CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI.

PRINCIPAL BENCH – COURT NO.II

Excise Appeal No.52325/2018

[Arising out of Order-in-Original No.12/D-I/17 dated 29.05.2017 passed by the Principal Commissioner, Central Excise, New Delhi]

M/s.R.S. Industries **Appellant**
Room No.G, First Floor,11,
Clive Road, Kolkata-700 001.

Versus

Commissioner of Central Excise, **Respondent**
Customs and Central Goods and Service Tax,
C.R. Building, I.P. Estate,
New Delhi-110 002.

APPEARANCE:

Shri Jitendra Singh & Shri Piyush Kumar, Advocates for the appellant
Shri H. C. Saini, Authorised Representative for the respondent

Date of Hearing:06.03.2019
Date of Decision:

CORAM:

HON'BLE SHRI ANIL CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE SHRI BIJAY KUMAR, MEMBER (TECHNICAL)

FINAL ORDER No.50488/2019

ANIL CHOUDHARY:

1.1 This is second round of litigation in this case and the Order-in-Original No. 12/D-I/17 dated 29.05.2017 appealed against is the one in de-novo proceedings in respect of Show Cause Notice No. NZU/INV46/2001/Pt-RSI/1170 dated 21.07.2004, passed by learned Commissioner, Central Excise and CGST, Delhi-I, in terms of this Tribunal's Final Order No. 53723/2016 dated 22.09.2016. Vide impugned Order-in-Original learned Commissioner has confirmed a demand of Central Excise duty amounting to Rs. 94,65,315/- under Section 11A(1) of the Central Excise Act, 1944 read with Section 11A(10) of the Act ibid invoking extended period along with interest on the duty confirmed under provisions of Section 11AB read with Section 11AA and imposed a penalty of Rs. 94,65,315/- under Section 11AC of the Act ibid read with Rule 25 of the Central Excise Rules.

1.2 In the first round, the then Commissioner, Central Excise, Delhi-I vide Order-in-Original No. 143/2005 dated 30.09.2005 had confirmed demand of Central Excise duty to the extent of Rs. 61,42,514/- as against demand of Rs. 94,65,315/- proposed in the Show Cause Notice, dropped the remaining demand amounting to Rs. 33,22,801/- and imposed penalty of Rs. 61,42,514/- under Section 11AC of Central Excise Act, 1944 read with Rule 25 of Central Excise Rules, 2002 and a separate penalty of Rs. 25,00,000/- under Rule 26 of Central Excise Rules, 2002. The said order was set aside by this Tribunal vide Final Order No 53723/2016 dated 22.09.2016 with directions for de-novo proceedings. Now, in de-novo proceedings learned Commissioner has passed the impugned order dated 29.05.2017 confirming the entire demand proposed in Show Cause Notice and imposed equal penalty.

2.1 The facts of the case as emanating from the Order-in-Original dated 29.05.2017 and the Show Cause Notice F. No. NZU/INV/46/2001/Pt.RSI dated 21.07.2004 is that in the year 2000, Hospital Service and Consultancy Corporation India Limited, (HSCC in short), a Government of India undertaking, floated a tender for supply of mosquito nets under National Anti Malaria and Kalazar Control Programme. The Appellant participated in tender proceedings and procured 2 orders one being Order No. HSCC/PUR/NAMP/208 dated 01.03.2000 for supply of 75,000 single bed mosquito nets of size 6'x3' for a value of Rs. 1,52,10,,000/- and another order No. HSCC/PUR/20/PR/220 dated 17.10.2000 for supply of 266666 single bed mosquito nets of size 6'x3' for Rs. 4,63,14,550/-. The said tender inter alia prescribed that only manufacturers would be eligible to participate in the tender and Appellant in his Tender Applications duly declared himself to be a manufacturer.

2.2 Later, on the basis of an intelligence, DGCEI obtained the documents pertaining to the said tender from HSCC and issued summons to the Appellant for appearance. Shri Arun Tibrewal, Proprietor of Appellant - R.S. Industries, did not evoke any response, DGCEI officers searched the premises situated at plot No. 122, Gali No. 13, Wazirabad, Delhi-110054 and office located at Room No. G, 1st floor, 11 Clive Row, Calcutta on 10.09.2002. During the search at premises at Wazirabad, the officers found 40 numbers of motorized stitching machines, 72 pieces of mosquito bed nets of size 6'x6' in ready to sell condition, white cuttings of net, cloth, stitching thread, thread cones and clothes tapes, etc. As stated in Panchnama, Shri. K.K. Bajaj, present at the premises informed the officers that the premises was in the possession of 'Moon Beverages Limited' which was engaged in bottling and distribution of Coca Cola. In the search at Kolkata office, nothing incriminating was found.

2.3 On examination of documents, procured from HSCC in respect of the goods supplied by the Appellant , DGCEI found that the bids were invited from the manufacturers only and the Appellant declaring himself as manufacturer had procured two orders referred supra and that on several occasions joint inspection teams of NAMP and HSCC has inspected bed nets offered by Appellant at Wazirabad premises and finding the same in order accepted supplies.

2.4 In compliance to the summons issued by DGCEI, Appellant Shri ARUN Tibrewal appeared before the officers and inter alia stated that they had received the two orders for supply of single bed mosquito nets from HSCC and procured the goods from and market and from job workers who manufactured the bed nets for him. He also stated that for examination of goods supplied under aforesaid orders, he had authorized Shri Sudhir Agarwal having his office at 15 Sri Ram Road, Civil Lines, Delhi, to offer the goods for inspection and do everything expedient and necessary for execution of said order. Later vide letter dated 19.05.2003 stated, that no manufacturing activity was ever carried out at Wazirabad premises and the same was used only for godown purposes for inspection and inter alia submitted the details of job workers located in Cuttack and East Midnapore as well as details of transportation of goods manufactured by job workers, and the inspection premises in Delhi. On enquiry, the transporters though accepted that the Bilties presented by Appellant were issued by them for transportation of mosquito bed nets from Cuttack/East Midnapore to Delhi, however, could not present corresponding original copies of Bilties. Similarly, on inquiry, the job workers accepted that they had stitched mosquio bed nets for labour charges of Rs. 28/- to Rs. 30/-

with tapes, thread etc. purchased by them, however on further inquiry they could not furnish any document with regard to purchase of tapes, threads or job work challans for other documents with regard to job charges by them.

2.5 On completion of investigation, DGCEI concluded that Appellant willfully suppressed the facts by not informing the Central Excise Department that they were manufacturing nylon bed nets at Wazirabad, Delhi; did not obtain registration, removed bed nets valued at Rs. 5,91,58,722/- without payment of duty; and contravened the provisions of Central Excise Act, 1944 and Central Excise Rules, 1944/2001.

3.1 We have heard both sides extensively and perused the records with assistance of learned counsel for the Appellant and learned A.R for Revenue.

3.2 At the outset, we observe that on the basis of investigation and search, DGCEI issued two Show Cause Notices viz. (i) Show Cause Notice No. NZU/INV/46/2001/Pt.RSI/0479 dated 06.03.2003 proposing confiscation of goods seized at Wazirabad premises under Panchnama dated 10.09.2002; (ii) Show Cause Notice No. NZU/INV/46/2001/Pt.RSI/1170 dated 20.07.2004 impugned in present Appeal proposing demand of duty in respect of goods supplied to HSCC against Tender, alleging manufacture.

3.3 In respect of first Show Cause Notice dated 06.03.2003, the then Assistant Commissioner, Central Excise Division VIII Delhi-II confiscated the goods seized on 10.09.2002 and imposed penalty under Rule 25 of the Central Excise Rules, 2002 ignoring Appellant's submissions that the premises was never let out to Appellant and the material seized at the premises did not belong to him, as Appellant had supplied mosquito bed nets of size 6'x3' whereas the goods found at the premises were bed nets of 6'x6', and steel beds meant for hospital supply. Appellant unsuccessfully contested the matter before Commissioner, Central Excise (Appeals) and thereafter preferred an Appeal before this Tribunal, wherein this Tribunal vide Final Order No. 1276/2006 - SM (BR) dated 20.06.2006 remanded the matter to Adjudicating Authority with specific instructions to ascertain whether the premises was in Appellant's possession and whether Appellant carried out any manufacturing activity at the said premises vis-à-vis the documents available on record. In compliance to Tribunal's aforesaid Order, Assistant Commissioner, Division-VIII, vide Order-in-Original No. 95/DMD/08 dated 30.09.2008 re-adjudicated the case and ordered confiscation of seized goods and imposed penalty on Appellant. Later Commissioner (Appeals) vide Order-in-Appeal dated 10.12.2009 once again upheld learned Assistant Commissioner's aforesaid Order. Aggrieved, Appellant again preferred an Appeal No. E/1069/2010 EX(SM) before this Tribunal and finding merit in Appellant's submissions, this Tribunal vide Final Order No. 54022/2015-SM(BR) dated 21.08.2015 quashed the confiscation and imposition of penalty categorically observing as under:

> *"5. This is the second round of litigation before this Tribunal in the initial ground. This Tribunal vide order dated 20th June, 2006 remanded the matter back to the Original Authority for a fresh decision on the issue regarding letting out of the house by one Smt. Ritu Aggarwal in favour of the Appellant M/s R.S. Industries.*

In the said order it has also been recorded that Smt. Ritu Aggarwal the owner of the property has specifically stated that the premises in question was let out to M/s Moon Beverage Ltd. and not to M/s R.S. Industries, the appellant, herein. In view of the fact that R.S. Industries were not carrying on any business activities in the premises, where search conducted by the Central Excise Officers, confiscation of goods is not proper and justified. Since the Appellant is not the owner of the goods as claimed. I am of the view that imposition of penalty under Rule 25 of the Central Excise Rules is not justified."

"6 Therefore, I do not find any merits in the impugned order, and thus, the same is set aside and the appeal is allowed in favour of the appellant."

4.1 During the course of hearing on 03.01.2019, learned counsel for Appellant Shri Piyush Kumar, stressing that when this Tribunal's Final Order No. 54022/2015-SM(BR) dated 21.08.2015 has been accepted by the Department, as no further Appeal appeared to have been filed, the finding that the Wazirabad premises was not in possession of Appellant and that the Appellant did not carry out any manufacturing activity at the said place, has become final and binding and the present demand which has been confirmed on presumption that Appellant manufactured bed nets at the said premises and cleared the same without payment of duty cannot be countenanced. Per contra, Shri A K Saini learned A.R. submitted that both the cases are separate, one relates to demand whereas the other relates to seizure of goods found at Wazirabad premises and therefore, both have to be adjudged on the basis of material referred by respective Adjudicating Authorities in respective orders. On being asked, Shri Saini could not answer our specific query whether Tribunal's Final Order No. 54022/2015 dated 21.08.2015 has been accepted by the Department and requested for allowing some time to take instructions from concerned Commissionerate. In view of his request, we adjourned the hearing with instructions to find out the fate of Tribunal's aforesaid Final Order dated 21.08.2015.

4.2 Hearing was resumed on 06.03.2019 wherein learned A.R. furnished a copy of letter C. No. IV(16)389/Judl/D-II/09/7995 dated 28.01.2019 communicating that the competent authority has accepted the final order of this Tribunal, on 23.08.2016. Thereafter, resuming the argument learned counsel Piyush Kumar vehemently urged that the finding of this Tribunal that Appellant did not carry out any manufacturing activity at said premises, confirmation of demand and imposition of penalty on the presumption that Appellant carried out manufacturing at the said premises, is not sustainable in law.

5.1 We have heard both sides extensively and perused the records including the letter dated 28.01.2019.

5.2 Learned counsel for the Appellant assailed the impugned order mainly on the following grounds.

A. The impugned order is unsustainable in law as in terms of Final Order No. 54022/2015 dated 21.08.2015, which has attained finality, Appellant was not in possession of subject premises and did not carry out any manufacturing activity at the said premises and hence there being no manufacturing, no Central Excise duty is leviable on Appellant.

B. Learned Commissioner has confirmed the demand in the impugned Order solely on the finding that Appellant in the tender documents declared himself as manufacturer and thus having declared himself as manufacturer he has to pay duty, which in Appellant's respectful submission is patently misconceived and contrary to settled law propounded by this Hon'ble Tribunal in Vasavi Synthetics Pvt. Ltd. versus Commissioner of C. Ex., Visakhapatnam - 2006 (201) ELT 446 (Tri.-Bang.) and Arch Pharmalabs Limited versus Commissioner of C. Ex., Hyderabad – 2005 (182) ELT 413 (Tri.-Bang.) holding that demand of Central Excise duty cannot be confirmed on the basis of documents prepared/furnished by an Assessee to Bank / Financial Institutions to obtain higher loan showing fictitious figures.

C. There is no evidence whatsoever to prove manufacturing activies at the said premises; procurement of raw material; consumption of power; payment of wages; clearance / transportation of manufactured goods. Moreover, it is a fact on record as evident from Panchnama dated 10.09.2002 and the letter dated 12.07.2004 of Mrs Ritu Agarwal / Naresh Agarwal, owners of subject premises that there was no power connection and there was no generator installed at the said premises. Learned Commissioner has confirmed the demand on the ground that there were 40 stitching machines lying at the premises, however without appreciating that there is no evidence available on record to show that any goods were ever manufactured from those machines and that the goods found at the premises during the raid being of 6’x6’ size, and steel beds, did not belong to Appellant.

D. Learned Commissioner has wrongly rejected documents furnished by Appellant during the course of investigation qua the manufacturing of goods on job work basis and transportation thereof from the job workers. The transporters in their respective letters have certified that they carried out transportation from job workers' premises and the job workers' who are semi-educated artisans, in their respective certificates in Bangla have categorically stated that they had carried out bed net manufacturing for Appellant on job work basis through middlemen. Department has not adduced any evidence that the said job workers are non-existent or that the documents furnished by Appellant are fictitious.

5.3 Per contra, learned A.R. reiterated the findings of the learned Commissioner in the impugned order and pointed out that in the remand order, this Tribunal had directed Commissioner to examine only the aspect of demand amounting to Rs. 33,22,801/- dropped by earlier Commissioner and thus as the demand confirmed in the earlier order amounting to Rs. 61,42,514/- was not set aside, Appellant's present Appeal in respect of said amount, is unsustainable in law as the same became final.

5.4 From the impugned Order-in-Original dated 29.05.2017 passed in de-novo proceedings we find that the learned Commissioner has confirmed the entire Central Excise duty amounting to Rs. 94,65,315/- with equal penalty and the Appellant has also assailed the entire demand in this Appeal and thus we do not find force in learned A.R's argument that Appellant's Appeal should have been limited to Rs. 33,22,801/- only especially as Department has not preferred any

Appeal questioning the impugned de-novo order. In our considered opinion, earlier order passed in first round of adjudication proceedings having been superseded by present Order-in-Original, the Appeal is maintainable qua the entire amount confirmed in the present impugned order.

5.5 Having held so, we now proceed to examine the sustainability of demand on the facts as available on record and in the light this Tribunal's Final Order No. 54022/2015 dated 21.08.2015 accepted by the Department as legal and proper.

5.6 We observe from the letter dated 28.01.2019 furnished during the course of hearing on 06.03.2019 that the Tribunal's Final Order No. 54022/2015 dated 21.08.2015 has since been accepted and thus the findings recorded therein have become final and binding.

We thus find force in the argument of learned counsel that once the issue that the premises was not in possession of Appellant and that the Appellant did not carry out any manufacturing at the said premises has conclusively been decided and accepted by Department, holding the Appellant guilty of clandestine manufacturing and clearing the consignments without payment of duty from Wazirabad premises is ex-facie unsustainable in law. Thus on this short ground alone, Appellant's Appeal succeeds.

5.7 In addition, we find that during the course of investigation itself, Appellant had adduced the evidence of procurement of impugned bed nets from job workers in Cuttack and East Midnapore and transportation of goods from there to Delhi. We further find that on investigation, the job workers as well as transporters in their respective statements admitted to have issued the documents i.e bilty/letters evidencing transportation / manufacturing but could not adduce the supporting documents. Learned Commissioner in the impugned order has rejected those documents as afterthought and confirmed the demand holding that as the Appellant in the tender documents declared himself as manufacturer and hence he cannot be allowed to turn around to say that the goods were procured from job workers. Appellant has assailed the said finding that even though the Appellant declared himself as manufacturer before HSCC, there being no evidence of raw materials transportation to Wazirabad premises, employment of labourers for manufacturing of goods and admittedly there being no power connection and/or generator at the said premises, conclusion that the Appellant carried out manufacturing is ex-facie wrong. This argument of Appellant's learned counsel also appears to be tenable as we find that Smt. Ritu Agarwal and her husband Shri Haresh Agarwal vide their letters both dated 12.07.2004 (RUD 32 annexed with Show Cause Notice) clearly stated that there was no power connection at the premises and further found from the Panchnama dated 10.09.2002 (RUD 1 to Show Cause Notice) that though the Panchnama contains details of every material found at the premises including machines, bed nets and fabric but does not contain any averment that there was any generator installed at the premises. Therefore, holding that a factory existed at the said premises, does not appear to be plausible. We also find from Smt. Ritu Agarwal's /Naresh Agarwal's aforesaid letters that the said premises was never let out to Appellant R.S. Industries and that she did not know any person named Arun Tibrewal. The aforesaid facts clearly prove that the Department's case is based on presumptions and surmises and demand has been confirmed on presumption and conjectures.

5.8 Learned counsel for the Appellant vehemently argued that though Appellant declared himself as a manufacturer in tender documents to obtain contract but did not manufacture any material but obtained the same form job workers and therefore, he cannot be saddled with duty liability in support of his aforesaid contention, learned counsel relied on following judgments, wherein various benches of this Tribunal held as under:

Vasavi Synthetics Pvt. Ltd. Vs. CCE Visakhapatnam – 2006 (201) ELT 446.

Clandestine removal - Demand cannot be raised on basis of documents prepared by assessee to obtain higher bank loan - Department ought to have produced evidence with regard to purchase of goods, higher electricity consumption, sale to purchaser, receipt of funds and evidence from transporters - No evidence on record except higher figures shown by appellants in commercial invoices to secure bank loan - Demand set aside.

Arch Pharmalabs Ltd. Vs. CCE, Hyderabad–2005(182)ELT 413.

The appellants have explained at the earliest that all the commercial invoices and the delivery challans were fictitious documents prepared solely for the purpose of taking enhanced bank loans. The entries made in private diaries cannot be considered as a conclusive evidence for confirming the demands on the allegation of clandestine removal. The Revenue has not established the receipt of inputs or manufacture *of goods and removal of the same to the concerned purchases. There is absence of corroborative evidence from the purchases and the receipt of money. The aspect pertaining to the appellants having produced the documents solely for raising higher bank loans appears to be sustainable. The demand is set aside*

5.9 Per contra, reiterating the findings of learned Commissioner in para 51 and 52 of the impugned order, that HSCC had invited bids only from manufacturers and that the Appellant in the tender documents clearly declared himself as manufacturer, learned A.R emphasized that the order of learned Commissioner confirming demand being legal and proper, cannot be faulted. Relying on the judgment of Cambridge Woolen Mills Vs. CCE Chandigarh – 2000 (120) ELT 687, learned A.R defended the impugned order.

5.10 We find that the order in the matter of Cambridge Woolen Mills, the Appellant therein claimed certain capacity to manufacture and later claimed that they procured the goods from market, learned Commissioner on the basis of their declaration and expert opinion of an expert rejected manufacturer's claim and held that having declared themselves as manufacturers having declared capacity and composition of resultant product, could not take a different stand in the later proceedings. The facts of said case are in stark contrast with the facts of present case wherein except the observation that the Appellant in the tender documents declared himself as manufacturer the facts and evidence available on record clearly depicted that no manufacturing activity ever took place at the said premises, and the said premises was never in possession of the Appellant and that

Appellant from, the beginning stated that he procured the goods from, job workers and only for obtaining order form HSCC. Hence finding force in Appellant's submission, we hold that the confirmation of demand solely on the basis of fact that Appellant declared himself as manufacturer in tender documents cannot be sustained in law.

6. In view of our aforesaid findings, we hold that the Appeal succeeds as the demand confirmed on the basis of conjectures and surmises is unsustainable in law.

7. We therefore, allow the Appeal and set aside the impugned order with consequential relief as per law.

[Order pronounced on 05.04.2019.]

(Anil Choudhary)
Member (Judicial)

(Bijay Kumar)
Member (Technical)

ckp