IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL,
WEST BLOCK NO.2, R.K. PURAM, NEW DELHI-110066

BENCH-SM

COURT –IV

**Excise Appeal No.E/2073/2007-EX [SM]**

[Arising out of Order-in-Appeal No.40/CE/DLH/2007 dated 30.03.2007 passed by the Commissioner (Appeals), Central Excise, Delhi-I]

C.C.E., Delhi-I …Appellant

Vs.

M/s.Vardhman Industries … Respondent

Present for the Appellant : Mr.G.R. Singh, D.R.
Present for the Respondent: Mr.A.K. Jain, Advocate

**CORAM: HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)**

**Date of Hearing : 03.11.2017**
**Date of Pronouncement:05.03.2018**

**FINAL ORDER NO. 50891/2018**

**PER : S.K. MOHANTY**

Brief facts of the case, leading to this appeal, are as follows:-

1.1 The appellant was engaged in the manufacture of excisable goods such as "SIR' brand Gutkha, Pan Masala and Metha Masala. The officers of the Central Excise, Anti-evasion Branch of Central Excise Commissionerate, Delhi-I intercepted one Tempo No. HR-46-7279 in front of Filmistan Cinema Hall, Rani Jhansi Road, New Delhi. On enquiry, the Driver of the vehicle informed that there were 60 bags of Gutkha loaded in the vehicle from the appellant's factory at 6926/C-3,C-5, Jaipuria Mills Complex, Clock tower, Subzi Mandi, Delhi. The officers seized the said goods valued at Rs. 6,08,400/- (Assessable Value) under Panchnama dated 23.08.2003, as the driver could not produce any duty paid documents such as, invoice etc. The Officers also visited the factory premises and the godown located outside the factory and conducted stock taking. It was detected by the Officers that 98 bags containing excisable goods i.e. "SIR" Brand Gutkha valued at Rs.13,75,920/- were found in Godown No. 117 and accordingly, the same were seized on a reasonable belief that they were kept unaccounted, with intention to remove them, without payment of duty. Statement of Shri Achey Lal, Driver and Shri Vijay Jain, Proprietor were recorded by the Department under summon. They *interalia* admitted the removal of said excisable goods without the cover of invoice and without payment of Central Excise duty. Apart from the seized goods, they also admitted to have removed and transported excisable goods from the appellant's premises to the transporters, namely M/s. Gopi Road lines, Delhi, M/s. Patel Roadways, Delhi and M/s. Prakash Roadways, Delhi for delivering of the same to the trading firms, namely M/s. Vijay General Stores, M/s. Sanjay Trading Company and M/s. Radhey Tobacco Company. Enquiries were conducted with the said transporters and on the basis of consignment Notes indicating the names of those three traders as consignors and on the basis of statements of Shri Vijay Jain, Proprietor and employees of the said transporters, it was alleged that the goods transported under those consignment Notes were 'Gutkha', manufactured and cleared clandestinely without payment of duty by the Appellant's firm. Accordingly, the show cause notice dated 19.02.2004 was issued, seeking confiscation of the seized goods, recovery of Central Excise duty on the goods transported under various Consignment Notes alongwith interest. Besides, proposals were also made for imposition of penalty. The matter was adjudicated vide Order dated 13.02.2006 wherein 'SIR' Gutkha valued at Rs.290,17,080/- was confiscated under Rule 25 of the Central Excise Rules, 2002 read with Section 34 of the Central Excise Act, 1944. Since the goods had already been released against execution bond/bank guarantee, the Adjudication Order has imposed fine of Rs.5,03,640/-. Further, the Adjudication Order also confirmed Central Excise Duty demand of Rs.38,75,040/- and imposed equal amount of penalty on the appellant.

1.2 On appeal against the Adjudication Order, the ld. Commissioner of Central Excise (Appeals), Central Excise, New Delhi vide Order-in-Appeal dated 30.03.2007 (for short, referred to as 'the Impugned Order') has upheld the Adjudication Order, so far as it confiscated the goods and imposed redemption fine. However, the Impugned Order has set aside the duty demand of Rs.38,75,040/- and imposition of penalty on the ground that the charges of clandestine removal have not been established by the Department.

1.3 Feeling aggrieved with the Impugned Order, Revenue has preferred this appeal before the Tribunal.

2. The ld. D.R. appearing for the Revenue reiterated the submissions made by Revenue in the grounds of appeal annexed with the appeal memorandum. He further submitted that interception of vehicle at midnight of 23.08.2003 regarding transportation of impugned goods without invoice/bill and without payment of duty was corroborated with the submissions made by Shri Vijay Kumar Jain, Proprietor of the respondent's firm. He further submitted that the driver of the vehicle Shri Achey Lal has never retracted his statement regarding carriage of goods in past without any invoice/bill and without payment of duty from the premises of the respondent. He also submitted that the statement furnished by Shri Vijay Kumar Jain has not been officially retracted and the letters sent through post on 25.08.2003, 03.12.2003 & 18.12.2003 cannot be considered as retracted statement. Thus, he submitted that based on reliable facts with documentary evidences produced by the Department, clandestine removal of goods is established.

3. On the other hand, the ld. Advocate appearing for the respondent, at the outset, submitted that no formal review order has been passed by the Committee of Commissioners in terms of Section 35 B (2) of the Central Excise Act, 1944 and

thus, the appeal filed by the Revenue before the Tribunal is not maintainable. In this context, he has relied on the judgement of Hon'ble Delhi High Court in the case of Japan Airlines International Co. Ltd. – 2015 (39) STR 541 (Del.). On merits of the case, ld. Advocate submitted that since the ld. Commissioner (Appeals) has recorded the findings based on the available records and held that charges of clandestine removal cannot be sustained against the respondent; the appeal filed by Revenue is also not maintainable on the ground of proper substantiation regarding the allegations levelled against the respondent.

4. Heard both sides and perused the case records.

5. At the time of hearing, the ld. DR for Revenue has submitted the note-sheet dated 24.04.2007 initiated by the Superintendant (Review). On perusal of said note sheet, I find that after detailed analysis of the Impugned Order, he has stated that the said order is not fair, legal and correct and accordingly, has stated that the said order may be considered for filing of appeal before the Tribunal. The noting of the Superintendant (Review) was also approved by the Joint Commissioner (Review) and subsequently placed before the Commissioner of Central Excise, D-II for necessary approval. In the said note-sheet, the Commissioner has approved for filing of appeal, with the observation that *"Good analysis. I agree with the inference that appeal need to be filed"*. The said approval in the said note-sheet was placed before the other

Commissioner, who has endorsed the noting recorded in the note-sheet. Thus, it is evident that the proper Committee was constituted for the purpose of filing appeal before the Tribunal. Therefore, I do not find any merits in the submissions of the ld. Advocate for the Respondent that the Committee was not properly constituted, deciding for contesting the impugned order before the Tribunal. In this context, I find that the Hon'ble Delhi High Court in the case of Japan Airlines International Co. Ltd. (Supra) has held that based on available records, if the Committee decides to file appeal, the same cannot be discarded on the ground that the procedures laid down in the statute has not been complied with. While answering to the question framed in Appeal, the Hon'ble High Court held that the Tribunal cannot examine the issue beyond the factum as to whether or not a decision has been taken by a Committee of Commissioners to institute the appeal. The relevant paragraphs in the said judgement are extracted herein below:-

> *"11. Therefore, having regard to the above, which is, that in our opinion, the decision rendered by the Committee of Commissioners is an administrative function, it would, to our minds, therefore, not require the members of the Committee to meet, consult and give independent reasons, as contended before us by Mr. Mittal.*
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> *11.1 In our view, a meeting and/or consultation is not mandatory so long as each member of the Committee has the requisite material placed before him prior to a decision being taken as to whether or not an appeal is to be preferred. It may be a wholesome circumstance to have a meeting and consultation between the members of the Committee but, the absence of the same, cannot render a decision taken by them open to challenge as long as they concur with each other and,*

*there is, material placed before them for reaching such a conclusion."*

6. With regard to the merits of the case, I find that the Original Authority had not considered the retractions made by the Respondent vide its letter dated 25.08.2003, 03.12.2003 and 18.12.2003, sent through the Postal Department. Further, no comments/reply to the communication dated 20.06.2006 of the Commissioner (Appeals) in this regard was furnished by the Original Authority. Thus, the Commissioner (Appeals) has rightly held that the retractions having been made on the very next dates of making of the statements, the same cannot be treated as voluntary and therefore, the statements have no evidential value for establishing the charge of clandestine manufacture. Further, I also find that the submissions made by Shri Achey Lal, driver pursuant to the cross-examination by the Advocate for the respondent that the truck was under repair in the garage, was also not considered by the Original Authority while adjudicating the matter. On the other hand, the ld. Commissioner (Appeals) vide the impugned order has considered such aspects and dropped the duty demand confirmed on the appellant. I also find that the employees of the transporters, who had booked the goods described as "scented supari" under the consignment notes have never admitted that they have received the goods from the respondent and that on their physical verification, they had found any "Gutkha'' manufactured by the respondent. Thus, it is evident that there was no material evidence to suggest that

the bags under the alleged relevant consignment notes had been booked by the respondent. The Department in this case, had not produced any cogent, tangible and convincing evidence in support of clandestine removal of goods and as such, the adjudged demand cannot be confirmed on the basis of mere assumptions and presumptions. On perusal of the impugned order, I find that the Commissioner (Appeals) has recorded detailed findings with regard to setting aside of the adjudication order, so far as it confirmed the duty liability and imposed penalty on the respondent. Since, the said order was passed based on the available records and evidences; I am of the view that the findings recorded therein cannot be disturbed at this juncture, in absence of any plausible evidence being produced by Revenue to sustain the charges of clandestine removal.

7. In view of above, I do not find any infirmity in the impugned order, so far as it dropped the duty demand of Rs.38,75,040/- and equal amount of penalty imposed on the appellant. Therefore, the appeal filed by the Revenue is dismissed.

[Pronounced in the open Court on 05.03.2018]

(**S. K. MOHANTY**)
MEMBER (JUDICIAL)

Anita