

**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE  
TRIBUNAL  
West Block No. 2, R.K. Puram, New Delhi - 110 066.  
COURT No. I**

**APPEAL Nos.E/50168, 50239/2016-DB**

(Arising out of Order-in-Original No.14/2015-16 dated 17/11/2015 passed by Commissioner, Central Excise, New Delhi)

**M/s Sugandhi Snuff King Pvt. Ltd.**

*(In Appeal No.E/50239/2016-DB)*

**Mr. Vicky Chaurasia, Director**

*(In Appeal No.E/50168/2016-DB)*

**Appellants**

Vs.

**Commissioner, Central Excise, New Delhi**

**Respondent**

Appearance:

Shri Vivek Kohli  
Shri R. K. Mishra (DR),

for Appellant  
for Respondent

**CORAM:**

**Hon'ble Mrs. Archana Wadhwa, Member (Judicial)**

**Hon'ble Mr. Bijay Kumar, Member (Technical)**

Date of Hearing : 31/10/2018  
Date of Pronouncement : 19/12/2018

FINAL ORDER No. 53424-53425/2018

**Per: Archana Wadhwa**

Both the appeals are being disposed of by a common order as they arise out of the same impugned order passed by the Commissioner of Central Excise, Delhi vide which he has confirmed the duty of Rs.4,66,18,716/- against M/s Sugandhi Snuff King Pvt. Ltd. along with confirmation of interest and imposition of penalty of identical amount under Rule 25 of the Central

Excise Rules, 2002, read with Section 11AC of the Central Excise Act, 1942. In addition penalty of Rs.20 lakhs stand imposed upon Shri Vicky Chaurasia, director of the M/s Sughandhi Snuff King Pvt. Ltd. in terms of the Rule 26 of the Central Excise Rules.

2. As per facts on record M/s Sughandhi Snuff King Pvt. Ltd. is engaged in the business of manufacture of Zarda under brand name 'Jagat' and 'Sagar Shakti' classifiable under Chapter Heading 2404 of the First Schedule to the Central Excise Tariff Act, 1985. Their factory premises as also the residential premises of one of the Director were visited by the officers of the DGCEI on 21.09.2011, who conducted various checks and verification. No discrepancy was found in the stock of the materials in the factory and no incriminating documents were recovered. However, the officers found one invoice No.06 dated 20.08.2011 issued by one M/s Sanjay and Co., Varanasi showing sale of 2,600 Kg of synthetic essential oil valued at Rs.13 lakhs (Approx.) on which central sales tax was also shown to the extent of Rs.26,600/- along with recovery of one Invoice No.155 dated 20.08.2011 from the residential premises of the Director. The officers scrutinized the statutory records and found that the said quantity as reflected in Invoice

No. 155 had not been entered by the appellant in their statutory record had not been entered by the appellant in their statutory records.

3. The officers also conducted simultaneous searches in the business premises of M/s Shantilal J. Sopariwala, Mumbai and resumed certain documents under the cover of panchnama dated 21.09.2011. On physical verification of the stocks lying in the shop and godown premises of M/s Shantilal J. Sopariwala, revealed that there was an excess stock of the Zarda involving duty of Rs.34,340/-, for which M/s Shantilal J. Sopariwala, could not offer any appropriate explanation.

4. In the above background, the statements of the Director of the appellant company were recorded wherein he deposed that the excess stock of 'Jagat' brand zarda found in the premises of M/s Shantilal J. Sopariwala was the replacement of the damaged goods and as such no duty was paid. He agreed to deposit a sum of Rs.34,340/- being the excise duty involved in the said excess stock.

It was, further, put to the appellant that they have purchased a consignment of aromatic chemicals from M/s Sanjay and Co. and from M/s Cosmo Elmek, which have not been entered in their records. The Director

stated that the said consignment were received by them. During his recording of further statements, it was brought to the notice of the director of the company that the Revenue Officers have also recorded the statements of the transporters who agreed to have transported the goods to the appellant's premises. Shri Vicky Chaurasia in his further statements detailed the process of manufacture of Zarda by submitting that first of all raw tobacco is cleaned by sieving machine, then perfumed (30% of the raw tobacco) is mixed with raw tobacco and such mixture is kept for 3-4 days for maturity. During the aforesaid period of 3-4 days the same is mixed/rubbed with hand thrice a day. The same is packed in tin container manually by hand sieving machine. He also gave the input/output ratio of the raw material of the final products. As regards preparation of perfume, he deposed that various aromatic compounds in varying ratio are mixed in liquid paraffin to obtain perfume. The ratio of liquid paraffin and various aromatic compounds is decided by his father Shri Jagat Kishore Chaurasia and the same is prepared by him. He also disclosed that M/s Shantilal J. Sopariwala is the distributor for the state of Maharashtra. As regards the two invoices issued by the raw material supplier for

essential aromatic oils, he submits that on going through the same he agrees that the said oils were sold by Shre Sanjay Kumar Upadhyay.

5. Inquires from the transporters M/s Ridhi Sidhi Goods Carrier revealed that the transport company was not having its own trucks and they were arranging trucks on commission basis. On perusal of sale invoice No.155 dated 20.08.2011 issued by M/s Sanjay & Co., Varanasi he was unable to say as to which invoice number was involved in transportation of the goods in question and that he send all the consignment of aromatic chemicals to the appellant under the cover of consignment notes, the freight for which was received from an employee of the appellant.

6. In the above background the statements of various employees of the assessee as also of the owners of the vehicles were recorded. On the basis of the evidences collected and statements recorded during investigations, proceedings were initiated against the appellant alleging that they have manufactured and clandestinely cleared their final product without payment of duty. Accordingly, the show cause notice proposing the confirmation of duty as also imposition of penalty were issued. The same stands culminated into the impugned order passed by

the Commissioner. The said order of the Commissioner is the subject matter of appeal before us.

7. Learned counsel shri Vivek Kohli appearing for the appellant submits that the entire case of the Revenue is based upon the excess recovery of Zarda from one of their distributor M/s Shantilal J. Sopariwala as also upon the recovery of invoices from the residential premises of the Director of the appellant indicating sale of aromatic chemicals. He submits that both the said issue stands clarified by the appellant during the course of adjudication. The miniscule excess of stock found at the premises of the appellant's distributor cannot lead to the allegations and findings of huge quantity of their final product in a clandestine manner. He submits that though the said excess found goods in the premises of M/s Shantilal J. Sopariwala was not on account of clandestine removal but to buy peace with the Revenue they have agreed to deposit the small duty of around Rs.34 thousand and are not contesting the same.

As regards the Invoice No.155, recovered from the residential premises and issued by M/s Sanjay & Co., he explained that the same was a clerical mistake at the end of M/s Sanjay & Co. inasmuch as the aromatic chemicals

mentioned in the said invoice was actually received by them under the cover of proper Tax Invoice No.06 dated 20.08.2011, which was recovered from their factory and was duly entered in their records. He submits that comparison of the two invoices clearly show that the quantum of aromatic chemicals as well as the prices were identical. This fact lead to the inevitable conclusion that invoice No.155 was inadvertantly issued by M/s Sanjay and Co. Even during cross-examination Shri Sanjay Kumar has denied having sold such a huge quantum of aromatic chemicals to the appellant. As such, he submits that the said facts cannot lead to the findings of clandestine activities.

In any case and in any view of the matter, he submits that the reliance by the Adjudicating Authority on the documents issued by third party and the statements made by them cannot be adopted as legal and proper evidences for arriving at the finding of clandestine removal. The proprietor of M/s Ridhi Sidhi Goods Carrier appeared for cross-examination and deposed that no such transportation was under taken by them. However, Shri Pawan Surana was not available for cross-examination and as such reliance on his statement is unwarranted.

8. Learned advocate, further, submits that entire case of the Revenue is based upon the said so called alleged receipt of the aromatic chemicals without there being any other evidences of procurement of the other raw materials, required to be used for the manufacture of the final products. He contends that their main raw material is raw tobacco which is used to the extent of 90% and in the absence of any evidences to show unaccounted receipt of the said raw materials, the evidence of the procurement of one of the raw materials, which is also being contested by the appellant, cannot lead to the inevitable conclusion of clandestine manufacture and removal of their final products. Arguing further, he submits that the manufacture of Zarda is a gradual process with various intermediate stages and requires machine, manpower, electricity, and packaging material. The said area have not been investigated by the Revenue, neither the buyers of the said allegedly removed zarda, without payment of duty have been identified. In such a scenario the findings cannot be held sustainable. The Adjudicating Authority has arrived at the quantum of clandestine removal on the basis of the input output ratio without taking into account the fact of the absence of any evidences corroborating the charges. He submits that the

entire case of the Revenue is based upon assumption and presumption and in the absence of any confessional statement made by the appellant, the findings of clandestine removal are required to be set aside. He also clarifies that during the visit of the officers in the assessee's factory, no unwarranted excess or short-account of stock was recovered, thus indicating that the appellant was working within four corners of law.

In the support of his above pleas, that the findings of clandestine removal are required to be based upon production of tangible, positive and affirmative evidences and the same cannot be arrived at on the basis of unwarranted presumptions, he draws our attention to various decisions.

9. Learned Shri R. K. Mishra, appearing for the Revenue supported the impugned order of the Adjudicating Authority by reiterating the reasons adopted by the Adjudicating Authority. He submits that the fact of recovery of excess non duty paid material from one of the distributors of the appellant indicate that the appellant was admittedly indulging in clandestine activity. Further, the Revenue has been able to establish the receipt of one of the raw material based upon the invoices issued by M/s Sanjay & Co., thus indicating that the appellant was

indulging into clandestine activity. As such he submits that the impugned order be upheld and appeal be rejected.

10. After carefully considering the submissions made by both the sides and after going through the impugned order we note that the allegations and findings against the appellant are in respect of clandestine manufacture and clearance of 1,39,307.14 Kg of zarda. The said findings are based upon the result of investigations made by DGCEI during the course of search in the appellant's factory premises, residence as also in the premises of one of the distributor of the appellant. It is a fact on record that during the search of the factory premises, no discrepancies were found in the stock of either the raw material or the final product of the appellant. Further the search of the residential premises of the Director resulted in recovery of one invoice of M/s Sanjay & Co. being Invoice No.155 dated 20.08.2011 indicating sale of 2,600 kg of aromatic material. Further, a meager quantity of the final product was also recovered from the distributor's premises.

The Revenue's entire case is based upon the recovery of the said excess material from the business premises of M/s Shantilal J. Sopariwala, which the

appellant have admitted having been cleared without payment of duty either as samples or as replacements for the damaged goods and have already discharged duty of Rs.34 thousand (approx.) on the same.

The question which arises is as to whether such recovery of small quantity of appellant's final product from the business premises of their distributor, lead to allegation of huge quantity of clandestine removal by appellant, thus leading to confirmation of demand to the extent of around Rs.4.6 crores. It is well established law that allegations of clandestine removal are required to be made on the production of sufficient and positive evidences, thus leading confidence to the Revenue's stand. Even for applying the theory of preponderance of proportionality there has to be evidences on record so as to inspire confidence in the Revenue's theory of clandestine removal. The said findings cannot be arrived at on the basis of assumptions & presumptions. However, merely because some excess quantity of final product was recovered from the appellant's distributor premises will not lead to the inevitable conclusion of removal of 1,39,307.14 Kg of the appellants final product zarda in a clandestine manner. Even, as per the settled law, the goods found in the open market are to be

considered as duty paid unless there is sufficient evidences to prove to the contrary. We find that the Revenue has not referred to any evidence to show that the said goods were cleared in a clandestine manner. However, as the appellant has not contested duty involved in the said excesses, we uphold the confirmation of the same.

11. Similarly the Revenue has placed strong reliance on the Invoice No.155 issued by M/s Sanjay & Co. showing sale of aromatic chemicals recovered from the Director's residence. The appellant have taken a categorical stand that they have received the said chemical under the cover of Invoice No.06 issued on the same date by M/s Sanjay & Co. which has been recorded in their statutory records. The issuance of another invoice being Invoice No.155 by M/s Sanjay & Co. was inadvertent mistake on the part of the clerk of the said seller. This fact also stand admitted by Shri Sanjay Kumar Upadhyay, during his cross-examination.

As such, the findings of the Adjudicating Authority that the appellant have admittedly received the said aromatic material cannot be upheld.

12. In any case and in any view of the matter, we note that as per the manufacturing process disclosed by Shri

Vicky Chourasia in one of his statements, number of raw materials are required for production of zarda. Raw tobacco is one of the main ingredients (almost upto 90%), which is present in the zarda. Revenue has not bothered to investigate the procurement of such huge quantity of tobacco required to be used in the manufacture of 1,39,307.14 kg of zarda alleged to be produced & cleared without payment of duty. Apart from the said raw material, the appellant also requires other raw materials for the procurement of which there is neither any evidence nor any allegations. As such, clandestine manufacture and removal of the final product cannot be upheld, in the absence of any evidence of procurement of other raw-materials.

13. In any case and in any view of the matter, we note that the Adjudicating Authority, for arriving at the findings of clandestine removal of such a huge quantum of zarda has proceeded ahead on the input output ratio of the various raw material and have calculated the quantum on the basis of such mathematical equations. For better appreciation we would like to reproduce the relevant paragraphs from the impugned order of the Commissioner (Appeals).

*“78. Having examined and held that SSKPL had indeed procured and received 10835 kg of essential*

aromatic oil from Sanjay & Co. and Cosmo Elmek vide invoice No.155 dated 20.08.2011 and four consignments notes No. 1655, 1664, 1665 & 1666. The next major issue is whether this un-accounted procurement of essential oils for production of zarda would lead to excess un-accounted production of zarda of corresponding quantity on which differential excise duty would be recoverable. The calculation of excise duty in the show cause notice is as per the formula of zarda given by Sh. Vicky Chaurasia in his statement dated 06.02.2012 and 10.05.2013 where he submitted that to produce 45 kg. of zarda, 35 kg. raw tobacco is mixed with 10.5 kg of perfumery ingredients and that while preparing a batch of 10.5 kg perfumery ingredients 3.5 kg base oil (liquid paraffin) 3.5 kg aromatic chemicals ( synthetic essential oil), 1.75 kg glycerin and 1.75 kg kimam is used. Therefore, it turns out that for 45 kg of zarda 3.5 kg aromatic chemicals (essential oil) is used. In terms of these norms, as explained by Shri Vicky Chaurasia, the excess unaccounted quantity of zarda manufactured and cleared by SSKPL has been calculated at 139307.14 kg attracting excise duty Rs.4,66,18,716/- calculated in terms of clearance of their 10gm packs (dibbia), their most common product, by allowing necessary abatement under RSP valuation under Section 4A. The said norms i.e. use of 3.5 kg of essential oil in manufacture of 45 Kg zarda has not been challenged in these proceedings. What has been argued that based on only one raw material out of several excess production cannot be assumed specially when there is no evidence of excess procurement of other raw materials or of clearance of finished goods i.e. zarda without accountal or of receipt of unaccounted sales proceeds. SSKPL has also cited several court decisions in support of their argument that based on unaccounted procurement of one raw material only the production of excess finished goods cannot be assumed. It is noted that the present case is based on evidence in

terms of documents- invoice No.155 dated 20.08.2011 and consignment note NO.1655, 1664, 1665, 1666 and the admission of the unaccounted procurement of essential aromatic oils vide these documents by Shri Vicky Chaurasia, Shri Sanjay Kumar Upadhyay, Shri pawan surana and Haresh Shah. These statements have not been retracted. Only Shri Sanjay Upadhyay initially retracted his first statement dated 06.02.2012 but in his subsequent statement dated 08.05.2013 he withdrew the said retraction, he however, during the cross-examination again denied the unaccounted clearance and sale of essential oils however as noted above I disregard the same. Further there is also evidence in shape of unaccounted Jagat brand zarda pertaining to SSKPL recovered from the trading premises of Shantilal J. Sopariwala and the admission of such unaccounted zarda both by shri Deepak Hari lal thakkar partner of shantilal J. Supariwala and shri vicky chaurasia of SSKPL. Therefore, some facts are evident in the case i.e. SSKPL was procuring unaccounted raw material – essential oils, in excess of their recorded receipts and also clearing zarda, their finished product, wherein such essential oils are used, clandestinely to its dealer. Both the procurement of the unaccounted raw materials and sale of unaccounted finished goods was in cash and without invoices and the same has been admitted by the persons concerned during the investigations. All this indicates that actually clandestine clearance of zarda took place and the exact quantification of the same is required, for the case, based on the evidence on record, as already noted, sh. Vicky Chaurasia himself gave the input – output norms for his zarda in his statements and these statements have not been retracted and even in these proceedings, the input output as explained by him has not been questioned by SSKPL. Their emphasis is rather on the grounds that no essential oils as mentioned in the Invoice No. 155 dated 20.08.2011 or the 4

*consignment notes had been received and further that based on such receipt, though not admitted, the quantification of the zarda cannot be arrived at for the reasons that a lot many other inputs go into making of zarda for instance raw tobacco and packings/dibias for which inputs there are no allegations of excess receipt by them and also there is no evidence of transport of such unaccounted zarda or receipt or sale proceeds for such alleged clandestine clearances. The argument is therefore a basic normative one that whether demand of duty can be upheld on the alleged un-accounted production based on receipt of an un-accounted input which is not a major input for the final product zarda. SSKPL has cited several decisions to argue that the answer is an emphatic n. However, I disagree to the contention. There are no specific principles in the matter of clandestine clearance and each case is to be examined on its own merit and the overall preponderance of probability is to be seen in such matters as has been explained by Supreme Court in several decisions.*

*78.2 In the instant case, duty has been demanded from SSKPL based on the formula for production of zarda based on the use of all the principle inputs. As a matter of fact, such a principle is not at all artificial and all the production and manufacturing are indeed based on such basic principles of utilization of a certain quantity of raw materials for the output of a certain quantity of finished products. Indeed this is basic to costing of the product and the pricing of the finished goods is to be determined by duly quantifying all such inputs along with the labour and other overhead charges which are involved in the production of the finished goods. Therefore, basically there is nothing wrong in determining the quantity of finished goods. Therefore, basically there is nothing wrong in determining the quantity of finished products from the consumption of raw materials and in a case where raw materials in excess of the recorded one have*

*been established the quantity of the finished goods as per the accepted ratio is justifiable. Coming to the case laws in the matter it is seen that the notice has submitted a number of such case laws with ratio that the determining of production of quantity of finished goods based on consumption of a particular raw material in that particular case was not acceptable.”*

14. As is seen from above, the allegation of clandestine removal are entirely on the basis of the mathematical calculations based upon the input output ratio, which cannot be upheld, inasmuch as the allegations of clandestine activities are serious allegations and are required to be arrived at on the basis of concrete evidences and not on the basis of assumption and presumption. Though the appellant have drawn the attention of the Adjudicating Authority to various decisions laying down that such determination of production of finished goods based upon the consumption of one of the raw material is not acceptable but he has not followed the said decision by referring to some other judgments which were not even relevant to the facts of the present case.

15. Apart from above, we note that there is virtually no evidence of the identification of the buyers to whom the said goods have been sold. Further the Revenue has not made any efforts to identify the transporters through whom the said goods were cleared. The value of such

clandestinely cleared goods is huge and their needs to be some evidences of receipt of consideration of the same from the buyers. There is nothing on the record to reflect upon the receipt of any consideration. We further note that the manufacture of zarda takes a period of around 3-4 days as disclosed by the proprietor but no such activity was found to be there in the assessee's factory during the course of the visit of the officers. No statement of any employee associated with the manufacture of such huge quantity stands recorded by the officers.

16. At this stage, we may refer to certain precedent decisions of the Tribunals. In the case of M/s Golden Steel Corpoation Ltd. V/s Commissioner of Central Excise, Kolkata-II reported as 2017 (347) E.L.T. 570 (Tri.-Kolkata) it was observed that clandestine removal of goods and demand of duty is a serious charge and cannot be held on the basis of the assumption and presumptions. The confirmation of demand on the basis of few documents recovered from the assessee's factory without their being any corroboration from independent sources cannot be held to be sufficient for arriving at the said findings. Similarly in the case of M/s Paragon Extrusions P. Ltd. V/s Commissioner, CGST, Ghaziabad Tribunal vide its Final Order No.72001/2018 dated

24.08.2018 again reiterated the legal position that the clandestine removal findings cannot be arrived at on the basis of some of the statements made and requires independent evidences to prove so. Reference was made to the Hon'ble Allahabad High Court decision in the case of M/s Continental Cement Company V/s Union of India reported as 2014 (309) E.L.T. 411(All.) wherein it was held that clandestine removal is required to be proved by clinching evidence in the nature of purchase of raw materials, use of electricity, sale of final products, transportation, the mode and flow back of funds. Such charge being a serious charge is required to be proved by Revenue by tangible and sufficient evidences and mere statements of some of the buyers (which were available in that case, whereas there is none in the present case) given on the basis of their memory are insufficient without support of any documentary evidences. Reference was also made to various other decisions which for the sake of ready reference are reproduced below:-

1. M/s Continental Cement Company V/s Union of India reported as 2014 (309) E.L.T. 411(All.)

2 Commissioner of Central Excise, Ludhiana V/s Renny Steel Castings (P) Ltd. reported as 2013 (288) E.L.T. 45 (P & H).

17. Similarly in the case of M/s Popular Paints and Chemicals and others V/s Commissioner of Central Excise and Customs vide its Final Order No.52716-52718/2018 dated 06.08.2018, the Tribunal lead down the various points required to be referred to for establishing clandestine removal. For better appreciation the same are reproduced below:-

*“It is now established that to prove clandestine clearance the department should produce clinching evidence regarding the followings:-*

- a. The department failed to establish procurement of unaccounted raw materials.*
- b. No investigation conducted as to consumption of excess electricity, or employment of extra labors.*
- c. No investigation conducted as to whether the appellants had installed capacity for manufacturing additional quantities of finished goods.*
- d. No investigation conducted about involvement of huge cash for procurement of unaccounted raw materials. Similarly, no investigation conducted to find whether the appellants had received huge cash of about 24 crore during the disputed period from the buyers of finished goods. Further neither any trail of unaccounted cash was found nor any unaccounted cash was seized.*
- e. No investigation conducted with the transporters to find out whether the appellants received unaccounted raw materials or cleared finished goods without invoices.*
- f. Though, the names of the alleged buyers were available but investigations were conducted only from six buyers.”*

18. Similarly to allege clandestine removal on the basis of the chemical formula or input/output or arithmetic calculation has been held to be as unacceptable by various decisions. Reference can be made to the Tribunal’s decision in the cases mentioned below:-

1 Commissioner of Central Excise, Raipur V/s Prachi Resins Pvt. Ltd. reported as 2014 (308) E.L.T. 518 (Tri.-Del.)

2 Tara Chand Naresh Chand V/s Commissioner of Central Excise, Jaipur reported as 2017 (355) E.L.T. 445 (Tri.-Del.).

3 Sunrise Food Products V/s Commissioner of Central Excise, Delhi reported as 2017 (357) E.L.T. 599 (Tri.-Del.).

4 Triveni Engineering & Industries Ltd. V/s Commissioner of Central Excise, Allahabad reported as 2016 (334) E.L.T. 595 (All.)

19. In the light of the above ratio of law declared by the various courts, it has to be observed that the clandestine removal findings cannot be solely based upon either the statements or recovery of documents issued by third party and there has to be clinching evidences on record to establish such removals. No doubt that such evidences cannot be expected to be upto last degree but the same should be in the nature of evidence so as to inspire confidence in the Revenue's allegations and to tilt the weight of the evidences in favour of the Revenue. In the present case, having already observed that the invoice of M/s Sanjay & Co. showing doubtful removal of one of the

raw material cannot be held to be a sufficient evidence so as to inevitably lead to the findings of clandestine removal in the absence of any other evidences corroborating the above stand of the Revenue, we are of the view that the impugned order is unsustainable. Accordingly, the same is set aside and both the appeals are allowed with consequential relief to the appellants.

(Pronounced in Court on 19.12.2018)

**(Bijay Kumar)**  
**Member (Technical)**

**(Archana Wadhwa)**  
**Member (Judicial)**

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