CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH - COURT NO. 1

Excise Appeal Nos. 50930, 50969-50970 & 51002 of 2017

(Arising out of order-in-original No. 06/D-I/2017 dated 02.03.2017 passed by the Commissioner, Central Excise, Delhi-I)

DATE OF HEARING : 14.11.2017
DATE OF DECISION : 04.12.2017

M/s Kuber Tobacco India Ltd. ….. Appellants
Chatar Singh Baid (Rep by Ms. Seema Jain, Adv.)
Vikas Malu
Dhanpat Singhee

VERSUS

CCE, Delhi-I ..… Respondent
(Rep. by Sh. S.K. Bansal, DR)

CORAM : HON'BLE MR. JUSTICE (DR.) SATISH CHANDRA, PRESIDENT
HON'BLE MR. V. PADMANABHAN, MEMBER (TECHNICAL)

FINAL ORDER NO. 58156-58159/2017

PER V.PADMANABHAN:

The present appeals are filed against order-in-original No. 06/D-1/2017 dated 28.02.2017. This is the second round of litigation before the Tribunal. The period in dispute is 26.08.2008 to 31.11.2008.

2. Brief facts of the case are that :

On the midnight of 31.10.2008 and 01.11.2008, the department searched the poultry farm at village Khera Khurd which was owned by Sh. Sandeep Mann. On search, it was found that there were four gutkha packing machines which were in working condition and one machine was lying idle. Packing material and finished products under the brand name of '**Kanchan'** were also recovered. However, it is claimed that raw material was not manufactured there but the same was brought readymade by the assessee-Appellants. The Department, on the basis of the statements of the concerned persons, made out a case of clandestine removal against the Appellants and levied penalties on the concerned persons.

3. Being aggrieved, the appellants filed Writ Petition No. 1738/2012 as well as Writ Petition No. 2851/2014 before the Hon'ble High Court. At the instance of the High Court, appellant deposited Rs. 1 crore for the release of Shri Vikas Malu (one of the assessee-Appellants). In the meantime, the original authority has passed the order where the demand was confirmed for the period September to November, 2008, but the demand for the month of August, 2008 was dropped. When the matter was pending before the High Court, the appellant have filed appeal before the Tribunal to contest their case on merit. The Tribunal in the first round of litigation passed the order where the matter was remanded to the original authority with

a direction to conduct the examine-in-chief and cross-examination of the persons whose statements were recorded at the relevant time.

4. In compliance, as per the direction of the Tribunal, the original authority has issued the summons to six persons out of which five persons appeared and recorded their statements. These five persons are namely; Sh. Rajesh Kumar Dubey, Om Prakash Dubey, Sh. Sandeep Mann, Sh. Manoj Tripathi and Shri Mohal Lal Shukla. Smt Rajbala did not appear. For the remaining persons, no summons were issued. By the impugned order, the Commissioner has demanded the duty and also levied the penalties. Being aggrieved, the present appeals have been filed.

5. With this background, we heard Ms. Seema Jain, ld. Advocate for the appellant who submits that the main assesseee-Appellants, M/s Kuber Tobacco India Limited has the following Directors:

1. Sh. Dhanpat Kumar Singhee
2. Sh. Jai Narain Virelley
3. Sh. Ashok Baid
4. Sh. Pradeep Anchalia

The said company was engaged in the manufacturing of pan masala and gutka etc. It has purchased the brand names of **Wiz** and **Kanchan** from Sh. Mool Chand, father of Sh. Vikas Malu (appellant). The company used this brand name commercially. She further submits that the poultry farm belongs to Sh. Sandeep Mann who has let out the premises to Sh. Om Prakash Dubey @ Rs.

8000/- p.m. as per the agreement. To this effect, she relied on para 21 and 22 of the impugned order where the statement of Sh. Sandeep Mann has been discussed. Accordingly, he has let out the premises to Sh. Om Prakash Dubey who has regularly paid the rent as per agreement.

6. On the other hand, Sh. S. K. Bansal, ld. AR for the Revenue relied on para 19 of the impugned order and stated that Shri Om Prakash Dubey has further given that premises on rent to Sh. Manoj Tripathi who was responsible for managing the machines and factory. Statement of Sh. Manoj Tripathi was recorded as discussed in para 23 of the impugned order where he stated that he took the premises on rent but the agreement was signed by Sh. Om Prakash Dubey. He submitted that he has signed the paper for Sh. Om Prakash Dubey. Sh. Sandeep Mann, owner of the premises in his preliminary statement, has stated that M/s Kuber Tobacco India is the manufacturer of **Kanchan** brand gutkha with the help of five machines but later, he retracted his statement.

7. Ms. Seema Jain, Ld. Advocate submitted that, Sh. Dhanpat Singhee is Director in M/s Kuber Tobacco India. His statement was recorded on 01.11.2008 where he has admitted the supply of ready made raw material mix. In the original statement, he stated that he was only sending raw material to Sh. Sandeep Mann but he has retracted from his statement immediately on next day i.e. 02.11.2009. On 29.10.2010, he again denied his earlier

statement during the course of cross-examination. Later, he was not summoned.

8. It is the submission of the ld. Counsel that none of Sh. O.P. Dubey; Sh. Manoj Tripathi and Sh. Sandeep Mann, has been made the co-noticee (party) in the instant case. Ld. Counsel submits that apart from the statement, no corroborative evidence was collected by the department. No material to this effect was brought on record. The learned counsel submits that the Director of the company has nothing to do with the said operation.

9. She has also drawn our attention to FIR lodged by the company on 16.10.2008, prior to the search, where it was stated that in the market under the same brand name, spurious/sub standard pan masala and gutkha are available in the market. So, he made a request to the Police to investigate the matter.

10. She further submits that in the instant case, the raw material was not supplied by M/s Kuber Tobacco India. Sh. Om Prakash Dubey has also obtained the registration belated but independently from the Central Excise Department for the factory at poultry farm, which was searched, and an amount of Rs. 30 lakhs was also deposited towards duty payment suo motu. So, she submits that Sh. Om Prakash Dubey and Sh. Manoj Tripathi are the responsible persons for the said clandestine manufacturing of pan masala and gutkha but they are not co-noticees in the instant case.

Lastly, she submits that the impugned order may kindly be set aside.

11. Regarding penalties, she submits that in the instance case, penalties are levied on Sh. Vikas Malu and Sh. M.C. Malu for the reason that in the brand names of **Wiz** and **Kanchan,** gutkha were sold, as per agreement, to M/s Kuber Tobacco India for its commercial use. Both these persons were not actively involved in the manufacturing of Gutkha. They were not having any interest in the appellant company. Regarding Sh. Dhanpat Singhee, she submits that during cross-examination on 29.10.2010, he has stated that he merely advised the accused persons and has nothing to do with the said episode. Lastly, she submits that penalties may kindly be dropped.

12. On the other hand, Sh. S. K. Bansal, ld. AR appearing for the Revenue justified the impugned order. He submits that the machines were supplied by Shri Manoj Tripathi to Sh. Dhanpat Singhee who is also responsible for maintenance of the machines. It is the submission of ld. AR that Sh. Manoj Tripathi in his statement on 18.01.2017 has also accused Sh. Dhanpat Singhee for the said clandestine manufacturing of the pan masala/gutkha. He also submits that on 06.11.2008 Sh. Sandeep Mann, owner of the Farm House, has lodged a FIR, after the search where it was stated that illegal manufacture of pan masala/gutkha has been done in his premises. He also submits that Sh. Om Prakash Dubey (in para 19 of the impugned order) admitted that three cheques of Rs. 10 lakhs

each were given by Sh. Chattar Singh Baid which were deposited in the Government exchequer towards the payment of duty. He also submits that Sh. Om Prakash Dubey is not in a position to generate the fund. His credit worthiness is not good. Sh. Baid is related to Sh. M.C. Malu (brother of Sh. Vikas Malu).

13. Ld.DR further submits that Sh. Vikas Malu, in his statement dated 17.03.2009, stated that he is the owner of the factory and he is ready to discharge duty liability for the factory at Khera Khurd i.e. Sandeep Poultry Farm, but the same was retracted. Lastly, he justified the impugned order.

14. After hearing both the parties at length and on perusal of record, it appears that all the statements which were recorded, were later retracted by the concerned persons. For example, the statement of Sh. Dhanpat Singhee dated 01.11.2008 was retracted on the very next day i.e. 02.11.2008. Similarly, the statement of Shri Rajesh Kumar Dubey was recorded on 01.11.2008 wherein it was mentioned that he was working on the directions of S/Shri Moolchand Malu, Vikash Mali, Chatter Singh Baid and Dhanpat Singhee, but the same also retracted on the next very day by stating that he was working for Shri Om Prakash Dubey. In cross-examination, he denied the earlier statement.

15. Statement of Shri J.N. Virley, Director, was recorded on 27.11.2008 wherein it was stated that Shri Chatter Singh Baid was the General Manager and Shri Vikas Malu was the owner. Daily

attendance register produced had the name of Shri Chatter Singh Baid as the Manager. In his statement, he stated that Shri Chatter Singh Baid is visiting only once in a month or two months and he had not drawn any salary. In other words, he has denied the status of Shri Chatter Singh Baid being a Manager. He was not summoned for examination-in-chief which was supposed to be conducted as per the direction of this Tribunal.

16. Statement of Shri Anil Dubey was recorded on 27.11.2008 wherein it was stated that Shri Dhanpat Singhee was in-charge and not Shri Chatter Singh Baid, but he was not summoned for the examination-in-chief. On the similar lines, the statement of Shri Sandeep Mann was recorded on 01.11.2008 wherein he stated that he is the owner of the poultry farm and admitted the manufacturing of Pan Masala in his premises which was rented to Shri Om Prakash Dubey, but never met with any Director or employee of Kuber (assessee-Appellants). His information was hearsay. He also filed the FIR after the search. Four more statements were recorded, but the name of the assessee-Appellants was not mentioned by him. In examination-in-chief, he stated that he came to know that goods were of M/s Kuber (assessee-Appellants) on the day of raid, as was told by Shri Sanjay Rana and Shri Manoj Tripathi.

17. Statement of Shri Pradeep Kumar Anchalia, Director, was recorded wherein he has stated that the work in Delhi factory

was being looked after by Shri Dhanpat Singhee, but this does not establish that the machines in poultry farm premises were owned by Kuber (assessee-Appellants). He was not summoned for the examination-in-chief. Statements of workers, that Shri Vikash Malu and Shri Chatter Singh Baid were the owner and factory manager respectively, were also recorded. But they have not mentioned any relationship between the appellant and factory at the poultry farm. Statement of Shri Chatter Singh Baid was recorded on 06.01.2009 wherein he has clearly stated that he had no relation with Kuber (assessee-Appellants). Statement of Shri Vikas Malu was recorded oon 17.03.2009 and 19.03.2009 wherein he admitted that he was owner of Kuber (assessee-Appellants) and ready to discharge duty, but it is alleged that statements were recorded under duress during transit remand which was retracted on 20.03.2009 from jail.

18. Statement of Shri Om Prakash Dubey was recorded on 18.12.2008 wherein it was stated that the seized machines were installed on the direction of Shri Chatter Singh Baid and Shri Vikas Malu, but in his another statement dated 02.12.2008, he claimed that he was manufacturer and ready to pay the duty. Shri Om Prakash Dubey is not the employee of the assessee-Appellants. The father's name of Shri Om Prakash Dubey is different in the attendance register. Similarly, Shri Manoj Tripathi is not the employee of the assessee-Appellants and, therefore, it is claimed that rent agreement cannot be said to be at their instance. Shri

Manoj Tripathi gave the cheques, but nowhere it is proved that the cheques were given by the assessee-Appellants.

19. In the instant case, no search was conducted at the business premises of the assessee-Appellants. The Department had not taken into account the consumption of raw material in the appellants' factory. So, it is very difficult to say that the raw material was supplied by the assessee-Appellants. For want of evidence, all the statements which were recorded, were retracted later. Hence, no demand can be raised on the basis of statements which were retracted, especially when no corroborative evidence was collected by the Department to substantiate the allegation of clandestine removal.

20 At the cost of repetition, it may be mentioned that Shri Om Prakash Dubey who had installed and maintained the machines, and also given the premises on rent to Shri Manoj Tripathi, was not made a party in the instant case. Similarly, Shri Sandeep Mann, owner of the poultry farm, was also not made a co-noticee. Even Shri Manoj Tripathi, who was also responsible for maintenance of the machines has not been made a co-noticee. It shows that the Department has passed the order in a hurried manner, even on remand by the Tribunal. No corroborative evidence has been collected. For lack of corroborative evidence, the impugned order suffers from irregularities.

21. Needless to mention that clandestine removal is very serious charge which requires corroborative evidence and in the instant case, no corroborative evidence was collected by the Department, as stated above.

22. When it is so, then we find no reason to sustain with the impugned order and the same is hereby set aside along with the reasons mentioned therein.

23. In the result, all the appeals filed by the assessee-Appellants are allowed.

(Pronounced in the open court on 04.12.2017)

\

(V. PADMANABHAN)
MEMBER (TECHNICAL)

(JUSTICE (Dr.) SATISH CHANDRA)
PRESIDENT

\

Golay