424 were produced and in the RG-1, 24,900 (after deducting the wastage) were entered and cleared on payment of duty. Out of these 15000 tablets received back and after reprocessing cleared without payment of duty – entered on 25.6.2005. Department has taken quantity of 15000 as suppressed production

(b) Against the dated 03.2006, 40,000 Deparferte tablet, against batch No. 907 were produced and in the RG-1 39,800 (after deducting the wastage) were entered and cleared on payment of duty. Out of these 10000 tablets received back and after reprocessing cleared without payment of duty – entered on 01.01.2007. Department has taken quantity of 10,000 as suppressed production.

(c) Against 24.3.2005 verdict syp 200 ml against batch No. 448, in column 'Production as per production register" 100 +100 Ltr. is written whereas in RG-1 entered 495 and suppressed production is 500. Again, on 4.8.2006 against batch No. 448, 100 ltr is written and 500 shown as suppression. Firstly there is a double entry i.e. on 24.3.2005 & 4.8.2006 and how it is possible that against 100 + 100 Ltr in record shown 495 and 500. These figures has been taken from RUD-XXI \and RUD-XXIII.

(d) Against 18.4.2005 Piotuss syp 100 ml against batch No. 469, in column 'Production as per production register" 100 + 100 Ltr is written whereas in RG-1 entered 995 and suppressed production is 1000. Again on 26.7.2006 against batch No. 469, 100 Ltr* 100 is written and 1000 shown as suppression. Firstly, there is a double i.e. on 18.4.2005 and 26.7.2006 entry and how it is possible that against 100 + 100 Ltr. in record shown 995 and 1000. These figures has been taken from RUD-XXI and RUD XXIII.

10. With regard to these discrepancies, the Revenue has failed to explain why there are double entries and why they have taken the quantity as cleared clandestinely and how the quantity was arrived. No corroborative evidence has been produced by the Revenue. Therefore, the said register maintained by Chemist is a rough register and the same cannot be a piece of evidence to allege clandestine clearance of goods and in the absence of corroborative evidence, as held by Tribunal in the case of ***Tulsi Polymers Pvt. Ltd. (supra)*** wherein this Tribunal has held as under***:***

> ***"5.*** *After considering the reasons adopted by Commissioner (Appeals), I note that the fact of clandestine removal is required to be established by production of sufficient*

> *records and the same cannot be based upon the entries made in a rough note book. As rightly considered by Commissioner (Appeals) there is no evidence on record corroborating the clandestine activities of the assessee. In view of the above, I find no reasons to interfere in the impugned order of Commissioner (Appeals). Accordingly, appeal filed by the Revenue rejected."*

Thus, the said register cannot be the basis of clandestine removal of goods.

11. I further find that apart from the rough register maintained by Chemist, Shri R A Singh who was not asked about the mark 'P' denotes for what', the demand cannot be confirmed alleging clandestine clearance of goods.

12. I further find that certain statements have been relied upon to allege clandestine clearance of goods by the assessee. the said statements cannot be relied upon in the absence of any corroborative evidence as held by this Tribunal in the case of ***Davinder Sandhu Impex Ltd.(supra)*** wherein this tribunal has held as under:

> **"*11.*** *In this case also, we find that the case has been made out only on the basis of the statement of Shri Baldev Singh, Managing Director of the appellant and no other evidence in the form of to manufacture of such huge quantity, the consumption of electricity, additional packing material, payment for purchase of additional packing material, payment received for clandestine removal of goods, how the goods were transported has been*

brought on record by the Adjudicating Authority or the inspecting team, therefore, relying on the said decision cited hereinabove, we hold that charge of clandestine removal is not sustainable in the absence of any corroborative evidence to the statement of Shri Baldev Singh, Managing Director."

13. No other corroborative evidence has been produced by the Revenue to allege clandestine clearance of the goods. Therefore, the demand against the assessee is not sustainable, as the clearance made as per the statutory records remain within the exemption limit of SSI exemption as per Notification No. 8/2003 CE dated 1.3.2003, therefore, I hold that the appellant assessee is entitled to the benefit of SSI exemption.

14. In view of the above observations, charge of clandestine clearance of goods against the assessee is set aside. Consequentially, the impugned order qua demand of duty and imposition of penalty on the appellant is set aside.

15. In the result, the appeal filed by the assessee is allowed and the appeal filed by the Revenue is dismissed.

(pronounced in the open court on 01.09.2017)

(Ashok Jindal)
Member(Judicial)

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