

**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH AT HYDERABAD**

Single Member Bench

Court – I

Appeal No. E/1141/2012

(Arising out of Order-in-Appeal No.125/2011 (H-III) CE dated 18.01.2012 passed by CCE
(Appeals), Hyderabad - III)

**M/s Victor Hitech,
New No.16, Meenakshi Street, K.K. Nagar,
Madurai – 625 020**

.....Appellant

VERSUS

**Commissioner of Central Excise, Customs
& Service Tax, Hyderabad - III
Kendriya Shulk Bhavan, L.B. Stadium Road,
Basheerbagh, Hyderabad – 500 004**

.....Respondent

and

Appeal No. E/20317/2014

(Arising out of Order-in-Appeal No.123, 124 & 125/2011 (H-III) CE dated 18.01.2012
passed by CCE (Appeals-I & III), Hyderabad)

**M/s Sanghi Polymers Pvt Ltd,
Sanghi Nagar,
RR District, AP – 501 511**

.....Appellant

VERSUS

**Commissioner of Central Excise, Customs
& Service Tax, Hyderabad - III
Kendriya Shulk Bhavan, L.B. Stadium Road,
Basheerbagh, Hyderabad – 500 004**

.....Respondent

Appearance

Shri K. Chandrasekhar, Advocate for the Appellants.

Shri V.R. Pavan Kumar, Authorized Representative for the Respondent.

Coram:

HON'BLE MR. P. VENKATA SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER No. A/30502-30503/2019

Date of Hearing: 15.04.2019

Date of Decision: 09.05.2019

[Order per: P.V. SUBBA RAO.]

1. These two appeals are filed against same impugned order (OIA) No. 123,124 & 125/2011 (H-III) CE dated 18.01.2012 and hence are being disposed of together. Appeal E/20317/2014 is filed by M/s Sanghi Polymers Pvt Ltd (SPPL) against whom there is an allegation of clandestine removal and a demand of duty and imposition of penalty. Appeal E/1141/2012 is filed by M/s Victor Hitech (VH) who are alleged recipients of the clandestinely removed goods on whom penalty was imposed.

2. Heard both sides and perused records. The facts of the case in brief are that SPPL are manufacturers of BOPP adhesive rolls which they supply as jumbo rolls to their customers. M/s VH is one of their customers who receives this jumbo rolls and cuts them into smaller BOPP adhesive films and clears them. Directorate General of Anti Evasion received intelligence and searched premises of M/s VH, Madurai and issued a show cause notice to them. The present show cause notice is result of follow up enquiries by DGCEI, Hyderabad. The allegation in this show cause notice is that M/s SPPL cleared jumbo rolls of 3000m length and misdeclared them as of 1000m length and thereby under paid Central Excise duty. The details of the disputed invoices are in annexure E to the show cause notice. During investigation, officers recorded statement of Shri V. Raja Gopal, Vice President of SPPL who, inter alia, indicated that the weight of 1000m jumbo roll will be between 45-50 kg and the weight of 3000m jumbo roll will be between 1035 and 1050 kg. In all the disputed invoices the quantity mentioned in invoices is as per the quantity declared by them and the duty has been paid accordingly. Since, the goods have to be carried from M/s SPPL in Hyderabad to M/s VH in Madurai, a transporter was engaged and the

transporter issued the Goods Consignment Notes (GCNs) in respect of each of the consignments. The transporter, as is the normal practice, charged for transportation on per-kg basis. Therefore, the exact quantity of the jumbo rolls cleared in terms of the weight was available in the GCNs issued by the transporter with respect to each of the individual invoices. Further, a computer printout was taken from the transporter's office giving details of all the consignments which they had transported. Further, a few test reports by SPPL were sent by SPPL to M/s VH, their buyer. These test reports of SPPL were recovered by the officers from the premises of M/s VH.

3. When the test reports, the GCNs and the invoices were correlated with one another, the quantity of the alleged clandestine removal could be worked out and accordingly, a table was prepared and amended to the show cause notice demanding Central Excise duty on the goods allegedly clandestinely removed by M/s SPPL. The details are enclosed as annexure E to the show cause notice.

4. Learned counsel for the appellant submits that the present proceedings included a search of the premises of SPPL on 24.09.2008 as a follow up to the original search in M/s VH on 11.09.2007. No incriminating documents or shortage of raw material or finished goods were discovered during the search proceedings. The officers of DGCEI, Hyderabad had not recorded any statements. They are relying on the statement of Shri V. Raja Gopal, Vice President of SPPL recorded on 11.02.2008 during the earlier proceedings. Reliance was placed on two test report copies of SPPL recovered from the premises of M/s VH, Madurai and have been used in the present proceedings. Statements of the transporter were recorded and some computer worksheets prepared by the transporter were also relied upon in the present proceedings. Cross examination during the adjudication

proceedings revealed some inconsistencies in the statements of the transporter. A show cause notice was issued after one year from the date on which the department has got the knowledge of the purported clandestine removal of goods. The allegations of excess quantity of clearances and duty calculations are based on the worksheets prepared and submitted by the transporter and not based on any evidence collected during the search proceedings. He would submit that the first appellate authority has wrongly recorded that in the annexure E-1 to the show cause notice, there is no evidence to the clearance of 3000m length rolls by SPPL through excise invoices which were issued. He would draw the attention of the bench to Sl.No.2 of annexure to show that 3000m consignments were also cleared and invoiced by the appellant. He further, submits that there were also 1500m length rolls which they had cleared, as can be seen from the worksheets. He further, submits that the two test reports of one invoice recovered at M/s VH in the earlier proceedings are being relied upon by the department which is not correct because the present proceedings are independent of the earlier proceedings. Further, he argued that based on quality control report of one invoice duty cannot be demanded on 19 invoices presuming that all invoices were correspondingly related to clandestine clearances of the goods.

5. His other line of argument was that the department failed to produce evidence of purchase of raw materials and clearance of such huge quantity of finished products and no documents, whatsoever, were recovered during the search proceedings and therefore, the demand cannot be confirmed on this ground. He further argued that the GCNs are raised by the transporter on the buyer and not by the appellant, although they pertain to the goods cleared by the appellant and therefore, they cannot be relied upon. The

transport freight is paid by the buyer and not by SPPL. The department did not produce any weighment slips supporting that the weights recorded in the GCNs as correct. He also argues that the limitation has to be applied within one year from the date on which the department has come to know about the alleged clandestine removal and the demand has been raised beyond that period. He therefore, prays that the impugned order may be set aside and the appeal may be allowed.

6. Countering the arguments of the learned counsel the learned departmental representative submits that although there could be inaccuracy in the first appellate authority mentioning in the order that consignments of 3000m were not cleared by the appellant, as can be seen from the annexure that in cases where there is no difference between the length of the roll indicated in the invoice and what has been arrived at based on actual quantity of goods transported, no demand, whatsoever, was raised. Therefore, there is no force in the argument of the learned counsel on this account. He vehemently argued that in case of clandestine removal no direct evidence or record is maintained and therefore what is required is sufficient proof to show that the goods were clandestinely removed. In this case, the supplier was located in Hyderabad and the buyer is located in Madurai and the goods had to be transported. Nobody knows what quantity goods were transported better than consignor, consignee and the transporter. The transporter knows the quantity because he charges for transportation on per-kg basis. With respect to each truck, he raised GCN. It does not matter whether the supplier has paid for the transport or the receiver has done so. What is material is the quantity of goods which have been transported from the appellant to M/s VH, the buyer. Evidently, neither the supplier nor the recipient who pays the transport charges will pay in

excess of the quantity of the goods transported. Therefore, the GCN clearly indicates the actual quantity of goods removed and transported. The GCNs are raised based on weight; the goods are sold based on length. The correlation between the length and the weight was available when the Vice President of SPPL clarified that each roll of 1000m weighs between 45-50 kg and each roll of 3000m weighs between 1035-1050kg. Therefore, if the total weight of the consignment is divided by the weight per unit, we know the quantity of goods cleared. These individual GCNs were further compared with the statement in the form of a computer printout generated by the transporter because he has to maintain an account of what quantity of goods have been cleared and how much he needs to be paid to him for the transport. Both these were tallied before arriving at the quantity of alleged clandestine removal of the goods. These calculations were further strengthened by the test reports recovered from the premises of the buyer. It is true that the individual test report is available only in a few cases but the test reports which were relied upon are sufficient to buttress the case of the revenue which is primarily based on the transport documents which show the quantity of goods which were taken out of SPPL and sent to M/s VH. The test reports are not of any outside agency but were prepared by the lab of the appellant themselves. He would argue that the learned counsel is not correct in stating that since their test reports are for internal use, reliance cannot be placed on them. Learned departmental representative would argue that in case of clandestine removal, where there is unaccounted removal of goods, evidence can only be gathered from other private records and it cannot be gathered from excise records. The test reports qualify as evidence in this case. He agrees that no incriminating documents were recovered during the search of SPPL conducted by the officers almost one

year after the initial search of M/s VH. He, therefore, argues that there is sufficient evidence based on the records available to show that goods were clandestinely removed in many cases misdeclaring 3000m rolls as 1000m rolls. On the last question of limitation, he would submit that there is no basis for the argument of the learned counsel for the appellant that the demand has to be issued within one year from the date of the department coming to know about the clandestine removal. He points out that section 11A has only two dates i.e., one year or five years from the relevant date. Relevant date is in no case the date on which the department comes to know of an alleged clandestine removal. Therefore, as long as elements of fraud, collusion, wilful misstatement, suppression of facts etc., are available, the demand can be issued within five years from the relevant date. There is no force in the argument of the appellant and the demand needs to be set aside.

7. I have considered the arguments on both sides and perused the records. The only issues to be decided is whether there is sufficient evidence of the alleged clandestine removal of goods by SPPL to M/s VH, as detailed in annexure E to the show cause notice, or otherwise and whether the demand has been raised within the time limit. Learned counsel for the appellant argues that since the department did not recover any incriminating evidence during the search of SPPL, they had no evidence whatsoever of clandestine removal. He further argues that the statement of Shri V. Raja Gopal recorded during the earlier proceedings should not be relied upon in this particular case. On this point, I find that the appellant is not correct because the only aspect relied upon as far as the statement is concerned is a factual matter regarding what is the weight of a 1000m and a 3000m jumbo roll manufactured by them. This weight does not vary with the case

proceedings and nobody knows it better than the Vice President of the appellant. It is true that the department searched the premises of SPPL almost one year after the initial search and has not found any incriminating documents. The second point of argument of the appellant is that there is no evidence of procurement of raw material or evidence of manufacture of illicitly removed goods and it is only based on transport documents. Therefore, the same does not sustain. Learned counsel relied on the case laws which are as follows:

- (i) Continental Cement Company Vs Union of India - 2014 (309) ELT 411 (All.)
- (ii) CCE, Raipur Vs Anil Agrawal – 2013 (287) ELT 489 (Tri-Del)
- (iii) Dalmia Vinyls (P) Ltd Vs. CCE, Hyd – 2005 (192) ELT 606 (Tri-Bang.)
- (iv) CCCE & ST, Bharuch Vs Shree Krishna Industries – 2017 (345) ELT 629 (Guj.)
- (v) Vigirom Chem Pvt Ltd Vs CCE, Bangalore – 2010 (251) ELT 544 (Tri-Bang.)
- (vi) Commissioner Vs Motabhai Iron and Steel Industries – 2015 (316) ELT 374 (Guj.)
- (vii) Kothari Pouches Ltd Vs CCE, New Delhi – 2001 (135) ELT 531 (Tri-Del.)
- (viii) A. Tajudeen Vs UOI – 2015 (317) ELT 177 (SC)
- (ix) UOI Vs MSS Food Products Ltd – 2011 (264) ELT 165 (MP)

- (x) CCE, Ludhiana Vs Renny Steel Castings (P) Ltd – 2012 (283) ELT 563 (Tri-Del)
- (xi) CCE, Mangalore Vs Pals Microsystems Ltd – 2011 (270) ELT 305 (SC)

8. He further, argues that the entire demand is based on assumptions and presumptions and does not sustain.

9. Learned departmental representative, on the other hand argues that nobody knows as to what quantity of goods were removed better than the transporter who receives the goods from the consignor and delivers it to the consignee and receives the payment for this service. I find that the documents of the transporter in this particular factual matrix is quite relevant because the goods have to be carried for a very long distance and the liability of the transporter for transporting the goods as well as the payment for transportation requires him to record the actual quantity of goods being transported. It does not matter whether the seller or the buyer pays for transportation. Nobody will pay for 3x quantity of goods when only x quantity of goods is transported. Further, in case of an accident or damage or theft the liability of the transporter will also be accordingly. No transporter will take upon him the liability of 3x quantity of goods when he is actually carrying x quantity of goods. In this case, I find that transporter not only issued GCNs but has also maintained computerised record of the goods transported presumably because he is dealing with two large companies. Both the GCNs and the statements by the transporter show the actual quantity of goods transported by weight. It is true that the appellant sells the goods by length and not by weight. However, any standard product such as this, the length of the goods and its weight can be correlated. This

correlation comes out of the statement of the Vice President of the appellant himself. Therefore, I do not find any inconsistency in arriving at the quantity of the goods transported against each invoice by dividing the weight of the goods transported by the weight per unit. Although the Vice President gave a range of Rs.1035-Rs.1050 per 3000m jumbo roll, the calculations were made taking the weight on the higher side thereby minimising the alleged clandestine removal. I also find that in cases where there was no difference between the quantity mentioned in the invoice and the quantity arrived at by the weight, no demand was made and such transactions were faithfully recorded in annexure E to the show cause notice. The test reports in question pertain to only few consignments and not to each consignment because only few test reports could be recovered from the buyer's premises. Thus, quality control test reports were made by the supplier's own quality control lab which also corroborate with the calculations made based on the GCN and statements by the transporter. Therefore, to that extent these test reports serve as additional corroborative evidence. In the factual matrix of this case, I find that there is sufficient evidence of clandestine removal by SPPL. It is impossible to have every single document to show with mathematical precision the clandestine removal starting from raw material to their production and clearance because by its very nature, clandestine removal is done without recording the figures. If all figures were recorded faithfully in the documents there will not be any clandestine removal. Therefore, in each and every case of alleged clandestine removal the facts and circumstances must be evaluated to come to a conclusion if there is sufficient evidence of clandestine removal or otherwise. It is true that the officers have searched the premises of SPPL almost one year after the initial detection in the premises of M/s VH. If the search was conducted prior to

this date they possibly would have found more evidence. However, my decision in the present case is only based on the evidence available on record and I find that there is sufficient evidence to show that there was clandestine removal of the goods. Accordingly, I find no infirmity in the order of the first appellate authority and the impugned order requires no interference. On the question of limitation, I find that section 11A of Central Excise Act provides for demand to be raised within five years from the relevant date in case of suppression of facts which has been the present case. I do not find any basis for the argument of the learned counsel for the appellant that the demand must be raised within one year from the date on which the department comes to know of the alleged clandestine removal. In conclusion, I find that the impugned order is correct and needs no interference.

10. The impugned order is upheld and the appeals are rejected.

(Order pronounced in open court on 09.05.2019)

(P.VENKATA SUBBA RAO)
MEMBER (TECHNICAL)