CUSTOMS, EXCISE & SERVICE TAX APPLELLATE TRIBUNAL,
<u>NEW DELHI</u>

PRINCIPAL BENCH COURT NO. IV

Excise Appeal No. 53674 / 2014

(Arising out of Order-in-Original No. JAI-EXCUS-001-Com-145-13-14 dated 04.04.2014 passed by the Commissioner of Central Excise, Jaipur)

M/s. Diamond Plaster Limited **Appellant**

G1-682. Industrial Area, Chopanki
Bhiwadi – Distt. Alwar, Rajasthan

VERSUS

Commissioner of Central Excise **Respondent**

NCR Building, Statue Circle,
C-Scheme, Jaipur

WITH

Excise Appeal No. 53675 / 2014

Shri Narender Kumar Gautam **Appellant**

Director
Regd Office at 1st Floor, Plot No. 8,
Laxmi Garden, Main Najafgarh Road,
Kirti Nagar, Opp. Metro Pillar No. 336
New Delhi.

VERSUS

Commissioner of Central Excise **Respondent**

NCR Building, Statue Circle,
C-Scheme, Jaipur

WITH

Excise Appeal No. 53676 / 2014

Shri Sumit Gautam **Appellant**

Director
Regd Office at 1st Floor, Plot No. 8,
Laxmi Garden, Main Najafgarh Road,
Kirti Nagar, Opp. Metro Pillar No. 336
New Delhi.

VERSUS

Commissioner of Central Excise **Respondent**

NCR Building, Statue Circle,
C-Scheme, Jaipur

APPEARNANCE:
Shri A K Prasad, Ms Priyanka Goel, Advocate for the Appellant
Shri R K Mishra, Authorized Representative for the Respondent

CORAM :
HON'BLE MR. C L MAHAR, MEMBER (TECHNICAL)
HON'BLE MS. RACHNA GUPTA, MEMBER(JUDICIAL)

FINAL ORDER NO. 50801 /2019

DATE OF HEARING : 08 /01/2019
DATE OF DECISION : 25/06/2019

PER C L MAHAR :

The brief facts of the matter are that the appellant are engaged in the manufacture of wall putty and decorative white cement and exterior paints falling under Chapter 32 of Central Excise Tariff Act, 1985. During the visit of Central Excise officers in the premises of appellant on 23 July, 2012, it was noticed that the appellant have been engaged in the manufacture of wall putty, decorative white cement, cement paints etc. using brand name of other persons. The department has been of the view that since the appellant have been using the brand name of other persons they should have got themselves registered with the Department since inception in July, 2011 and should have paid Central Excise duty on clearances of branded goods. It has also been the contention of the Department that the total value of the clearances effected by the appellant in a particular financial year was much more than the threshold limit set for availing exemption of SSI notification and, therefore, the appellants have failed to discharge the Central Excise duty on the clearances effected by them on the clearances of wall putty, white cement etc. A show cause notice dated 16.01.2013 came to be issued wherein Central Excise duty amounting to Rs.1,40,11,254/- has been demanded for the period 08.07.2011 to 23.07.2012. Penal provisions against the appellant as well as its Directors and various signatories have also been invoked where penalty as per the provisions of Rule 26 of the Central Excise Rules, 2002 has been invoked. The matter got adjudicated vide Order in Original No. Jai-ExCus-001/COM/145-13-14 dated 04.04.2014 where the duty as demanded in the Show cause notice has been confirmed and penalty of Rs.20 lakh each have been imposed on the other two appellants. Penalty of equal amount of Rs.1,40,11,254/-

has also been imposed on the appellant No. 1 as per the provision of section 11 AC of Central Excise Act, 1944.

2. Learned advocate appearing on behalf of the appellant have contested that during the financial year 2011-12 and 2012-2013, the quantification of value of the products manufactured and cleared by them under the brand name 'Suraksha Gold' and the product without any brand name have been valued at the MRP price declared for the product with for the brand name 'Diamond Gold' which has higher MRP value then actual value of "Suraksha Gold" and without any brand putty and, therefore, it resulted in demanding higher amount of Central Excise duty and confirmation of same by the adjudicating authority. It has been the contention of the appellant that goods manufactured and cleared under the brand name of "Diamond Gold" is of superior quality, hence the MRP price are higher for "Diamond Gold" brand and the goods which are manufactured under the brand of 'Suraksha Gold' and products without any brand are comparatively of the lower quality and as a result, the MRP of these two products are on the lower side to

that of 'Diamond Gold' Brand. Thus, it was stressed that the adjudicating authority has wrongly taken price of superior grade putty for valuing the lower grade putty. It has also been contended that they are eligible for SSI notification benefit for the financial year 2012-2013 as aggregate value of the clearances during financial year did not exceed Rs.4 crores. The learned advocate appearing for the appellant have also contested that the adjudicating authority has failed to deduct the value of trading goods while determining the value of aggregate clearances during a particular financial year submitting that one of the Director of the appellant firm through their statement dated 30.07.2012 has categorically submitted that clearance value indicated by the department also include the value of traded goods while deciding the aggregate value of clearnces. It has been claimed that during the year 2011-2012, the total value of the traded goods comes to Rs.38,59,300/- (MRP) in respect of decorative white cement. It has been claimed by the appellant that they were only engaged in repacking of white cement from bulk pack to smaller consumer pack and the white cement was purchased by them from M/s. J K Cement and M/s. Ultra Tech Cement on payment of Central Excise duty and since the packing of white cement from bulk pack to smaller consumer pack does not amount to manufacture and therefore same is not eligible to central Excise duty.

3. It has also been contended by the appellant that they have got wall putty manufactured on job work basis from M/s. J K Cement, M/s. Ultra Tech Cement and some other parties.

4. Learned Advocate has also mentioned that paragraph 13 of the show cause notice classifies the decorative white cement under heading 3214 and since the heading 3214 is specified under Notification No. 49/2008 CE (NT) dated 24.12.2008, the Department has proposed that the assessment of white cement has to be as per the provisions of section 4A of the Central Excise Act. The learned advocate further has contested that the white cement is not classifiable under heading 3214 but probably under Chapter heading 2523 2100 of the Central Excise Tariff Act, 1985 and therefore, the

assessment of white cement on the basis of MRP price is legally not proper. Learned advocate has also mentioned that as per the provisions of Rule 3 of the Legal Metrology (Packaged Commodities) Rules, 2011, MRP is not required to be printed on packages containing quantities of more than 25 Kgs (except Cement and Fertilizers). In the instant case, admittedly, large quantities of wall putty were sold in bags of more than 25 Kgs (in fact all branded wall putty was packed in bags of 40 kgs). The assessment in respect of these bags was required to be done under section 4 of the Central Excise Act, 1944, on 'transaction value', and not on MRP as per Section 4A of Central Excise Act, 1944. For the disputed period the total MRP on such bags comes to Rs.2,41,64,255/-. In these cases, the demand needs to be re-quantified.

5. The learned advocate has also contested that the seizure of the goods valued at Rs.14,14,350/- found in the factory premises could not have been confiscated as the same were recorded in their private records and were not yet been cleared from the factory premises.

The learned advocate has also pleaded that penalty under Rule 26(1) of Central Excise Rules, 2002 is not imposable on either Shri Sumit Gautam and Shri Narender Kumar Gautam as show cause notice nowhere brings out their role in actively associating with the alleged evasion of Central Excise Act /Rules. It has further been added that they have not physically dealt with the goods and therefore, the penalty under Rule 26(1) is not imposable on them.

6. We have also heard learned Departmental Representative who has defended the findings of Order-in-Original.

7. Having heard both the sides and after perusal of the record of the appeal, we find that the appellants have been engaged in the manufacture of wall putty, decorative white cement and other exterior cement paints which are generally classifiable under section 32 of Central Excise Tariff Act, 1985. It is also a matter of fact and record that during the visit of officers at the factory premises on 23.07.2012 certain quantities of wall putty, decorative white cement of brand name

'Diamond Gold' and 'Suraksha Gold' were found lying in the factory premises and same were seized under section 110 of Customs Act, 1962. Shri Rajesh Singh, Production Supervisor of the appellant in his statement dated 24.07.2012 recorded under section 14 has voluntarily admitted that the appellant firms / factory at the given premises was running for seven to eight months and it was admitted that the unit was manufacturing wall putty, decorative white cement in the brand name of 'Diamond Gold' and 'Suraksha Gold' in the unit packs of 1kg, 5Kgs, 20kg, 25kg, 45kg and 50 kg. During the visit of the factory premises, the officials have also found and seized certain packing materials which clearly indicated that the wall putty, decorative white cement of 'Diamond Gold' and 'Suraksha Gold' brands were being manufactured by the appellant. The appellants in their defence has stated that wall putty and decorative white cement are being manufactured by various other manufacturers such as Ultra Tech Cement, Jodhpur, J K White Cement Works Ltd. Gotan, M/s. Decotouch Sales Pvt. Ltd., Sikar, M/s. Diamond Retail

Mart Pvt. Ltd., Alwar etc. on job work basis. We find that the investigations has established it beyond doubt that the manufacturing units work have been mentioned as doing job wok for the appellant have categorically stated that they have never undertaken any job work for the appellant. We take note of the fact that M/s. J K White Cement Works vide their letter No. GTN:WH:SALES:1:5183 dated 27.7.2012, and M/s. Ultra Tech Cement, Jodhpur vide their letter No. UTCL/BW/EXCISE/2012/60242 dated 29.7.2012 have categorically stated that they have never undertaken any job work for the appellant. When the other units which have been mentioned by the appellant to have supplied the manufactured white putty and decorative white cement with the brand name of 'Diamond Gold' and 'Suraksha Gold', it has been found during necessary inquiries that these parties have been found as non-existing or there is manufacturing activity of such kind of goods.

8. Thus, we find that the investigations have brought it out very firmly and categorically that the appellants have been engaged in the manufacture of wall putty and decorative white cement and other cement paints etc. They have also been found using brand name 'Diamond Gold' belonging to other person namely M/s. Diamond Waterproof Compound Pvt. Ltd. and even during the investigation, they have tried to mislead the proceedings by stating that the goods are being got manufactured on job work basis from some other manufacturers, however, it has been established that the goods were being manufactured by the appellants only.

9. The other argument which have been taken by the appellants in their defence is that while calculating the value of the clearance of the goods manufactured by them, the MRP value of 'Diamond Gold' brand has been adopted for 'Suraksha Gold' and for the product which were without any brand names and as the 'Diamond Gold' being a superior quality product, the value of the same cannot be adopted for another brand name 'Suraksha Gold' and other product of without any brand.

However, it is a matter of fact that MRP which was printed for all the three type of goods i.e. goods with 'Diamond Gold' brand, goods with 'Suraksha Gold' brand as well as goods without any brand, MRP has been indicated on the packing material. It has been established by the Department that the MRP which was indicated on the finished goods which were seized at the factory premises of the appellant has same MRP for all the three type of products. We note that the MRP which are indicative of price of various type of wall putty and decorative white cement are as follows:

Weight of Packing & Brand of Product	MRP per Bag (Rs.)
40 Kg 'diamond' wall putty	1050
40 Kg 'suraksha' wall putty	1050
20 Kg 'diamond' wall putty	650
20 Kg 'suraksha' wall putty	650
50Kg 'diamond' decorative white cement	1050
50 Kg 'suraksha' decorative white cement	1050
1 Kg 'diamond' decorative white cement	35
1 Kg 'suraksha' decorative white cement	35
5 Kg 'diamond' decorative white cement	145
5 Kg 'suraksha' decorative white cement	145

10. From the above, it can be seen that the price of 'Diamond Gold' brand as well as for 'Suraksha Gold' brand for 40Kgs packing of wall putty is same at Rs.1050/-. The appellants have failed to adduce any concrete evidence to contradict the above findings of the adjudicating authority. We therefore, do not find anything wrong in adopting the MRP which was found mentioned on the packing of finished goods which was put for seizure at the factory premises of the appellant for deciding the effective rate of clearance for the relevant financial years. We do not find any illegality in the seizure and confiscation of finished goods valued at Rs.14,14,350/- under Rule 25 of the Central Excise Rules, 2002 as it has been established that same was manufactured with the brand name of other persons and the manufacturing has taken place without taking valid registration from the Central Excise Department and the appellant have been clearing the dutiable goods without payment of Central Excise duty. We also find that the issue of the classification for the decorative white cement and its implication of applicability of the

Rule 3 of the Legal Metrology (Packaged Commodities) Rules, 2011 is raised by the learned advocate before this Tribunal only. We find that this ground has never been taken by the appellant before the adjudicating authority and therefore, raising a fresh ground of defence before the Tribunal on which the adjudicating authority has not given any finding, is legally not maintainable.

11. In view of above facts of the matter, we find that investigation has established beyond doubt that the appellants have been engaged in the manufacture of wall putty, decorative white cement etc. with the brand name of some other person and on the basis of record of clearances recovered by the investigation team, it is established that the appellants have crossed the exemption limit which is available for SSI units and therefore, they should have been taken a proper Central Excise registration from the Excise authorities. They were also required to make clearances of products manufactured and branded with other persons brand name on payment of Central Excise duty which they have failed.

12. In view of the above, we do not find any shortcomings so far as the Order-in -Original is concerned and as a result, refrain from interfering with the findings of the Order in Original. Accordingly, all the three appeals are dismissed.

(order pronounced in the Court on 25/06/2019)

(Rachna Gupta)
Member (Judicial)

(C L Mahar)
Member (Technical)

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