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

Single Member Bench

Court – I

Appeal No. E/77/2007

(Arising out of Order-in-Original No. 18/2006-Commr dt.31.10.2006 passed by CCCE, Hyderabad - I)

M/s. Vishnu Chemicals Ltd
Survey No.15, Gaddapotharam,
Jinnaram Mandal, Medak District,
AP – 502 319 **......Appellant**

VERSUS

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

with

Appeal No. E/78/2007

((Arising out of Order-in-Original No. 18/2006-Commr dt.31.10.2006 passed by CCCE, Hyderabad - I)

M.V. Ramana Murthy, Central Excise Incharge, M/s. Vishnu Chemicals Ltd,
Survey No.15, Gaddapotharam,
Jinnaram Mandal, Medak District,
AP – 502 319 **......Appellant**

VERSUS

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

and

Appeal No. E/94/2007

((Arising out of Order-in-Original No. 18/2006-Commr dt.31.10.2006 passed by CCCE, Hyderabad - I)

CH. Krishna Murthy, Managing Director,
M/s. Vishnu Chemicals Ltd,
Survey No.15, Gaddapotharam,
Jinnaram Mandal, Medak District,
AP – 502 319 **......Appellant**

VERSUS

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

Appearance

Shri K. Nagaraja Rao, Advocate for the Appellant.

Shri N. Bhanu Kiran, Authorized Representative for the Respondent.

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

FINAL ORDER No. A/30707-30709/2019

Date of Hearing: 02.07.2019
Date of Decision: 18.07.2019

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

1. These appeals have been filed by the appellants against the same impugned order and hence are being disposed of together.

2. Heard both sides and perused the records. The facts of the case in brief are that the appellant M/s Vishnu Chemicals Ltd (VCL) is engaged in manufacture of Sodium Bichromate (SB) falling under Chapter heading 2841.10, Basic Chromium Sulphate (BSS) falling under heading 2833.00 and Yellow Sodium Sulphate (YSS) falling under heading 2833.00. They have been paying Central Excise duty on these products. On receiving information that they are not discharging the duty liability on the full value of their clearances, the officers of Central Excise searched the premises and took stock and found that there was shortage of 5.060 MTs of Sodium Bichromate Mother Liquor (SBML) in the factory on which the duty liability comes to Rs.28,567/-. Further, they conducted detailed investigation and recorded statements of various persons and seized private records which showed removal of goods without showing them in the Central Excise records and paying Central Excise duty. After analysing all these records, they issued a Show Cause Notice OR No. 54/99-Adjn. dated 10.04.2000 demanding the following duty from VCL.

Annexure	Product	Quantity (MT)	Period	Duty
A	SBML	33.555	4/1997 to 6/1998	2,16,007
B	SB as YSS	59.5	7/1997 to 6/1998	3,87,351
C	SB as BCS	12.95 SB & 12.5 of BCS	3, 9 & 10/1997	1,36,750
D	SB, SBML & BCS	11.595 SB, 8.598 of SBML & 1 of BCS	June 1998	1,52,624
E	SB	172.064	8/1997, Jan to May 1998	12,69,832
-	Shortage SBML	5.060	Panchanama	28,567
				21,91,131

It was also proposed to impose penalties on the other appellants.

3. The period of dispute in this case was March, 1997 to June, 1998. The appellants submitted their replies to the adjudicating authority and sought cross-examination of some persons. After following due process, but without allowing cross-examination, the OIO No. 04/2002 dated 25.01.2002 was passed confirming the demand of duty with equal amount of penalty, interest as well as penalties under Rule 173Q upon M/s VCL and personal penalty of Rs.50,000/- under Rule 209A on the Managing Director, Shri CH. Krishna Murthy, a penalty under Rule 209A of Rs.10,000/- on Shri M.V. Murali Krishna, Marketing Manager and penalty of Rs.2,000/- on Shri M.V. Ramana Murthy, Central Excise Incharge of M/s VCL.

4. Aggrieved by the order, the appellants appealed to the Tribunal who, vide Final Order No. 961-963/2002 dated 24.07.2002, remanded the matter to the adjudicating authority directing him to allow cross-examination as sought by the appellants. The department's appeal to the Hon'ble High Court against this order of the Tribunal was dismissed on 07.07.2003. On 31.07.2006, the cross-examination of Shri Krishnaiah, Shri Ramana Murthy, Shri Vinay Mehta, Shri Krishna R Latwade and Shri Surender Jhawar were allowed. The appellants also gave written submissions to the adjudicating authority on 24.08.2006. Thereafter the adjudicating authority vide the impugned Order-in-Original No. 18/2006 dated 24.08.2006:

a) Confirmed the demand of Rs.21,91,131/- under section 11A upon M/s VCL along with interest under section 11AB.
b) Imposed a penalty equal to the amount of duty under section 11AC upon M/s VCL.
c) Imposed penalty of Rs.10,00,000/- under Rule 173Q upon M/s VCL.
d) Imposed penalty of Rs.1,00,000/- under Rule 209A on Shri CH. Krishna Murthy, Managing Director of M/s VCL.
e) Imposed penalty of Rs.10,000/- on Shri Murali Krishna, Marketing Manager of M/s VCL.
f) Imposed penalty of Rs.5,000/- on Shri M.V. Ramana Murthy, Central Excise Incharge of M/s VCL.

5. Aggrieved by this impugned order the present appeals have been filed by M/s VCL, Shri M.V. Ramana Murthy and Shri CH. Krishna Murthy. Learned Consultant for the appellants takes the bench through the chronology of

events and summary of demands raised. He submits that the SCN has raised a demand of Rs.28,567/- on shortage of SBML found during the stock taking as recorded in the panchanama. He submits that the remaining amount of the demand is based on the analysis of various documents which have been summarized in Annexures A to E attached to the SCN. These are as follows.

1) Annexure-A - the details of SBML cleared in excess over the invoice quantities during the years 1997-98 and 1998-99. The total amount of differential duty demanded on this differential quantity was Rs.2,16,007/-.
2) Annexure-B - the details of clearances of SB made in the guise of YSS during 1997-98 and 1998-99. The differential duty demanded on this count is Rs.3,87,351/-.
3) Annexure-C - the details of the BCS cleared without payment of duty and without any bill. The differential duty demanded on this head is Rs.1,36,750/-.
4) Annexure-D - details of actual production of SB, SBML and YSS as per the recovered notebook during the period 01.06.1998 to 15.06.1998. The differential quantity, the value and the duty on this count were as follows.

   <u>DETAILS OF DIFFERENTIAL QUANTITIES BETWEEN NOTE BOOK AND RG-1</u>

PRODUCT	DIFFERENTIAL QUANTITY	RATE PMT (Rs.)	VALUE (Rs.)	DUTY (Rs.)
SBML	8,598	41,000/-	3,52,618/-	63,453/-
SB	11,595	41,000/-	4,75,395/-	85,571/-
BCS	1,000	20,000/-	20,000/-	3,600/-
		TOTAL DUTY		1,52,824/-

5) Annexure-E is the details of actual production of SB & YSS as per the labour contractor reports. He submits that on this count the demand was raised on the difference between RG-1 quantities and quantities indicated as produced in the labour contractor reports. However, the actual amount of differential duty on this count has not been indicated in the Annexure-E. However, the learned Commissioner in the impugned order calculated this duty as Rs.12,69,832/- and confirmed the demand accordingly.

6. Learned counsel fairly submits that the demands were raised based on the investigation conducted by the department and various notes and other records recovered from the factory by the departmental officers. These have been collated into five annexures to the SCN as indicated above. When questioned, the company officers have confirmed in their statements that the clearances in Annexure-A, B & C were unrecorded clearanes. These statements have not been retracted by the officers of the company so far. However, as far as Annexure-D and E are concerned, he argued that Annexure-D is based on the difference between RG-1 quantity and the quantity recorded in a private note book maintained in the factory and the differential duty has been demanded. On this issue, he submits that even if it is presumed that there was excess production which was not shown in the RG-1, there is no evidence that goods so manufactured have been removed and in the absence of evidence of removal the demand does not sustain. He, further, argues that this demand of goods based on the presumption that there was excess unrecorded production, must be set off against any alleged unrecorded clearances in Annexure-A, B & C. The logic for this is simple. If there is allegation that there was unrecorded clearance of goods, such production must have come from unrecorded manufacture or recorded manufacture. If the clearance was on account of recorded manufacture, the same would have been reflected as shortage during stock taking. If it was from unrecorded manufacture, a separate demand cannot be raised first, on the ground that there was unrecorded manufacture and second, again on the ground that unrecorded goods have been cleared. As far as Annexure-E is concerned, he would submit that this is based on note book which was maintained for the purpose of making payments to the labour contractor, Shri Ganga for the services rendered by him. The signature of Shir Ganga was not there and during cross-examination it was confirmed that he was an uneducated and cannot read or write. The authenticity of this annexure has not been established by the department. Further, the alleged clandestinely manufactured products must also be set off against the alleged clandestinely removed goods and there cannot be a charge of duty twice – first on the manufacture and again on its removal. He would, therefore, urge that as far as Annexure-E is concerned, they do not subscribe to the authenticity of the records and the department has not been able to establish the same. In

view of the above, he pleads that their appeals must be allowed and the impugned order may be set aside.

7. Learned departmental representative reiterates the findings of the OIO. He submits that the assessees were allowed an opportunity to cross-examine the person whose statements were referred to while passing the OIO and four persons appeared for cross-examination on 31.07.2006 and retracted the statements given by them in 1998. The persons are (a) Shri Surender Jhawar, Proprietor of M/s Piyush Chemicals Ltd, (b) Shri Vinay Mehta, Proprietor of M/s Delight Enterprises, (3) Shri Krishna R Latwade, Partner of M/s Krishna Chemicals and (4) Shri K. Krishnaiah, Managing Partner of M/s Kalyani Chemicals Ltd. During the entire intervening period of eight years, these persons never approached the department or retracted their statements. All these four persons are the alleged recipients of the clandestinely removed goods. The incriminating documents were recovered from the factory on 16.06.1998 under a Panchanama and hence the entries made therein must be considered as substantial evidence and the case is built up based on the differences noticed in these documents and statutory documents such as RG-1 returns and invoices. Further, the Chartered Engineer's report submitted by the appellant was also considered by the adjudicating authority and a detailed perusal of the said report was made in Para 7.5 of the OIO. The efficiency of the plant at 92.5% was also taken into consideration while arriving at the different products manufactured by the assessee. Even after taking the Chartered Engineer's certificate into account, there were still differences between the production particulars and the records in RG-1 which could not be explained by the assessee and hence the demands were confirmed. He would submit that production figures were reckoned by taking the molecular weights of the raw materials and final products through stoichiometric calculations. These calculations show what should be the production based on pure chemical equations. The actual production would be less depending upon the efficiency of the plant which factory has been brought out by the Chartered Engineer whose certificate was produced by the appellants themselves. Accordingly, the difference in production was worked out and the duty has been demanded and penalties have been imposed.

8. I have considered the arguments on both sides and perused the records. The SCN lists out the framework for raising the demand and imposing penalties. I do not find from the SCN any reliance on stoichiometric calculations or on the Chartered Engineer's certificate. In this regard, I reproduce Para 13 of the SCN which reads as follows.

"13. Reliance for issue of this notice is based on the following documents,-

- *i. Panchanama dt.16.6.98 drawn at the factory premises of the assessees.*
- *ii. Panchanama dt.16.6.98 drawn at the Regd./Admn office premises of the assessees.*
- *iii. Statement dated 16.6.98 of Shri E.V. Koteswar Rao, Chemist.*
- *iv. Statements of Shri M.V. Ramana Murthy, Central Excise Incharge given on 16.5.98, 14.8.98, 20.8.98 & 24.12.98.*
- *v. Statements of Shri M.V. Murali Krishna, Marketing Manager given on 17.6.98, 4.8.98, 12.8.98, 22.8.98, 23.9.98, 26.9.98 & 11.12.98.*
- *vi. Statement dated 18.6.98 of Shri D. Venkat Reddy, Partner M/s Kalyani Chemicals, Hyderabad.*
- *vii. Letter dated 14.8.98 of Shri M.V. Murali Krishna, Marketing Manager.*
- *viii. Statement dated 18.8.98 of Shri K. Krishnaiah, Managing Partner, M/s Kalyani Chemicals, Hyderabad.*
- *ix. Statement dated 18.8.98 of Shri Md. Fazal Rahman, Managing Partner, M/s Chromochem, Hyderabad.*
- *x. Letter dated 31.8.98 of Shri Md. Fazal Rahman, Managing Partner, M/s Chromochem, Hyderabad.*
- *xi. Statements of Shri Ch. Krishna Murthy, Managing Director, M/s Vishnu Chemicals Pvt Ltd, Khazipalli given on 2.9.98 & 16.1.99.*
- *xii. Statement dated 15.9.98 of Shri S. Ganga, Labour Contractor M/s Ganga Transport.*
- *xiii. Statement dated 15.10.98 of Shri Vinay Mehta, Prop. Enterprises, Bombay.*
- *xiv. Statement dated 26.12.98 of Shri Krishna R Latwade, Partner, M/s Krishna Chemicals, Ichalkaranji.*
- *xv. Letter dated 16.12.98 of Shri Aman Gupta, Prop. M/s Chem Enterprises, New Delhi.*
- *xvi. Statement dated 30.11.98 of Shri R.K. Mittal, Partner, M/s United Chemplast, New Delhi.*
- *xvii. Statement dated 21.12.98 of Shri Surender Jhawar, Prop. M/s Piyush Chemicals Ltd, Secunderabad.*
- *xviii. Statement dated 18.9.98 and 12.12.98 of Shri Kamleshbhai Manibhai Patel, Partner M/s Rubi Red (I), Vapi.*
- *xix. A Notebook recovered vide Sl.No.5 of the Panchanama dt.16.6.98 drawn at the factory premises.*
- *xx. Scribbling pads in 11 Nos. recovered vide Sl.No.38 to 48 of the Annexure to the Panchanama dt.16.6.98 drawn at the Regd./Admn. Office of M/s Vishnu Chemicals Pvt Ltd, Hyderabad.*

xxi. *Files recovered vide Sl.No. 4, 8 & 10 of the Annexure to the Panchanama dt.16.6.98 drawn at the Regd./Admn. Office, M/s Vishnu Chemicals Pvt Ltd, Hyderabad.*

xxii. *Made up file recovered vide Sl.No.6 of the Annexure to the Panchanama dt.16.6.98 drawn at the factory premises.*

xxiii. *RG-1 registers for the period 1196-97, 1997-98 & 1198-99.*

xxiv. *Invoices raised during the relevant period."*

9. As can be seen, the demand was raised based on the Panchanama, statements and the private records seized from the premises of the appellant as well as statements of the alleged buyers of the clandestinely removed products. All these have been summarized into Annexures-A to E enclosed to the SCN giving cross reference to Pg.Nos., File Nos. and Note book Nos., etc. As far as Annexure-A, B & C are concerned, learned counsel for the appellants fairly submits that these have been agreed to by the officers of the company in their statements and which have not been retracted so far. These are as follows.

a) Annexure-A: Details of Sodium Bichromate Mother Liquor cleared in excess over the invoice quantities during the years 1997-98 & 1998-99.

b) Annexure-B: Details of clearances of Sodium Bichromate made in the guise of Yellow Sodium Sulphate by M/s. Vishnu Chemicals Pvt Ltd during the year 1997-98 & 1998-99.

c) Annexure-C: Details of Sodium Bichromate and Basic Chromium Sulphate cleared without payment of duty and without any bill.

10. All these pertain to alleged clandestine clearances of goods. As far as Annexure-D is concerned, he fairly submits that the notebook in this case was also seized from the premises of the factory and the differential duty was worked out. However, he submits that differential duty worked out as per this annexure alleging that there was excess unrecorded production which must be set off against demand of alleged excess unrecorded clearance as in Annexure-A, B & C. As far as Annexure-E is concerned, he submits that this was a notebook meant for payment to the labour contractor and it cannot form a sound basis for alleging that there was clandestine production and clandestine clearance of the goods. Therefore, the demand on this account is not sustainable.

11. This is a case of alleged clandestine removal of goods. Therefore, it is unthinkable that there will be official records of the clandestine manufacture and clandestine clearance. If these were recorded, they will no longer be clandestine. By their very nature, unrecorded production and clearance of goods can only be found based on evidence gathered during investigation such as stock taking, private records, private notebooks, statements of persons concerned, their examination and cross-examination which will lead to conclusion whether there was a clandestine removal of goods and if so, to what extent. Private note books seized from the factory under panchanama during the course of investigation and their analysis, as supported by the statements of various persons in the factory, form a fairly sound basis for demanding duty on such clearance. These statements can be supported by the statements of alleged recipients of the clandestinely removed goods. Such statements were recorded in this case. After a gap of eight years, during cross-examination, four of them have retracted their statements. However, this can, at best, be said to be an afterthought. Any person who makes statement under duress or coercion will, at the earliest opportunity, retract the statement so made. The conduct of these persons does not instil confidence that they have not voluntarily given the statements. Nevertheless, even if the statements of the alleged recipients are ignored, as far as Annexure-A, B & C are concerned, the statements of the factory employees themselves also support the evidence of clandestine removal of the goods. Therefore, the demand to that extent needs to be sustained.

12. As far as the alleged clandestine production of goods is concerned, this is listed in Annexure-D and E of the SCN. Annexure-D deals with the differential production arrived at from the differences between the RG-1 and the private notebooks also seized from the factory of the manufacturer. Learned Counsel for the appellants submits that if this production is considered then the demand on this account needs to be set off against the alleged clandestine removal as listed in Annexure-A, B & C. I find considerable force in this argument. Even if the assessee is clandestinely manufacturing and removing the goods without accounting for the same in their Central Excise returns and registers, duty cannot be demanded first alleging that they have clandestinely manufactured the goods and again alleging that they have clandestinely removed the same. In fact, I find in the initial order of the adjudicating authority in 2002 that this set off was

allowed and accordingly, the demand was confirmed for a much lower amount than was indicated in the SCN. In view of the above, I find that the demand raised under Annexure-D needs to be set off against demands alleging clandestine clearance for the same period under Annexure-A, B & C. As far as Annexure-E is concerned, this is based on labour contractor reports which are meant for paying amounts to the labour contractor, Shri S. Ganga. It is not clear as to who has prepared these records. Shri S. Ganga himself states to be an uneducated person and is unable to support the statement as representing the manufacture of the goods clandestinely removed during the period. Further, I find that there is no quantification of the demand in this annexure. For these reasons, I find demand in Annexure-E is not sustainable and needs to be set aside. In conclusion, the demands raised under Annexure-A, B & C to the SCN are upheld; demand under Annexure-D is upheld but the same needs to be set off against any demand on the ground of clandestine clearance in Annexure-A, B & C for the same period; demand based on the alleged clandestine production based on labour contractor reports in Annexure-E are not sustainable and are set aside; demand on shortage of SBML noticed during panchanama is upheld. Consequently, the demand of interest has to be recalculated and the penalty under section 11AC upon the appellants/assessees also needs to be recalculated. Considering the reduction in the demand, the penalty under Rule 173Q upon the assessee M/s VCL is reduced to Rs.2,00,000/-; the personal penalty on Shri CH. Krishna Murthy, Managing Director of M/s VCL, under Rule 209A is reduced to Rs.50,000/-; penalty on Shri M.V. Murali Krishna is reduced to Rs.8,000/- and the penalty on Shri M.V. Ramana Murthy, Central Excise Incharge of M/s VCL is reduced to Rs.2,000/-.

13. The appeals are remanded to original authority for the limited purpose of calculation as above. The appeal is disposed of as herein above.

(Order pronounced in the open court on 18.07.2019)

(P.VENKATA SUBBA RAO)
MEMBER (TECHNICAL)

Veda