CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

West Block No.2, R.K.Puram, New Delhi

COURT-IV

Date of hearing: 23.08.2017

Appeal No. E/1283-1285/2010-EX[SM]
[Arising out of the Order-in-Appeal No. 88 to 90/CE/D-II/2010 dated 04.03.2010, passed by the Commissioner of Central Excise, Delhi]

M/s. Ahuja Battery Covers,
Shri K.L. Ahuja,
Shri Amit Ahuja, Proprietor … Appellant

Vs.

C.C.E. Delhi-II ... Respondent

Appearance:
Present Shri Hemant Bajaj, Advocate for the appellant
Present Shri Kannu Verma Kumar, DR for the respondent

Coram: Hon'ble Mr. Ashok Jindal, Judicial Member

FINAL ORDER No. 56853-56855 /2017

Per Ashok Jindal:

The appellants are in appeal against the impugned order demanding duty alleging clandestine removal of goods along with interest and equivalent amount of duty and imposition of penalty on all the appellants.

2. The brief facts of the case are that M/s. Ahuja Battery Covers are engaged in the manufacture of PVC battery separator and were not registered with the Central Excise Department as they were availing SSI exemption in respect of

the excisable goods manufactured and cleared from their factory upto the value of Rs.1 crore in the financial year. On the basis of intelligence, the premises were searched on 06.05.2005 at the business premises, residential premises and other contract premises. During the course of search one register ledger was found containing various entries there in and certain statements were also recorded. On the basis of these documents it was alleged that M/s. Ahuja Battery Covers is clearing goods clandestinely and not maintaining proper records. Therefore, the duty was demanded along with interest and penalty on all the appellants was imposed. The said order was challenged before the Ld. Commissioner (A) who remanded the matter back to the adjudicating authority with certain observations. In remand proceedings, the adjudicating authority re-confirmed the earlier adjudication order which was carried out by the appellant before the Commissioner (A) who confirmed the adjudication order. Aggrieved from the said order, the appellants are before me.

3. Heard both the sides.

4. In first round of litigation Ld. Commissioner (A) remanded the matter back with the following observations:

"It is observed that:-

8.1 The show cause notice mentions the following aspects of investigation-

a) The production activity in the factory, the number of machines, manufacturing process, number of workers, hours and days for which the machines work, the wastage *arising, the quantum of production of the final product from the machines.*

b) The modus operandi of payments made / accountal,

c) The transport and storage of raw material

d) The transport of finished goods

e) Obtaining the raw materials through imports / indenting agents and local procurement and attempts to quantify the raw material obtained locally / imported, tabulated in charts

f) Alleged modus operandi of fictitious firms, non raising of bills / invoices

g) Private records

h) Statements recorded

8.2 Quantification of raw material – While tables have been prepared tabulating the data of purchases / import / indent of the raw material, battery separator grade PVC resin, the quantification / calculation of the alleged suppression of production and evasion of duty refers to the entries in the private record treating them as of the finished product (PVC Battery separator).

8.3 Quantification of the finished product – While numerically expressing the production of the finished excisable goods (PVC Battery separator) in terms of pieces and lots produced on machines working n terms of hours, days and months and the percentage of waste the calculation of duty refers to the entries in the Kacha records.

8.4 It is observed that the adjudicating authority in the impugned order has reproduced portions / charges in the show cause notice without discussing or giving findings on the submissions of the appellants. The allegation is that all the entries in the ledger (also referred to as diaries / kacha records in the adjudication order) pertain to the sale of battery separators. As against this the appellants have contended that the ledger contains five different types of *entries and have contended that the prices are different and the entries represent different items, namely, lead oxide, battery separator and PVC resin, that, however, all sales of the items have been treated as sale of PVC battery separators in the show cause notice and in the impugned order without any reason. No finding has been given. It is observed that thought here is no explicit allegation that all the entries in the ledger are being treated as of only PVC battery separators but the demand has been apparently worked out on the basis of all the entries in the ledger being treated as of PVC battery separators. There is a large body of case law on clandestine manufacture and removal. Each case has to be considered on its merits. The totality of facts and circumstances has to be considered in any case for which a speaking order is necessary. To illustrate 1) in the case of A. Ravindran vs. CCE Pondicherry 2006 (203) ELT 515 (Tri-Chennai) the charge was of clandestine production and removal which case was remanded for a de novo adjudication with the observation "Adjudication is a process involving careful application of mind to each and every piece of evidence adduced by both sides" 2) In Ruby Chlorates (P) Ltd. Vs. CCE, Trichy 2006 (204) ELT 607 (Tri-Chennai) order was held at para 25 to be non-speaking on charge of clandestine removal, 3) in the case of CCE Kanpur Vs. Latex Chemicals 2005 (181) ELT 138 (Tri-Del) it was held at para 4 that "This documentary evidence was ignored by the adjudicating authority who attached much preference / value to the alleged confessional statements of the above said named respondents." In other words, a speaking order is a pre-requisite for maintaining a balanced and judicious approach. Examination of points / submissions precedes the stage of giving weightage to each aspect and of summing up the totality of facts and circumstances. In their replies, to the show cause notice* *and as recorded in the OIO the appellants had made detailed submissions. However, the adjudicating authority has not passed a speaking order on the points raised and no finding has been given. The order is cryptic. In any adjudication order a finding is required to be given on the points and submissions of a notice. Thus it is seen that the present order is non-speaking on the submissions made. While acceptance or rejection of submissions is for the adjudicating authority to examine and decide, however, there must be a finding on the submissions of the appellants. The case deserves to be remanded for examination of the submissions of the appellants including the submissions made in the appeals. In Rajasthan Transformers and Switchgears vs. CCE 1993 (68) ELT 626 (Tri) and Water Trading Corporation Vs. CC Kolkata 2003 (160) ELT 323 (Tri-Kol) in view of the non speaking order the case / matter were remanded for passing a speaking order."*

5. The said order of the Ld. Commissioner (A) has not been challenged by the Revenue before this Tribunal or any other higher forum. Therefore, the said directions of the Ld. Commissioner (A) are binding on the Revenue and in the remand proceedings those directions have not been followed by the authorities below. In these circumstances, impugned order deserves no merits. Accordingly, the same is set aside. As in remand proceedings the directions of the Ld. Commissioner (A) given by the order dated 18.05.2007 has not been complied with. Therefore, the matter is remanded back again to the adjudicating authority first to comply with the directions of the Ld. Commissioner (A) vide order dated

18.05.2007 and thereafter to pass an appropriate order after giving reasonable opportunity to the appellant to present their case to pass an order in accordance with law.

6. Appeals are disposed of by way of remand.

[Operative part of the order Pronounced in the open court]

(Ashok Jindal)
Judicial Member

Bhanu