In the Customs, Excise & Service Tax Appellate Tribunal
West Block No.2, R.K. Puram, New Delhi-110066

E/ROA/50116-50117/2018
in Appeal No.E/205-206/2012

(Arising out of Order-in-Appeal No.06/D-1/2011 dated 31.10.2011 passed by the Commissioner of CE , New Delhi)

M/s Prabhat Zarda Factory …Appellant

Sh Purushottam Arya
Managing Partner Vs

CCE Delhi-I …Respondent

Appearance:
Present for the Appellant : Shri A.K.Trivedi, Advocate
Present for the Respondent : S/Shri R.K. Mishra, S.K. Bansal, DRs

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

Date of hearing: 19.04.2018
Date of decision: 18.05.2018

Final Order No. 51915-51916/2018

Per V. Padmanabhan,

The present appeals are against the Order-in-Original No.6/2011 dated 31.10.2011. M/s Prabhat Zarda Factory (PZF) are engaged in the manufacture of branded chewing tobacco under the brand name of "Ratna". The Department in pursuance of the intelligence that M/s PZF clandestinely cleared the final products without payment of duty, investigated into the allegation by carrying-out search operations at the following premises on 14-15/09/2010, after intercepting a truck coming out of the factory premises:

i) M/s Prabhat Zarda Factory (Co.), B-117-118, GT Karnal Road Indl. Area, Delhi-33

ii) M/s Prabhat Zarda Factory (Co.), B-113, Indus trial Area, GTK Rd, Delhi

iii) Godown premises located at Basement of E-46, Shastri Nagar, Delhi

iv) Godown of M/s Balaji Trading Co. A-908, Shastri Nagar, Delhi

v) Residential premises of Partners of M/s Prabhat Zarda Factory (Co.) located at A-194, Derawal Nagar, Delhi

vi) M/s Pooja Agencies, 284-85, Katra Peran, Tilak Bazar, Khari Baoli, Delhi

vii) Premises of packing material supplier of M/s Prabhat Zarda Factory Co. located at A-66/1, GTK Rd Industrial Area, Delhi

2. At the factory premises, stock verifications revealed that the finished goods tallied with the recorded balance but raw materials in excess of the recorded balance was noticed. In the two godowns situated at Shastri Nagar, Delhi, both belonging to Shri Dinesh Gupta (Mittal), finished goods bearing the brand name of “Ratna” was found and since there were no documents evidencing the licit nature of the goods, the same were seized. Shri Dinesh Gupta (Mittal), in his statements, recorded by the Departmental Offices, admitted that the goods bearing “Ratna” brand were purchasd from M/s PZF, but he could not produce any documents evidencing payment of duty. He also admitted, in his statements,

that the godowns were taken on rent by him and the rent was paid in cash to the owner of the godowns; and that he was getting regular commission @ 2% of the sale value of the "Ratna" brand goods from M/s PZF.

3. Shri Purushottam Kumar Arya, Managing Partner of M/s PZF in his statement admitted that a part of the goods manufactured were cleared without payment of duty and that such un-accounted clearances were approximately valued at Rs.12 lakhs PM for the past two years. He further admitted that such unaccounted goods were cleared to Shri Dinesh Gupta (Mittal). The statement of Shri Purushottam Arya was later on retracted. The statement of Shri Arya was, however, corroborated by that of Shri Kedar Mehrotra, GM of M/s PZF and his statement was not retracted.

4. After conclusion of investigation, SCN dated 08.03.2011 was issued to the assessee as well as other connected parties. On completion of the adjudication proceedings, the impugned order was passed in which the adjudicating authority confiscated the finished goods seized from the various premises. Option was given to redeem the same on payment of redemption fine of Rs.30 lakhs. Central Excise duty amounting to Rs.52,99,602/- was demanded on the goods clandestinely cleared. Penalties were also levied on various per sons connected with M/s PZF as also on the buyer, the packing material seized was also ordered for confiscation.

5. Aggrieved by the impugned order, the present appeals have been filed.

6. All the appeals are being disposed-of through its common order.

7. With the above background, we heard Shri A.K. Trivedi, ld Advocate representing all the appellants . Revenue was represented by S/Shri RK Mishra and S.K. Bansal, Departmental Representatives.

8. The ld Advocates for the appellants argued the case on behalf of all the appellants. The arguments are summarized below:

(i) No serious irregularities were unearthed by Revenue during the search at factory as well as residential premises of the Managing Partner. Even in the CPUs recovered, nothing incriminating was found. The vehicle intercepted by the Revenue Officers was found to be in possession of valid documents for the goods.

(ii) The confiscation of seized goods as well as demand of duty has been raised only in respect of "Ratna" brand goods found and seized from the premises of the two godowns in Shastri Nagar, Delhi but Revenue has not produced any evidence on record to substantiate the claims that such goods were manufactured and cleared from the factory of M/s PZF. In the absence of such evidence, the duty demand cannot be raised on the PZF.

(iii) Revenue has sought to impose the demand on M/s PZF only on the strength of the statements given by some of the buyers. They have relied on the statement of Shri Deepak Mittal as well as Shri Dinesh Gupta but the duty demand cannot be fastened only on the basis of such statements in the absence of any evidence on record linking the goods to the appellant's factory.

(iv) In addition to "Ratna" brand goods, the Revenue also found goods with brands belonging to others in the premises of buyers.

(v) Inculpatory statement given by Purushottam Arya, Managing Partner of M/s PZF has been retracted and cannot be taken cognizance in the present proceeding.

(vi) The Hon'ble Commissioner, while passing the impugned order, has not considered the procedure laid down in Section 9D of the Central Excise Act which is mandatory as has been held by a series of decisions of the Hon'ble High Court of P&H.

(vii) Finally, he submitted that the Revenue has not produced any evidence to support the charge of clandestine manufacture and clearance by the appellant. As such, he prayed that the impugned order may be set-aside.

9. Ld DR justified the impugned order. It is his submissions that "Ratna" brand is a popular brand of chewing tobacco. There is no complaint on record by the appellants to the effect that the seized goods were counter-feit. No FIR appears to have been filed by M/s PZF to the effect that "Ratna" brand was misused by anyone else. He also submitted that the ownership of the goods have been admitted by Shri Purushottam Arya, Managing Partner in his statement and this

fact has also been corroborated by the statements of the buyers. Since it is established that the goods bearing the appellants brand name have been cleared clandestinely from the factory of M/s PZF. He submitted that the order of confiscation as well as demand of duty and penalties may be sustained.

10. We have heard both sides and perused the appeal record.

11. The factory of M/s PZF is engaged in the manufacture of “Ratna” brand chewing tobacco. Finished goods with the same brand were found and seized from two godowns belonging to Shri Dinesh Gupta (Mittal). Packing materials bearing the brand name have also been seized from the premises of certain other buyers. The crux of the dispute in the present case is whether the seized goods have been manufactured and clandestinely cleared from the factory of M/s PZF. The connected question is whether the appellant is liable to payment of duty in respect of such seized goods. The penalties against various persons will be a corollary to the above questions.

12. Admittedly, no documents have been produced evidencing the licit nature of the seized goods. Consequently, the goods are liable for confiscation and the order of confiscation by the lower authority cannot be faulted. But the option of redeeming the same on payment of redemption fine, as ordered by the lower authority, will be available only to the person who is the owner of such goods.

13. From the record of the case, we note that the Revenue has not brought any evidence on record regarding clandestine manufacture and clearance of the goods from the factory. No investigation appears to have been done in respect of procurement of raw materials or even the actual manufacture. The evidence, linking the seized goods to the factory of M/s PZF, is in the form of oral statements. Shri Purushottam Arya, Managing Partner admitted in his initial statements that seized goods were manufactured in the factory and cleared clandestinely without payment of duty but his statement was retracted subsequently. At the end of the buyers, both Shri Dinesh Mittal and Shri Dinesh Gupta in their statement have admitted that the seized goods were purchased from M/s PZF but without payment of duty.

14. The appellant, during the course of arguments, has raised the issue that the adjudicating authority, while passing the impugned order, has not considered the procedure laid-down in Section 9D of the CE Act, 1944, which is mandatory. They have also cited the decision of the Hon'ble P&H High Court in the case of M/s Jindal Drugs (P) Ltd, 2016 340 ELT 67 (P&H). We have perused the cited case law. The Hon'ble High Court has observed as follows after examining the statutory provisions of Section 9D:

> *"17. There is no justification for jettisoning this procedure, statutorily prescribed by plenary Parliamentary legislation for admitting; into evidence, a statement recorded before the Gazetted Central Excise Officer, which does not suffer from the handicaps contemplated by clause (a) of Section*

9D(1) of the Act. The use of the word "shall" in Section 9D(1), makes it clear that , the provisions contemplated in the sub-section are mandatory. Indeed, as they pertain to conferment of admissibility to oral evidence they would, even otherwise, have to be recorded as mandatory.

"18. The rationale behind the above precaution contained in cause (b) of Section 9D(1) is obvious. The statement, recorded during inquiry/investigation, by the Gazetted Central Excise Officer, has every chance of having been recorded under coercion or compulsion. It is a matter of common knowledge that, on many occasions, the DRI/DGCEI resorts to compulsion in order to extract confessional statements. It is obviously in order to neutralize this possibility that, before admitting such a statement in evidence, clause (b) of Section 9D(1) mandates that the evidence of the witness has to be recorded before the adjudicating authority, as, in such an atmosphere, there would be no occasion for any trepidation on the part of the witness concerned.

"19. Clearly, therefore, the stage of relevance, in adjudication proceedings, of the statement, recorded before a Gazetted Central Excise Officer during inquiry or investigation, would arise only after the statement is admitted to evidence in accordance with the procedure prescribed in clause (b) of Section 9D(1). The rigour of this procedure is exempted only in a case in which one or more of the handicaps referred to clause (a) of Section 9D(1) of the Act would apply. In view of this express stipulation in the Act, it is not open to any adjudicating authority to straightway rely on the statement recorded during investigation/inquiry before the Gazetted

Central Excise Officer, unless and until he can rely on the said statement as relevant for proving the truth of the contents thereof, he has to first admit the statement in evidence in accordance with clause (b) of Section 9D(1). For this, he has to summon the person who had made the statement, examine him as witness before him in the adjudicate ion proceeding, and arrived at an opinion that, having regard to the circumstances of the case, the statement should be admitted in the interests of justice.

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"25. In the light of the above, respondent No.2 is directed to adjudicate the show cause notice issued to the writ petitioners by following the procedure contemplated by Section 9D of the Act and the law laid down by various judicial authorities in this regard, including the principles of natural justice, in the following manner:

(i) In the event that the Revenue intends to rely on any of the statements, recorded under Section 14 of the Act and referred to in the Show Cause Notices issued to Ambika and Jay Ambey, it would be incumbent on the Revenue to apply to Respondent No.2 to summon makers of the said statements, so that the Revenue would examine them in chief, before the adjudicating authority, i.e., before Respondent No.2.

(ii) A copy of the said record of examination-in-chief, by the Revenue, of the makers of any of the statements on which the Revenue chooses to rely, would have to be made available to the assessee, i.e., to Ambika and Jay Ambey in this case.

(iii) *Statements recorded during investigation, under Section 14 of the Act, whose makers are not examined-in-chief, before the adjudicating authority, i.e., before Respondent No.2, would have to be eschewed from evidence, and it would not be permissible for Respondent No.2 to rely on the said evidence while adjudicating the matter. Neither, needless to say, would be open to the Revenue to rely on the said statements to support the cases ought to be made out in the show cause notice.*

(iv) *Once examination-in-chief, of the makers of the statements, on whom the Revenue seeks to rely in adjudication proceedings, takes place and a copy thereof is made available to the assessee, it would be open to the assessee to seek permission to cross-examine the persons who have made the said statements, should it choose to do so, in case any such request is made by the assessee, it would be incumbent on the adjudicating authority, i.e., on Respondent No.2 to allow the said request, as it is trite and well-settled position in law that statements recorded behind the back of an assessee cannot be relied upon, in adjudicating proceedings, without allowing the assessee an opportunity to test the said evidence by cross-examining the makers of the said statements. If at all authority is required for this proposition, reference may be made to the decision of the Hon'ble Supreme Court in Arya Abhushan Bhandar v. U.O.I., 2002 (143) ELT 25 (S.C.) and Swadeshi Polytex v. Collector, 2000 (122) ELT 641 (S.C.).*

"26. With the above directions, the writ petition stands disposed-of."

15. In the light of the above observations of the Hon'ble High Court, we are of the view that the statements of the buyers form a critical evidence in arriving at a decision in the present case. Hence we set-aside the impugned order and remand the matter to adjudicating authority to re-adjudicate the matter after following the procedure laid-down in Section 9D, which has been explained in detail in the above case.

16. In the light of above observations, the impugned order is set-aside and matter remanded.

(Pronounced in the court on 18.05.2018)

(Justice Dr. Satish Chandra)
President

(V. Padmanabhan)
Member (Technical)

pcs