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

Division Bench

Court – I

Excise Appeal No. 386 of 2012

(Arising out of Order-in-Original No.16/2011- C.Ex.(Commr.) dt.31.10.2011 passed by CCCE & ST, Guntur)

Harika Resins Pvt Ltd
D.No.76-8/1-10, Lalitha Nagar,
Bhavani Puram, Vijayawada,
Andhra Pradesh – 520 012
......Appellant

VERSUS

Commissioner of Customs, Central Excise & Service Tax, Guntur
Kannavarithota, Guntur,
Andhra Pradesh – 522 004
......Respondent

and

Excise Appeal No. 387 of 2012

Arising out of Order-in-Original No.16/2011- C.Ex.(Commr.) dt.31.10.2011 passed by CCCE & ST, Guntur)

Sama Rajasekhar
D.No.76-8/1-10, Lalitha Nagar,
Bhavani Puram, Vijayawada,
Andhra Pradesh – 520 012
......Appellant

VERSUS

Commissioner of Customs, Central Excise & Service Tax, Guntur
Kannavarithota, Guntur,
Andhra Pradesh – 522 004
......Respondent

Appearance
Shri C.V. Narasimham, Advocate for the Assessee.
Shri N. Bhanu Kiran, Authorized Representative for the Revenue.

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

INTERIM ORDER No. 30117-30118/2020

Date of Hearing: 02.03.2020
Date of Decision: 18.11.2020

[Order per: P. VENKATA SUBBA RAO.]

1. Heard both sides and perused the records. Both these appeals arise from the same impugned order and hence are being disposed of together. Appeal E/386/2012 has been filed by the assessee while appeal E/387/2012 has been filed by Shri Sama Rajasekhar, Managing Director of the assessee firm challenging personal penalty imposed upon him. The Show Cause Notice (SCN) in this case was issued on 31.10.2005 which culminated in an adjudication order by the Commissioner which, on appeal has been remanded for denovo adjudication by this bench by its earlier final order No.A/1649-1656/2009 dt.24.11.2009. Meanwhile, the assessee company has gone into liquidation and therefore the matter was argued on behalf of the company by the learned counsel for the official liquidator before us.

2. The appellant/assessee was a manufacturer of Alkyd, Phenolic and Malleic Resins (herein after referred to as "resins") falling under Chapter heading 3907.50/3909.51 of the First Schedule to the Central Excise Tariff Act, 1985. Shri Sama Rajasekhar was the Managing Director of the appellant/assessee and is the appellant in the appeal E/387/2012. Officers of DRI conducted searches and seizures, investigated and came to the conclusion that the appellant was clearing resins in excess quantity which were being booked for transportation under fictitious bills issued in the name of M/s Kalyan Chemicals, M/s Prasad Chemicals and M/s Priya Chemicals. It was further found that the goods in such invoices were declared as Orthoxylene, MTO, Xylene, etc. During searches they found 10 barrels of chemicals at the premises of the transporter M/s SRMT Ltd issued under the cover of two bills of M/s Kalyan Chemicals, Vijayawada and the goods therein were declared as orthoxylene. Further investigation by the officers showed that the goods were indeed the resins manufactured by the appellant/assessee and were misdeclared as orthoxylene and booked in the name of M/s Kalyan Chemicals. Chemical analysis of the samples confirmed that the goods were indeed resins.

3. After completing their investigations two show cause notices were issued by the officers of the DGCEI, Chennai OR No.57/2003 dt.19.04.2004 and OR No.54/2005 dt.31.10.2005 for Rs.1,00,000/- and Rs.67,47,513/- respectively. These, on adjudication, culminated in an Order-in-Original

passed by the Commissioner of Central Excise which on appeal was remanded to the original authority by CESTAT Bangalore by Final Order No.1397-1404/2009 and S.O. 1649-1656/2009 dt.24.11.2009. The specific direction given while remanding the matter was to provide to the appellants copies of all the relied upon documents and allow cross examination of various witnesses sought by the appellant and pass an order after following principles of natural justice.

4. In compliance of these directions, the impugned adjudication order (denovo) has been passed which is under challenge in these cases. During the denovo proceedings cross examination was conducted in respect of 12 of the 18 persons whose statements were relied upon. The list of these statements is as follows:

S.No.	***Statement dt.***	***Name, designation/status of the deponent***
1.	*19.08.2004*	*V. Durga Prasad, Agent of M/s SRMT Ltd, Vijayawada*
2.	*28.07.2005*	*S.S. Abrar, Proprietor, M/s Inter City Cargo Movers, Vijayawada*
3.	*21.10.2003 03.12.2003 24.12.2003*	*V. Srinivas Mahesh, Marketing Representative at Chennai for M/s Harika Resins Pvt Ltd, Vijayawada*
4.	*21.10.2003 22.10.2003 05.08.2004 26.07.2005*	*Sama Rajasekhar, Managing Director, Harika Resins Pvt Ltd, Vijayawada*
5.	*09.08.2004*	*M. Kalyana Chakravarthy, clerk-cum-typist, Harika Resins Pvt Ltd, Vijayawada*
6.	*09.08.2004*	*V.B.S. Durga Prasad, Sales Executive, Harika Resins Pvt Ltd, Vijayawada*
7.	*09.08.2004 28.07.2005*	*Ch. Siva Durga Prasad, Accountant, Harika Resins Pvt Ltd, Vijayawada*
8.	*31.08.2005*	*Yogesh Manmohan Vora, Proprietor, M/s Krishna Petrochem, Mumbai*
9.	*19.09.2005*	*K. Prabhuraj, Proprietor, M/s Sandhya Trading Co., Hyderabad*
10.	*21.10.2003*	*N. Nagarajan, Proprietor, M/s Balaji Enterprises, Anna Nagar East, Chennai*
11.	*22.10.2003*	*M. Mohan of M/s Sujatha Paints, Washermanpet, Chennai*
12.	*21.10.2003 30.12.2003*	*V. Veera Raghavan, Proprietor, M/s Vee Kay Jay Paints & Chemicals, Chennai*
13.	*21.10.2003*	*R. Radhakrishnan, Proprietor, M/s Star Paints, Tondiarpet, Chennai*
14.	*03.08.2004*	*R. Karthick (alias) R. Daniel Karthick, Proprietor, M/s Raja Colour Tech and formerly Proprietor of M/s Raja Paints, Old Washermanpet, Chennai*
15.	*14.07.2005 25.08.2005*	*Smt S. Shanti, W/o Late Sri P. Sekhar, Proprietrix of M/s Vivek Paints, Muthugounderpalayam, Erode*
16.	*18.07.2005*	*T. Kalyanasundaram, Managing Director, M/s Veena Paints Pvt Ltd, Solaialagupuram Street, Madurai*
17.	*29.08.2005*	*K. Nagaraj, Partner, M/s Nirma Paints & Chemicals, Bellary*
18.	*10.07.2005*	*Sri Rajesh Mehta, Partner of M/s Oilchem India, Indore*

5. Of the above, cross examination of S.No.1, 3, 8, 11, 15 & 18 could not be completed. S.No.11 above had died and therefore, could not be cross examined, while, S.No.15 has expressed her inability to come because of her severe lower back pain. Thus only 12 of the 18 witnesses could be cross examined.

6. As far as the relied upon documents are concerned, it is the case of the revenue that all relied upon documents were already supplied along with the original SCN. As relied upon documents were not legible, fresh copies of all relied upon documents, except five, have been supplied to the appellant. The five documents which could not be supplied were S.No.23, 42, 44, 46 & 48 of Annexure-C to the SCN which are as follows:

> *"23. Made-up file No.1 with pages (odd-numbered) from 1 to 447.*
>
> *42. CE Invoices of HRPL for 2000-01, 2001-02 and 2003-04, in totally 29 books, submitted by Sri Sama Rajasekhar vide letter dated 10.08.2004.*
>
> *44. Invoices of Priya Chemicals (two no.s) submitted by Sri N. Nagarajan of M/s Balaji Enterprises, Chennai vide letter dated 27.10.2003.*
>
> *46. Bill, letter of Kalyan Chemicals and copy of SRMT-LR, submitted by Star Paints, Chennai.*
>
> *48. Invoice of Kalyan Chemicals, submitted by Nirma Paints, Bellary."*

7. The reason for the inability of the department to supply these documents was that the original documents could not be traced in the office of DGCEI.

8. At this stage, it would be pertinent to discuss the evidentiary value of the statements made by various persons before the officers of Central Excise. Such statements are made under section 14 of the Central Excise Act and such enquiry shall be deemed to be a judicial proceeding within the meaning of section 193 and section 228 of the Indian Penal Code. The statements so made are relevant for any prosecution of offence before the Court under the Act and also before any other proceeding under the Act other than before the Court as per section 9D subject to some conditions. Section 14 & section 9D of this Act are reproduced below:

> ***"Section 14. Power to summon persons to give evidence and produce documents in inquiries under this Act.*** -
>
> *(1) Any Central Excise Officer duly empowered by the Central Government in this behalf, shall have power to summon any person whose attendance he considers necessary either to give evidence or to produce a document or any other thing in any inquiry which such officer is making for any of the purposes of this Act. A summons to produce documents or other things may be for the production of*

certain specified documents or things or for the production of all documents or things of a certain description in the possession or under the control of the person summoned.

(2) All persons so summoned shall be bound to attend, either in person or by an authorised agent, as such officer may direct; and all persons so summoned shall be bound to state the truth upon any subject respecting which they are examined or make statements and to produce such documents and other things as may be required :

Provided that the exemptions under Sections 132 and 133 of the Code of Civil Procedure, 1908 (5 of 1908) shall be applicable to requisitions for attendance under this section.

(3) Every such inquiry as aforesaid shall be deemed to be a "judicial proceeding" within the meaning of Section 193 and Section 228 of the Indian Penal Code, 1860 (45 of 1860).

***Section 9D. Relevancy of statements under certain circumstances.** -*

(1) A statement made and signed by a person before any Central Excise Officer of a Gazette rank during the course of any inquiry or proceeding under this Act shall be relevant, for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which it contains, -

(a) when the person who made the statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable; or

(b) when the person who made the statement is examined as a witness in the case before the Court and the Court is of opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interests of justice.

(2) The provisions of sub-section (1) shall, so far as may be, apply in relation to any proceeding under this Act, other than a proceeding before a Court, as they apply in relation to a proceeding before a Court."

9. It has been the practice for a long time to accept the statements made before the officers of Central Excise under section 14 as evidence in judicial/quasi-judicial proceedings without having regard to the provisions of section 9D. This matter came up before the Hon'ble High Court of Punjab & Haryana in the case of Jindal Drugs Ltd [2016 (340) ELT 67 (P & H)] and the Hon'ble High Court has held that section 9D is a mandatory provision and no statement before an officer under section 14 is relevant as evidence in any judicial/quasi-judicial proceedings unless the requirement of section 9D is fulfilled viz., the person being examined as witness and the Court being of the opinion that having regard to the circumstances of the case, the statement should be admitted as evidence in the interest of justice. Thus, if any statement is made under section 14 before an officer and the person making the statement has not been examined as witness, it cannot be

admitted as evidence or used in any judicial/quasi-judicial proceedings. Para 25 of the judgment of the Hon'ble High Court is reproduced below:

> *"25. In the light of the above, respondent no. 2 is directed to adjudicate the Show Cause Notice issued to the writ petitioners by following the procedure contemplated by Section 9D of the Act and the law laid down by various judicial authorities in this regard, including the principles of natural justice, in the following manner:*
>
> *(i) In the event that the Revenue intends to rely on any of the statements, recorded under Section 14 of the Act and referred to in the Show Cause Notices issued to Ambika and Jay Ambey, it would be incumbent on the Revenue to apply to Respondent No 2 to summon the makers of the said statements, so that the Revenue would examine them in chief before the adjudicating authority, i.e. before Respondent No 2.*
>
> *(ii) A copy of the said record of examination-in-chief, by the Revenue, of the makers of any of the statements on which the Revenue chooses to rely, would have to be made available to the assessee, i.e. to Ambika and Jay Ambey in this case.*
>
> *(iii) Statements recorded during investigation, under Section 14 of the Act, whose makers are not examined in chief before the adjudicating authority, i.e. before Respondent No 2, would have to be eschewed from evidence, and it would not be permissible for Respondent No 2 to rely on the said evidence while adjudicating the matter. Neither, needless to say, would be open to the Revenue to rely on the said statements to support the case sought to be made out in the Show Cause Notice.*
>
> *(iv) Once examination-in-chief, of the makers of the statements, on whom the Revenue seeks to rely in adjudication proceedings, takes place, and a copy thereof is made available to the assessee, it would be open to the assessee to seek permission to cross-examine the persons who have made the said statements, should it choose to do so. In case any such request is made by the assessee, it would be incumbent on the adjudicating authority, i.e. on Respondent No2 to allow the said request, as it is trite and well-settled position in law that statements recorded behind the back of an assessee cannot be relied upon, in adjudication proceedings, without allowing the assessee an opportunity to test the said evidence by cross-examining the makers of the said statements. If at all authority is required for this proposition, reference may be made to the decisions of the Hon'ble Supreme Court in Arya Abhushan Bhandar v U.O.I., 2002(143)ELT 25 (SC), Swadeshi Polytex v Vollector, 2000 (122) ELT 641 (SC)."*

10. In the present case, only 12 out of 18 statements can be considered as these were the cases where the persons were cross examined during the proceedings before the adjudicating authority.

11. The case of the department rests on the following 6 pieces of evidence:

(a) The representative samples drawn from barrels seized at the premises of M/s SRMT Ltd, Chennai, the transporter, by Panchnama dt.14.04.2004 and the test report indicated that the materials are resins and not orthoxylene as declared. The modus operandi adopted by the assessee in clearing the resins clandestinely in the guise of orthoxylene is therefore, held to be proven beyond doubt. When the assessee was questioned, their only explanation was they were not concerned with the seized consignment because it was not theirs.

(b) Goods were cleared from the factory of the appellant as per the statement of Shri V. Durga Prasad, Booking clerk of M/s SRMT Ltd dt.19.08.2004. Consignment notes were being written at the place of loading i.e., factory in the name of another firm and as per the description given to them. These clearances were also maintained in the form of registers by the transport company. The ten barrels of chemical described as orthoxylene which was seized by DGCEI were booked in the name of M/s Kalyan Chemicals. This confirms the modus of misdeclaration of the nature of the goods and also of booking the consignment in the name of front companies.

(c) In the case of Inter City Cargo Movers, Shri S.S. Abrar, Proprietor, in his statement dt.28.07.2005 said that they were clearing the material from the consignor's godown only. However, Shri Abrar has negated his own statement during the cross examination although there was no specific retraction by him before the cross examination.

(d) Private books of accounts maintained by the employees of the appellant contained references to the consignment notes, quantities and actual quality/grade of the goods and the realisation actually done. In some cases, the books contained entries other than those transported by the above two transporters viz., M/s SRMT and M/s Inter City Cargo Movers. These entries were explained by the authors of the books in their statements under section 14 of the Central Excise Act. The two authors who made the entries were Shri V. Srinivas Mahesh, Marketing Representative of the appellant and Shri V.B.S. Durga Prasad, Sales Executive of the appellant. Shri Srinivas Mahesh was not cross examined. Shri Durga Prasad reaffirmed his original statement during the cross examination.

(e) Corroborative evidence taken in the form of statements by the buyers as follows:

i. Statement dt.18.07.2005 of Shri T. Kalyana Sundaram, Managing Director of M/s Veena Paints, Madurai.
ii. Statements dt.21.10.2003 and 31.12.2003 of Shri V. Veera Raghavan, Proprietor of M/s Vee Kay Jay Paints & Chemicals, Chennai.
iii. Statement dt.21.10.2003 of Shri N. Nagarajan, Proprietor, M/s Balaji Enterprises, Chennai.
iv. Statement dt.21.10.2003 of Shri R. Radha Krishnan, Proprietor of M/s Star Paints, Chennai.
v. Statement of Shri M. Mohan, working in M/s Sujatha Paints, Chennai given on 22.10.2003.
vi. Statement of Shri R. Karthick (Alias R. Daniel Karthick), Proprietor of M/s Raja Colour Tech, Chennai recorded on 03.08.2004.
vii. Statement dt.29.08.2005 of Shri K. Nagaraj, Partner of M/s Nirma Paints & Chemicals, Bellary.
viii. Statements of Smt. S. Shanthi, W/o P. Sekar (late), Proprietrix of M/s Vivek Paints, Erode recorded on 14.07.2005 and 25.08.2005.

All but two of the above eight were cross examined. During the denovo proceedings when the above were cross examined, all the above purchasers have held that they purchased only resin from M/s HRPL, the appellant under proper invoices thus supporting the assessee's case. They have not, however, retracted their earlier statements made under section 14.

(f) Evidence of sale proceeds flowing back to the appellant by way of cash/DD was discovered during investigation. The counterfoils of deposit slips pertaining to deposits of cash and cheques into savings bank account of Shri V. Srinivas Mahesh, Marketing Representative with Canara Bank were recovered. Some of the DD application counterfoils showed that DDs were obtained favouring the appellant and M/s Priya Chemicals. The amounts collected from customers in cash as well as in cheques were deposited into accounts of Shri V. Srinivas Mahesh and further the DDs were obtained against cash from the said accounts. Shri V. Srinivas

Mahesh dt.21.10.2003 said that three different accounts were maintained by him as per instructions of Shri Sama Rajasekhar to avoid tracing; he had purchased DDs out of sale proceeds collected by him under different names including the name of the assessee/appellant and the DDs were sent by courier along with the covering letter; that he sent an amount of Rs.70,00,000/- in this manner.

12. The assertion of the learned counsel for the appellant before us is that the entire case is based on assumptions and presumptions and does not hold water. The only physical evidence which the officers have collected were some barrels of Chemicals which the transporter M/s SRMT booked in the name of M/s Kalyan Chemicals and which were described as orthoxylene which on testing proved to be resin. These barrels are not related to them. All documents showed that they pertain to M/s Kalyan Chemicals. Therefore, clearance of these barrels cannot be attributed to them.

13. He would argue that although the seizure was with respect to these barrels, the case was made out to be much larger and this case was built on the basis of statements of 18 persons and several relied upon documents. Of the 18 persons, 6 were not examined/cross examined by the adjudicating authority even during the denovo proceedings and hence their statements cannot be relied upon. As far as the remaining 12 are concerned, the alleged buyers of the goods, whose statements were relied upon, have negated their statements during the cross examination and affirmed that they only purchased resin from the assessee/appellant under the cover of proper documents and made payments accordingly. Thus, their statements do not support the contention of the department that goods were cleared in the name of M/s Kalyan Chemicals, M/s Prasad Chemicals etc., describing the goods as orthoxylene, xylene etc., while the actual goods were resins manufactured by the assessee/appellant clandestinely and sold to them. The department could not also establish that the goods were indeed manufactured by the appellant/assessee. The department also could not establish that the money has flown back to the assessee. With regard to the above 6 specific pieces of evidence on which the department's case is built up, he would argue as follows:

i. The samples of the chemicals drawn from the seized barrels do not pertain to them as has been always maintained by them from date of seizure.

ii. The statement of Shri V. Durga Prasad, Booking clerk of M/s SRMT Ltd (transporter) was relied upon by the department to assert that the goods were indeed collected from the assessee/appellant. Shri V. Durga Prasad was not examined under section 9D or cross examined during the proceedings and therefore, his statement cannot be relied upon. Once the statement of Shri V. Durga Prasad is not relied upon, nothing survives against the assessee as far as the seized barrels are concerned.

iii. The statement of Shri S.S. Abrar, Proprietor of M/s Inter City Cargo Movers, another transporter was relied upon by the revenue in which he said that he was collecting material from the assessee/appellant although the bills were issued in the name of M/s Kalyan Chemicals. It is true that Shri S.S. Abrar has not retracted his statement on his own. However, when he was examined/cross examined during the denovo proceedings, he negated his own statement and affirmed that he was only collecting materials from the consignor's godown. In view of section 9D of the Central Excise Act, his statement having been negated by Shri S.S. Abrar, this evidence also does not stand.

iv. The alleged private books of accounts maintained by employees/ agents of the assessee/appellant was the fourth piece of evidence relied upon by the revenue. These were maintained by Shri V. Srinivas Mahesh, Marketing Representative, who gave his statement on 21.10.2003, 03.12.2003 & 24.12.2003. Shri V. Srinivas Mahesh was not cross examined and therefore, in terms of section 9D his statement is not relevant and cannot be considered in these proceedings. Shri V.B.S. Durga Prasad, Sales executive has stood by his earlier statement that he is an employee of the assessee/appellant and that he opened a unit in the name of M/s Prasad Chemicals on instructions of Shri S. Rajasekhar within the factory of the assessee only. The firm was run in his name from the same premises as the assessee and it does not have any independent business. Only documents are signed in the name of Prasad Chemicals. Similarly, Shri Kalyana Chakravarthy, another employee of the assessee has confirmed that Kalyan Chemicals was a unit opened in his name and he was actually only an employee of the assessee and only papers are drawn in the name of M/s Kalyan Chemicals. Both Shri Kalyana Chakravarthy and Shri V.B.S. Durga Prasad have affirmed their statements during the cross examination. Learned counsel would submit that these statements, per se, would not be sufficient to assert that M/s Kalyan Chemicals and M/s Prasad Chemicals are fictitious firms created as front for assessee. He would submit that separate VAT registrations have been obtained for each of these companies and have been filing returns also.

v. The statements of the buyers taken by the revenue as evidence are no longer relevant because of the buyers who have been cross examined have negated their statements made before the officers.

vi. As far as the evidence in the forms of sale proceedings flowing back to the assessee by way of cash/DD are concerned, he would submit that these allegations are based on the statement of Shri V. Srinivas Mahesh who was not cross examined.

14. In view of the above, he would urge that there is no evidence, whatsoever, adduced by the revenue in the case and the entire case has been built on assumptions and presumptions. Consequently, the case needs to be dismissed and impugned order needs to be set aside and their appeal needs to be allowed with consequential relief.

15. Per contra, learned Departmental Representative (DR) supports the impugned order. At the outset, he would argue that in case of clandestine removal it will be impossible to have records with mathematical precision. If everything has been recorded in the books of accounts then the clearance will not be clandestine at all. Such cases must necessarily take into account various pieces of evidence which come to light during investigations such as the private records, cash flow details, statements of various persons concerned, etc. He would submit that case started on the basis of specific intelligence. The barrels of the chemicals seized at the transporter M/s SRMT Ltd was just the beginning of the case. The barrels were marked in the name of M/s Kalyan Chemicals and were said to contain orthoxylene but had the resin instead. The person who booked the consignments, Shri V. Durga Prasad, agent of M/s SRMT Ltd was questioned and he confirmed that the

goods were received from the appellant's place. Subsequent investigation showed that there were three dummy firms viz., M/s Kalyan Chemicals, M/s Prasad Chemicals and M/s Priya Chemicals while the goods were all being cleared by the assessee/appellant. The other companies were mere dummy firms. Two of these were opened in the premises of the assessee by their own employees. The so called owners of M/s Kalyan Chemicals and M/s Prasad Chemicals were actually the employees of the assessee. When examined, they have confirmed that they are only employees and they have affirmed this position during the cross examination made by the assessee's own advocate. Thus, there cannot be any doubt that these are dummy firms. The third company M/s Priya Chemicals was opened in the name of the wife of the owner of the assessee firm which was also a dummy firm.

16. Statements were also records from other transporters such as Shri S.S. Abrar of M/s Inter City Cargo Movers. Statements of the buyers of the chemicals who were mainly the paint manufacturers were also recorded. None of these people have retracted their statements. The buyers as well as Shri S.S. Abrar have negated their statements during the cross examination which was conducted after several years. The learned adjudicating authority has correctly held that such negation during cross examination without having retracted their statements made several years ago cannot be accepted and their original statements must be relied upon. Therefore, it must be held that appellant has cleared goods clandestinely in the name of three dummy firms.

17. He would further submit that not only has the clearance of goods been established but the flow back of money has also been established by producing evidence of cash deposits and DDs being made in the favour of the assessee. In view of the above, he would submit that the case is fully established and the impugned order is correct and balanced and needs to be upheld and the appeals may be rejected.

18. We have considered arguments of both sides and perused the records. At the outset, we observe that the evidentiary value of any statement made before the Central Excise officer under section 14 of Central Excise Act is subject to fulfilment of procedure under section 9D of the Act. This is a statutory provision in the Act itself and has been interpreted as such by the Hon'ble High Court of Punjab & Haryana in the case of Jindal Drugs Pvt Ltd

(supra). Therefore, the statement of six persons who could not be cross examined are not relevant for the present proceedings and only the statements of 12 persons who have been cross examined are relevant. Of the persons who have been cross examined, we find that Shri Kalyana Chakravarthy and Shri V.B.S. Durga Prasad have stood their ground and affirmed their original statements made before the Central Excise officers. Shri Kalyana Chakravarthy worked as clerk/typist in the assessee's firm and has opened another company in the name of M/s Kalyan Chemicals. He confirmed when cross examined by the assessee's counsel that it was a dummy firm created at the behest of Shri Sama Rajasekhar, Managing Director of the appellant firm and no manufacturing activity takes place there and only papers are made in the name of M/s Kalyan Chemicals for the goods actually cleared by the assessee. Similarly, Shri V.B.S. Durga Prasad, Sales executive has also confirmed that M/s Prasad Chemicals was dummy firm opened by him at the behest of his employer Shri Sama Rajasekhar, through which only bills are raised while the actual goods are cleared by the assessee. All the buyers of the paints have however retracted their original statements and affirmed that they were buying only from assessee/appellant under the cover of proper invoices and paying for the goods.

19. Thus, we find, as far as the present case is concerned, the alleged buyers of the clandestinely removed goods have negated their own statements when cross examined before the adjudicating authority. Without such examination/cross examination before the adjudicating authority their statements are not relevant and cannot be relied upon. The learned adjudicating authority has observed that although they negated their statements, such negation is only an afterthought as they have not retracted their statements before. We find that the admissibility of the statements itself depends upon the examination/ cross examination of the person making the statement under section 9D. If the statement has been negated during such cross examination, the evidentiary value of such statement is in doubt. Similarly, the statement of Shri S.S. Abrar, Proprietor of M/s Inter City Cargo Movers also has been negated by him during the cross examination. Thus, the evidence, as far as the transportation of the goods alleged to be clandestinely manufactured and removed as well as their sale to the prospective buyers has not been established to a

reasonable degree of certainty in this case. As far as the manufacture and clearance are concerned, the alleged owners of M/s Kalyan Chemicals and M/s Prasad Chemicals have confirmed that they have set up dummy units at the behest of Shri Sama Rajasekhar, Managing Director of the assessee only to make paper entries. They have affirmed this position during the cross examination by the assessee's advocate. The assessee's advocate could not establish during the cross examination that their statements were false.

20. As far as the flow back of cash is concerned, we find that there is some evidence of the accounts being opened and cash being deposited and counterfoils of DDs present but we find it not sufficient to establish with a reasonable degree of certainty that the money has flown back to the assessee.

21. To sum up, in this factual matrix, we find as follows:

a) The fact that M/s Kalyan Chemicals and M/s Prasad Chemicals were dummy firms has been established by the revenue and it has not been countered effectively by the assessee.
b) The evidence regarding transportation of goods alleged to be clandestinely manufactured and removed and their sale to the buyers have not been established as both the transporters and the buyers have all negated their statements during cross examination before the adjudicating authority. In terms of section 9D the statements are only admissible if the persons were examined before the adjudicating authority. Thus, the evidential value of the original statement is in doubt.
c) As far as the alleged flow back of money is concerned, we do find that there is some evidence regarding cash deposits and counterfoils of DDs but we do not find this sufficient to establish a flow back of money to the assessee.

22. We are aware that the case under Central Excise Act is civil case and preponderance of probabilities is the level of evidence required and not proof beyond reasonable doubt. We are also fully conscious of the fact that in case of clandestine removals there cannot be a 100% accurate point to point correlation with mathematical precision. If such accounts are maintained then it will no longer be clandestine removal. However, in this

factual matrix where the evidence is based on statements and all but two of which have, during cross examination, reneged on the original statements and thus negatived their value in terms of section 9D, we find that the revenue could not establish the case based on the preponderance of probabilities and statements which are admissible in terms of section 9D that the assessee/appellant has clandestinely removed goods without paying Central Excise duties.

23. In view of the above, we find that the impugned order needs to be set aside and we do so.

24. The appeals are allowed and the impugned order is set aside with consequential relief, if any.

(Pronounced in the open court on ________________________)

(separate order)

(ANIL CHOUDHARY)
MEMBER (JUDICIAL)

(P. VENKATA SUBBA RAO)
MEMBER (TECHNICAL)

Veda

ANIL CHOUDHARY:

I have the benefit of going through the order recorded by learned brother Shri P. V. Subba Rao, Member (Technical) but I am unable to agree with the same. I hereby record my separate order as follows:-

Revenue had intelligence of evasion of duty by the appellant company and accordingly parallel search was organised in the premises of the appellant and also in the premises of some of the suppliers as well as buyers of finished goods, as well as transporters. Search was also conducted at the residential premises of employees / sales agent. From all these places incriminating documents were seized and the concerned persons admitted to the removal of excisable goods clandestinely by the appellant, which is morefully discussed in the following paragraphs.

25. The Managing Director - Shri S. Rajsekhar of M/s Harika on being confronted with the documents and statements of other connected person(s), admitted clandestine removal in his statement recorded on 22.10.2003 and also on other dates. He categorically admitted that he was clearing part of his finished goods in the name of M/s Kalyan Chemicals, a trading concern the proprietor of which was Shri N. Kalyan Chakraworty (employee). The plot where the trading premises of M/s Kalyan Chemicals was situated is owned by Managing Director Shri S. Rajsekhar. Shri N. Kalyan Chakraworty was working as a Typist in M/s Harika Resins who admitted in his statements that M/s Kalyan Chemicals has been set up at the behest

of Shri S. Rajsekhar. Further, he categorically admitted that his duty included typing, correspondence, maintaining various records and other things in HRPL. He also looked after the work of M/s Priya Chemicals, the other firm owned by Mrs. M. Varalaxmi w/o Shri S. Rajsekhar, the Managing Director. He further admitted that he has signed various documents like bank account opening forms, cheque books, bills, sales tax registration application, etc. etc. on the instruction of Shri S. Rajsekhar. He did not know the details of the business and was signing on the dotted line, as being instructed by Shri S. Rajsekhar. He categorically stated that he has nothing to do with the amount deposited in the bank account No. 1142 and 1248 with Global Trust Bank, Vijayawada. He also stated that the cheque book and passbooks were kept with Shri S. Rajsekhar only. He also identified various bills issued in the name of M/s Kalyan Chemical and corresponding slips written by him at the instruction of Shri S. Rajsekhar. He also categorically stated that the bills of M/s Kalyan Chemicals were used to cover the finished goods clandestinely removed by M/s HRPL to various customers. Such bills were prepared, showing the bills for sale of orthoxylene, M.T.O. or castor oil etc., which are actually the raw material for manufacture of resin. He further stated that the purchasers made payment of the actual value, as per the slips annexed to the bills, either by cash or demand draft through the employees/ agent of M/s HRPL situated at Chennai or were deposited in the account held in Global Trust Bank in his name or in the name of other employees. On being questioned by Revenue as to the non accountal of the sale transaction, despatched through the transporter SRMT or ICCM in his books, he replied that sale bills and sale tax return of M/s Kalyan Chemicals were also prepared as per the instruction of Shri S. Rajsekhar and he did not know any details, etc. Further, purchase invoices in the name of M/s Kalyan Chemicals were also arranged by Shri S. Rajsekhar. He also stated that he has done all these activities on the instruction of his employer - Shri S. Rajsekhar to save his job, without any other consideration.

26. Shri Kalyan Chakraworty was cross examined on 08.12.2010, and he stood by his earlier statement given during investigation. He also filed written submission being reply to the show cause notice, wherein he also reiterated the facts as aforementioned and affirmed his statement.

27. Further, ten barrels of goods described as orthozylene were seized by the Revenue from the godown of transporter – SRMT at Chennai, consignor - M/s Kalyan Chemicals. On the test being done of the samples drawn, the goods were found to be 'resin' and not 'orthozylene'. M/s Kalyan Chemicals has not purchased resin nor have the manufacturing facility to manufacture resin. Thus, evidently the ten barrels of resin were despatched clandestinely by M/s HRPL, in the name of M/s Kalyan Chemicals misdeclared as orthozylene to evade payment of duty.

28. Similarly, appellant has created another proprietorship concern in the name of style of M/s Prasad Chemicals, Prop. Shri C.S. Durga Prasad, an employee – Accountant, working for HRPL and M/s Priya Chemicals. Under similar modus operandi finished goods of M/s HRPL has been cleared through M/s Prasad Chemicals.

29. Further, from the documents seized, simultaneous despatch on the same date was found to the same buyer, wherein some part of despatch was accounted as despatch by M/s HRPL and some despatch was shown in the name of either M/s Kalyan Chemicals or M/s Prasad Chemicals under misdeclaration. Even the LR nos. was found to be consecutive. Further, the transporters have also affirmed that they were lifting the goods from the premises of M/s HRPL, partly consigned by M/s HRPL and partly (purportedly) consigned by M/s Kalyan Chemicals or M/s Prasad Chemicals. The transporters categorically stated that they had ignored the anomaly in view of their business interest.

30. Shri Durga Prasad, agent of M/s SRMT, Vijayawada (transporter), in his statement dated 19.08.2004 stated that they use to go with lorry for pick up to the premises of M/s HRPL, for booking of resin barrels. He use to deal with Shri S. Rajsekhar for getting the transport orders for M/s HRPL and its sister concern M/s Priya Chemicals. On being questioned as to the booking made by them in the name of M/s Kalyan Chemicals he stated that he did not know where M/s Kalyan Chemicals were actually located or to whom it belongs. He categorically stated that the bills in the name of M/s Kalyan Chemicals were actually for covering the barrels which were loaded at M/s HRPL factory, as required by Shri S. Rajsekhar. He also stated that the staff of M/s HRPL used to give the bills in the name of M/s Kalyan Chemicals also, which were signed by M. Kalyan Chakraworty, a Clerk of HRPL.

31. Usually the number of barrels despatched by HRPL, which were loaded at the same time from its factory, were spilt by issue of separate invoices by HRPL and M/s Kalyan or M/s Prasad Chemicals. As per instructions, he took two or more sets of LRs for booking. Such LRs usually had continuous or consecutive sl. Numbers. He further pointed out that the LR numbers were available on the bills and the LRs were prepared by him, both for M/s HRPL and M/s Kalyan Chemicals. He also identified and explained the contents of the 'outward register' maintained by M/s SRMT and identified the pages /entries made by him and other staff. On being queried as to the name of M/s Prasad Chemicals, appearing in the outward register of M/s SRMT (till June, 2001), Shri Durga Prasad explained that prior to giving bills of M/s Kalyan Chemicals, M/s HRPL use to give the bills under the name of M/s Prasad Chemicals in the same/ similar manner as in the name of M/s Kalyan Chemicals. He also stated that the address of M/s Prasad Chemicals is indicated as Kabela area, Vijayawada, but the goods were actually loaded and booked for transport at M/s HRPL factory only.

31. The aforementioned facts are further corroborated from letter dated 15.10.2003 written by M/s Kalyan Chemicals on its letterhead to M/s SRMT, with regard to claim for damage of goods suffered during transit. As per the letter, the consignments were booked in the name of M/s Kalyan Chemicals vide LR Nos. 1218202 and 1218203 both dated 04.09.2003 and consigned to parties at Chennai were stated to be paints/ resin and the value of damaged or leaked quantity was required to be settled @ Rs. 49/- per kg. Further, as

evident from M/s SRMT booking register and also from the copy of LR, these two consignments were originally booked by describing the goods as orthozylene with value at Rs. 10/- per kg. Thus, this fact also corroborates the clandestine despatch of resin (finished goods) by M/s HRPL by resorting to misdeclaration and under the invoice of M/s Kalyan Chemicals.

32. Similar dispatches in the name of M/s Kalyan Chemicals was also found through another transporter – Inter cities Cargo Movers, Vijayawada (ICCM in short). From the consignment notes found and recovered from the premises of ICCM, it was found that these bookings under the name of M/s Kalyan Chemicals were made from May, 2003 onwards while in the earlier period certain booking of M/s HRPL were available. Evidently in the consignment note No. 8114 dated 01.05.2003 pertaining to the first booking in the name of M/s Kalyan Chemicals by ICCM, the consignor name column was written as 'M/s Kalyan Chemicals, Vijayawada c/o Harika'. The goods were usually indicated as 'alkyd resin' and the values reflected in the LR was about Rs. 10/- per kg.

33. The Proprietor of ICCM Shri S.S. Abrar in his statement dated 28.07.2005 stated that they were transporting for M/s HRPL being resin in barrels to Chennai through railway. He further stated - regarding consignments of M/s Kalyan Chemicals, these were also brought by the staff of M/s HRPL for transport to Chennai. Shri Abrar identified LRs and they were indicative of M/s Harika in the consignor name, was written to identify the party in case of any need. He

reiterated that the barrels covered under the bills of M/s Kalyan Chemicals were brought by M/s HRPL staff only.

34. Revenue also searched Room No. 20 at Shivkasi Nadar Mansion at Chennai which was taken on rent by Shri V. B. Durga Prasad, Sales Executive of M/s HRPL who looked after the sales, collection of sales proceeds by visit to the outstation customer(s) at Chennai and other places. Certain documents were found and recovered which included 'Executive Diary -2003' containing handwritten entries. The entries contained details of payment receipt/ collection from different parties, party name, outstanding balance and noting etc. Diary appears to be maintained in regular course of business showing particulars of (a) party name/ short name (b) a multi digit Sl. No. followed by (c) an encircled number (d) coded description of goods, (e) quantity in number of barrels and weight per barrel, and (f) rates/ price per kg. On verification, the aforementioned particulars at (a) to (e) were found to match with the details of consignee name, LR No., the quantity in barrels and total weight respectively of the consignment booked for transport from Vijayawada in the name of M/s Kalyan Chemicals also corroborated with record of the transporter. The dates of entry in the diary by and large correlated to the date on which the consignments were booked for transport at Vijayawada (as per the transporter records), or were either of immediately preceding or following dates. While the description and value as per the available transport record of the consignment were those of orthozylene / zylene /MTO etc. having value approximately Rs. 10/- per kg., the

particulars denoted at Sl. No. (d) and (f) as mentioned above pertain to the actual description of the goods as resin of different variety as indicated in short or code form, as RML, RMD, etc. having value/ price in the range of Rs. 50 per kg.

The following representative examples found in the Diary would illustrate the above deductions:-

(a) In page of the date of 24th March, 2003 – two handwritten entries read as follows:

(i) Raja Paints (C), 5 RMD >951413 – 5- RMD 5 x 190 @ 49 – PAID

(ii) Bhagwan Paints (C), 951414 – 5 RMD – 5 x 190 @ 49 – PAID

The above date (24 march, 2003), party-names and the numbers 951413 and 951414 were correlatable to the date, consignee –names and LR Numbers in the SRMT's booking Registers, pertaining to the consignments booked under the name 'Kalyan Chemicals', consisting of 5 barrels in each consignment, which also tallied with the quantity indicted in the entry as above. The indication 'C' was apparently a reference to 'Chennai', where the party was located as also used in other instances. However, for booking the transport, the goods were declared as 'Orthoxylene' with the price at Rs. 10/- per kg., while in actuality, the goods were Resin i.e., RMD (Rosinated Medium DCO (Dehydrated Castor Oil-based) Alkyd Resin of value at Rs. 49/- per kg., as depicted in the above entry.

(b) Similarly, in the page dated 17th March, 2003 of the said Diary, the following handwritten entry was available:

Vivek, Erode - 951202 -10
RMD (LAV) - 9@ 48
MM -1 @ 50

These particulars were correlatable to a consignment booked under LR No. 951202 of SRMT, Vijayawada, the consignor – name being Kalyan Chemicals, of 10 barrels declared to be containing 'Orthoxylene'. However, as the above entry shows, the goods actually consisted of 9 barrels of Alkyd Resins indicated as RMD-LAV plus one barrel consisting of Malleic Resin denoted as 'MM' beneath these entries and the total value was arrived at as Rs.91,580/- against which the payment of Rs. 49,580/- was deducted and the balance indicated as Rs. 42,000/- (which was also indicated as subsequently paid on 04.06.03). The details of payment of Rs. 49,580/- were also written with details of the Demand Draft number and date, etc.

35. Thus, the aforementioned Executive Diary - 2003 was found to be a privately maintained record, showing the actual description and value of resin that were supplied to various parties under the fictitious bills of M/s Kalyan Chemicals during the period from January, 2003 to October, 2003. Further, in respect of various consignments/ parties, the datewise detail of payment receipt were also found available in this diary, and the noting 'PAID' was written against the specific consignmentwise entries. This diary contained

despatches made both in the name of M/s Kalyan Chemicals as well as M/s HRPL. It was also found that certain despatches by M/s HRPL purportedly as trading despatches, example - vide invoice No. T-364 dated 18.01.2003 showing sale of MTO 950 kg. in five barrels @ 16.70 per ltr., valued Rs. 16,500/- booked to M/s Durga Coating, Bangalore through SRMT vide LR No. 767607. This transaction in the said diary was recorded on dated 18.01.2003 as –Durga Coating LR No. 767607 (5) and RMD @ Rs. 45/-. Similarly other trading invoices of M/s HRPL for purportedly sale of MTO were corelatable to the entries in the diary wherein the actual description and value recorded shows the goods were actually resin.

36. Further, small diaries 'Dolphin', 'Vajawat' ledgers were recovered vide Mahazar Sl. No. 2 and 3 maintained as pocket ledger containing partywise account for the period January, 2003 onwards. Such parties accounts were maintained containing name or short name of the party such as 'Master' for 'Master Paints, Chennai', 'Archana' for 'Archana Colour coatings, Chennai' etc.. Each such account contained datewise particulars and amounts posted accordingly as debit and credit and also the balance after each transaction/ entry. The particulars of debit included description of the goods i.e. resin –RML/RMD /RDCO/ Soya etc. followed by a number in brackets such as (2) or (5) etc. The particulars of credit amount were indicated as 'by chq' or 'cash' also with cheque /DD number. On verification the date and particulars pertaining to the debit in the party's account, matched with the date, description and the party name as recorded in the Executive Diary-2003. While the

number in bracket match with the quantity in terms of number of barrels, and these were further corelatable to the particulars of the consignment transported through SRMT or ICCM. Most of the entries in the private ledger /diary were corelatable to the consignment transported through SRMT or ICCM in terms of date, party name, quantity and also the actual description of the consignment transported under the bill of M/s Kalyan Chemicals. The amounts written in partywise account in the private ledger were found to be expressed in code, as was evident from comparison with the value arrived at from the entries in the Executive Diary-2003 (i.e. rate per kg. and total quantity in kgs.). For example, the figures 389.50 were written in ledger to denote Rs.38,950/-. For illustration, in folio No. 30 of pocket ledger vide Mahazar Sl. No. 2 pertaining to the party 'BHARANI', such entry dated 09.06.2003 is RMD 5 barrels x 190 kg.-475.00. But, in page for 09.06.2003 in the Executive Diary-2003, the supply of 5 barrels of 190 kg. each of RMD @ Rs.50/- is equal to Rs.47,500/- supplied vide LR No. 1144296 to BHARANI was mentioned. Similarly, in folio 50 of the pocket ledger against ten barrels @ Rs. 49/- per kg. was mentioned. Thus, the debit apparently pertains to the value of supplies and credit for the payments received against the supplies.

37. The record recovered vide Mahazar Sl. No. 4 was a small notebook containing various notings including datewise details of expenses apparently incurred by Shri V. B. Durga Prasad in the course of his duty and also certain notings showing the actual description, quantity and value/ rate of certain consignments, which

was on verification, pertained to those cleared under the bills of M/s Kalyan Chemicals.

38. Further, various loose sheet slips including computer printed partywise account – statement of M/s HRPL, letters/ correspondence of M/s HRPL, M/s Priya Chemicals etc. were found and recovered and placed in a file at Sl. No. 5 in the Mahazar. The following documents in the said file were found to be of significance:-

(a) Pages 19, 25 to 31, 145, 381 to 385 of the said file Sl. No. 5 consisting of the LRs of SRMT/ ICCM pertaining to consignments booked under the name Kalyan Chemicals to various parties at Chennai, bills No. 1/98 of Kalyan Chemicals (corresponding to the LR dated 04.08.03 of ICCM) and No. 2/11 dated 20.08.03 and a letter on the letterhead of Kalyan Chemicals dated 04.08.03, addressed to Check-post authorities requesting clearance, in the absence of Way-bills. The said letter contained the signature of M. Kalyan, as proprietor of 'Kalyan Chemicals'. The said name and signature were identical to those appearing in a letter on the letterhead of HRPL containing C-Form reminder dated 30.07.2003, signed by 'M. Kalyan' as Manager, HRPL, available at page 327 of the same file.

(b) Pages 279 to 283, 319, 321, 323, 351, 365 & 411 of the said file Sl. No. 5 were handwritten statements (including fax-copies and originals at page 351, 411) showing the details of Resin' consignments supplied during June and July, 2003 to various parties. The particulars of each consignment in these statements include date, party-name, LR number, transport name, the actual description/ coded name of the Resin, quantity in no. of barrels, price per kg. etc. On verification, the particulars of consignments in these statements were found to be corelatable to those booked under the name of Kalyan Chemicals, wherever transported through SRMT and ICCM, except the description of goods (indicated as Xylene/ Orthoxylene, etc. in SRMT's LRs) and the values.

(c) Page 257 of the above said file Sl. No. 5 was a small slip dated 26.07.03 bearing handwritten particulars as "RMD-10X190 kgs. @ 46/- to Star Paints, Chennai through SRMT (Door delivery)", which on verification, apparently showed the actual description (and price) of the consignment booked with SRMT under the name of Kalyan Chemicals vide LR No. 1171077 to M/s Star Paints, Chennai on 26.07.03, however with goods described as 'orthozylene'.

(d) Page 371 of the above said file consists of a handwritten statement of party-wise outstanding amounts, showing certain remarks, additions and adjustments from different parties' amounts. The caption on the page 'Mahesh book and boss book' appeared to be self-indicative that the details pertained to a reconciliation between the amounts reflected in the privately maintained ledger of Sri V. Srinivas Mahesh, the employee of HRPL at Chennai and the amounts as per the 'boss-book' an obvious reference to Sri Sama Rajasekhar, M.D. of HRPL.

(e) More importantly, page 299 of the above said file was a printed List of products i.e. Resins manufactured by HRPL (with the printed company name and address). In this sheet, prices were handwritten against many items and in addition notings/ remarks were written as the prices being effective from 1st August, 2002 and also that the rates are including CST. The said handwriting was identical to that appearing in the small slips (showing the actual description and price/ rates), as also the other privately maintained documents including those showing the consignment-wise details of the actual description and values corelatable to the bills of Kalyan Chemicals.

It thus appeared that the above documents pertained to and showed the actual sales of Resin by HRPL, (including those made under the bills of Kalyan Chemicals, with mis-declared description), collections made against the same from various parties and other related details, which were apparently recorded by Sri V.B. Durga Prasad in the course of his day-to-day activities as Sales Executive of HRPL. The particulars in the above pages, sheets, etc. were found to be identical or matching with the entries in the Executive Diary-2003 vide Mahazar Sl. No. 1 and the ledgers, vide Mahazar Sl. No. 2 & 3 detailed above, and thus, the later records appeared to be maintained as a regular/ consolidated record of the transactions and basing on the entries noted down in loose sheets, slips, etc.

The aforementioned details and record were identified and explained by Shri V. B. Durga Prasad in his statement under Section 14 of the Act.

39. One Shri V. Srinivas Mahesh was the Marketing representative of the HRPL at Chennai from 1997 till about June, 2003. In the course of search at his residence, certain privately maintained account notebooks and other documents were found. These were similar to those recovered from the room of Shri V. B. Durga Prasad and discussed hereinabove relating to the period 2000-2001 to 2002-2003. In the pocket / small ledger notebooks recovered vide Mahazar Sl. No. 4 and 5, the accounts were maintained in the name / short name such as 'Master' for 'Master Paints', Chennai, 'Archana' for 'Archana Colour Coatings', Chennai etc. These accounts contained details of debit and credit and the balance amount after each transaction/ entry in similar fashion, as in the small diary recovered from Shri V. B. Durga Prasad. On finding the correlation between

the entries in these private ledgers and the consignment booked under the name of M/s Kalyan Chemicals, M/s Prasad Chemical and M/s Priya Chemical etc. has been tabulated in Annexure D-1 to the show cause notice.

40. The other records / documents recovered from the residence of Shri V. Srinivas Mahesh include – made up file No. 1 containing various documents as party's account – statements, correspondence, etc. pertaining to HRPL and M/s Priya Chemicals. Sheet 64 and 65 of the file consist of Bill No. 1/65 dated 20.06.2003 of M/s Kalyan Chemicals, Vijayawada showing supply of goods declared as orthoxylene ten barrels x 190 kg. @ Rs. 10/- per kg. total value Rs. 19,000/- (including CST) to M/s Ranga Paints, Chennai vide LR No. 1009160 of SRMT for door delivery. Sheet 66 is the small slip, stapled to sheet No. 64 and 65 containing handwritten details as follows:-

> 20.06.2003: Ranga Paints, Chennai, RML (LAV)- 10x 190 kg. @ 49/-; SRMT – Door delivery.

Thus, from the matching of the particulars and date, consignee, quantity and transporter's name in the bill and LR with the small slip, it is apparent that the goods supplied were resins (EML-LAV denoting Resonated Medium Linseed Resin with Low Acid Value) at a price of Rs. 49/- per kg., while the corresponding bill was issued showing supply of orthozylene @ Rs. 10/- per kg.

41. Similarly, sheet No. 57 to 62 consist of set of LR of SRMT, Vijayawada and corresponding small handwritten slip confirming

supply of Resin @ Rs. 50/- or Rs. 51/- whereas as per the invoice of M/s Kalyan Chemicals and in LR the description was orthozylene @ Rs. 10/- per kg.

Sheet No. 53 and 54 of the file consist of photocopy of various cheques received during June and July, 2003 all payable to M. Kalyan Chakraworty. Further, counterfoils of bank deposit slips and demand draft application forms were also found as mentioned in Sl. No. 8 to the Mahazar.

42. The counterfoils of deposit slips found pertaining to deposit of cheque and cash into the saving account No. 2273, 1834 and 2034 of Shri V.S. Mahesh with Canara Bank at Chennai. The pay in slips also indicated the source of receipt mentioned on the reverse side such as 'Master', 'Ranga', 'VKJ' etc. pertaining to the parties to whom resin were supplied. Further, from the copy of demand draft application, it was found that these are obtained in favour of firms like Oswal Traders, Oilchem India etc. and also in the name of employees of HRPL at Vijayawada namely Shri C. Durga Prasad, Shri M. K. Chakraworty, Shri V. Durga Prasad, Shri T. Sharma, Saroj Rani etc., Copy of counterfoil at page 44 showing demand draft for Rs. 46,859/- was obtained on 17.01.2001 out of Rs.47,090/- received from Sujatha Paints. The entry in the ledger book vide Mahazar Sl. No. 5 maintained by Shri V. S. Mahesh, on verification was found to be to the date, party name and amount as appearing on the bank deposit / demand draft application counterfoil. Similarly, folio No. 69 of ledger vide Mahazar Sl. No. 5 seized from V.S. Mahesh relates to Surya Chemicals containing details of receipt of cash amounting to

Rs. 14,785/- on 04.04.2002. On comparing the same bill entry and report of Shri V.S. Mahesh dated 04.04.2002 available at sheet No. 389 and 391 of made up file seized from the room of Shri V. Durga Prasad, it is evident that Rs. 14,790/- was collected in cash by Shri V.S. Mahesh from Surya Chemicals on 04.04.2002.

Thus, HRPL was receiving the flowback i.e. cash/ cheque for clandestine removal through Shri V.S. Mahesh, cheque received were encashed in the personal account of Shri V.S. Mahesh and further demand draft were obtained against cash or transfer from the account as narrated hereinabove.

43. Further, Shri V.S. Mahesh, the Marketing Representative of HRPL in his statement recorded with the department on various dates under Section 14 has identified the documents and admitted the same as being maintained in the normal course of business at the instance of Shri S. Rajsekhar. He further admitted that he has been employee of HRPL from 1997 till June, 2003 stationed at Chennai and his duty included contracting buyers of resin manufactured by HRPL, procuring orders, forwarding the same to HRPL, receiving the LR and collecting the sale proceeds from the buyers. Normally he communicated the orders for sale to Shri S. Rajsekhar over phone and raisin was despatched generally by door delivery through SRMT, Vijayawada. That after dispatch of resin Shri S. Rajsekhar used to send the third copy of the LR alongwith a chit and bill of Kalyan Chemicals or Prasad Chemicals or Priya Chemicals. That the chit contained details of the buyers name, description of goods, quantity and actual rate at which the resin was supplied.

That the set of documents i.e. LR, chit and bill was received by courier and were handed over by him to the respective buyers, who in turn issued a chit being an acknowledgement of receipt of goods and in these chits also the actual rate, quantity and total value of the goods were indicated. That on due date of payment, he contacted the buyers and collected the amount as per the chit and returned the chit issued by the buyer on receipt of the full value/ amount. He also identified that sheet No. 57 and 66 of the made up file No. 1 recovered from his residence where some of the chits and LRs received from HRPL for resin supplied through SRMT. He further identified sheet No. 30 of the message received by him from HRPL informing the despatch of ten barrels of resin through ICCM to VKJ Paints, Chennai. He further affirmed that in this manner demand draft totalling about Rs. 70.04 lakhs were purchased by him out of sale proceeds of clandestine removal. He further identified and explained that the entry of the reverse side of pay in slips denotes from whom the sale proceeds were received and the name of such buyers and the amount realised. He further admitted that the private records were maintained as per the instruction of Shri S. Rajsekhar in order to closely monitor the outstanding amount from the various customers. Shri V. Mahesh also identified the documents recovered from the room of Shri V. Durga Prasad which were in his handwriting, such as collection – daily report, partywise account, amount etc.

44. The department also obtained copy of account statement from Canara Bank, Chennai relating to saving account Nos. 2273, 1834

and 2034 opened and operated by Shri V. S. Mahesh. Account statement of account No. 2273 showed various deposits of relatively larger amount during the period 2001-02, also from which amounts were drawn in cash or demand draft obtained. These deposits correlated to the sale proceeds collected from the parties as per the entries in privately maintained ledger by Mahesh. The total amounts thus deposited in the bank account of Shri V. Mahesh amounted to Rs. 39.04 lakhs. The said practice of collecting the flow back or amount of clandestinely removed goods is also evident from the bank account in Global Trust Bank in the names of employees of HRPL, namely Shri V. B. Durga Prasad, C.S. Durga Prasad and M. Kalyan Chakraworty. The said practice is evident from the following documents found and recovered.

Page 21 of the made-up file No. 77/1, recovered from the factory of HRPL during the search on 21.10.03 was a type-written sheet/ letter, unsigned, but bearing the rubber-stamp impression of HRPL. The contents of this documents were as follows: "Dear Mahesh, Today, we opened Current Account Premium at Global Trust Bank Ltd., in the name and style of M. Kalyana Chakrawarthy A/c No. 29011 01142. Today onwards, you deposit all the 'without funds' in the above account. Also we are going to close V. Durga Prasad A/c. So please do the necessary action immdtly".

45. On requisition, Global Trust Bank, Vijayawada furnished the copies of the Account- Statements of the above said accounts alongwith copies of the Account-Opening forms and related

documents. The relevant details as per these documents, are as follows:

Name S/Shri	Account Number	Period operated	Total amounts deposited
Ch. Siva Durga Prasad	29000 - 18190	October, 2001 to March, 2002	Rs. 27.54 lakhs (excl. Transfers)
V. Durga Prasad	29011 -01075	July, 2002 to May, 2003	Rs. 62.64 lakhs
M. Kalyana Chakravarthy	29011- 01142	March, 2003 to October, 2003	Rs. 1.1 crores approx.
M. Kalyana Chakravarthy	29011-01248	October, 2003 to November, 2003	

For the above accounts, the introduction for the account opening in the name of V. Durga Prasad was given by Ch. S. Durga Prasad (who held the account operated in the immediately preceding period), while in respect of Shri M. Kalyan Chakraworty account, the introduction was given by Sri V. Durga Prasad. The telephone numbers given (namely 414124) in the Account-Opening forms for accounts in the names of S/Sri Ch. Siva Durga Prasad and V. Durga Prasad was the factory-telephone number of HRPL. The amounts deposited into each of the above accounts, were relatable to the payment/ realisation details available in the privately maintained ledgers/ records of Shri Srinivas Mahesh and Sri V. Durga Prasad, as detailed above and also the DDs/ deposits remitted by Sri Srinivas Mahesh / Sri Durga Prasad, as evident from the documents seized from their respective residential premises. Apart from this, amounts pertaining to deposits/ remittances made at other places such as Bangalore, Trichy, Madurai, Nagapattinam etc. and also those at Chennai - Kilpauk (in the period not covered in the above records), were also found to be credited into the above accounts. The withdrawals/ debits in these accounts were broadly in the form of (i) cash/ ATM withdrawals, (ii) Demand drafts obtained payable at Mumbai, Hyderabad etc., and (iii) cheques issued in the names of different parties.

46. Shri S. Rajsekhar, the Managing Director of M/s HRPL in his statement dated 22.10.2003 inter alia admitted that the bills of M/s Kalyan Chemicals were used for covering the transport of resin clandestinely cleared by M/s HRPL. He also submitted certain records of M/s Kalyan Chemicals which included sale - bill books and other files containing purchase documents, vouchers, sales tax return, etc. On scrutiny of the records, it was observed that the sales reflected in the sale bill of M/s Kalyan Chemicals were mostly for castor oil cleared to various parties located in and around Vijayawada within the State. Thus, none of the sale/ consignment booked for transport through SRMT and ICCM were accounted for in this record. All the aforementioned records were found handwritten by Shri Kalyan Chakraworty. Significantly, the vouchers for rent payment by M/s Kalyan Chemicals were in the signature of the rent recipient, identified as Shri S. Rajsekhar, the Managing Director of Harika. As regards similar records of M/s Prasad Chemical, Shri S. Rajsekhar vide his letter dated 10.08.2004 specified that the records of M/s Prasad Chemicals as well as those of M/s Kalyan Chemicals for the earlier period were destroyed and hence not available. Shri S. Rajsekhar further confirmed that Plot No. R.S. 409/2 which was the address of M/s Prasad Chemicals belongs to him and the address of M/s Kalyan Chemicals D. No. 25-52/1, Kabela Road was a room in a

corner of the plot which was used by the Watchman who stayed there and rared cattle. He also identified and admitted the rent receipts of M/s Kalyan Chemicals as issued by him. He also affirmed that all the letters in the name of M/s Kalyan Chemicals were delivered at HRPL factory (located nearby).

47. Thus, it is evident that M/s Prasad Chemicals and M/s Kalyan Chemicals were created and registered with the Sales Tax Authority in the name of employees of HRPL to clandestinely purchase raw materials for HRPL and also clandestine clearance of the finished goods of HRPL for the purpose of evading Central Excise duty and other taxes. Further, bank accounts were opened in the name of the said employees namely Shri M. Kalyan Chakraworty, V. B. Durga Prasad, C. S. Durga Prasad etc. to facilitate the receipt of flow back of money for the clandestinely cleared finished products. The transaction of large amounts reflected in these bank accounts, hereinabove mentioned, is abnormal and unexplained in respect of status of these individuals who are the employees of M/s HRPL at meagre salary. Further, these employees in their statements have admitted that these accounts were opened and operated at the instance of Shri S. Rajsekhar.

48. Shri M. Kalyan Chakraworty - employee of M/s HRPL, in his statement dated 09.08.2004 stated that he had joined M/s HRPL sometime in the year 2000 as a Typist-cum-Clerk and his duty included typing, correspondence, maintaining various records of M/s HRPL, M/s Priya Chemicals, and some other firms belonging to Shri S. Rajsekhar. On being questioned regarding the large amounts

regularly transacted in the two bank accounts with Global Trust Bank, Vijayawada, he stated that the said two accounts were opened at the instruction of Shri S. Rajsekhar and he had nothing to do with the amount deposited in or paid from the said account(s). He had signed on the account opening form and other form / enclosures and given his certificates, etc. He had also signed the cheques, withdrawal/ deposit slips as and when asked by Shri S. Rajsekhar. That the cheque books and passbooks to these accounts were kept by Shri S. Rajsekhar. He further identified various bills of M/s Kalyan Chemicals with the corresponding slips, forming part of the seized records as written and prepared by him on the instructions of Shri S. Rajsekhar. He further stated that as instructed by Shri S. Rajsekhar, he used to prepare the bills of M/s Kalyan Chemicals and these were used to cover the transport of resin manufactured by M/s HRPL to various customers showing the goods as orthozylene/ MTO/ Castor oil etc. The copy of the LR alongwith the slip showing the actual description, quantity and rate (prepared by him mostly), were sent to the party or M/s HRPL's representative. He further stated that the buyers made the payment as per the value indicated in the slip either by cash or demand draft, and further admitted that these amounts were deposited in the account held in Global Trust Bank in his name or in the name of other employees. That the demand drafts were also obtained favouring certain raw material suppliers from the said account. He also stated that all the records of M/s Kalyan Chemicals like sales bills, sales tax return etc. were also prepared as instructed by Shri S. Rajsekhar, and he did not know anything or any details. He also stated that the purchase invoices for M/s Kalyan Chemicals were also arranged by Shri S. Rajsekhar and he did not know the manner of disposal of the purchases. Further, he categorically stated that he has done all activities in the name of M/s Kalyan Chemicals on the instruction of Shri S. Rajsekhar, being the employee and have not received any additional consideration for the same.

49. Shri V. B. Durga Prasad, Sales Executive of M/s HRPL in his statement dated 09.08.2004 deposed, that in connection with his duty he used to visit Chennai and other places frequently for procuring orders and collection of payment from the customers. That the amount(s) collected were deposited in the account of M/s HRPL and also in the account of Shri M. Kalyan Chakraworty in Global Trust Bank, and sometimes the customer deposited the payments directly in the accounts as per the instructions of Shri S. Rajsekhar. He used to note down the details of despatches of resin and collection of payment. He had taken a room on rent in Shivkasi Nadar Mansion, Chennai for his stay. He also identified the Executive Diary -2003 recovered from his room at Chennai, containing the datewise details of despatch of resin from M/s HRPL for the period January, 2003 to 17.10.2003. He also explained the contents therein including the abbreviation(s) used for description of the resin, and admitted that the same was maintained by him. He also identified the small diary recovered vide sl. No. 2 as maintained by him, containing the details of resin supplied from M/s HRPL to the customers (both accounted & clandestine), and the balance of payment due from them. He also identified the other ledger book

recovered vide Sl. No. 3, wherein entries were mostly written by Shri V. S. Mahesh the former Sales Executive of M/s HRPL and explained the contents therein. He also explained the contents as queried in respect of various pages in the made up File No. 5 including the details of actual description and value of resin supplied from M/s HRPL to various customers and the collections/ realisation against such supplies. He also admitted that bank account No. 29011 - 01075 with Global Trust Bank, Vijayawada in his name was opened at the instance of Shri S. Rajsekhar who operated the said account till its closure in May, 2003. The said account was used to deposit the unaccounted money realised out of the unaccounted / clandestinely sale of resin, under the bills of M/s Kalyan Chemicals. He has no personal interest in the transactions in the said account as the same was operated as per the direction of Shri S. Rajsekhar. He had signed blank cheque books and handed over the same to Shri S. Rajsekhar. He further identified and explained the documents at pages 3 and 7 in the made up File No. 6 showing details of payment(s) deposited in the account of M/s HRPL and Shri M. Kalyan Chakraworty denoted in code as – HK and KC respectively and such entries were written by him.

50. Shri C. S. Durga Prasad, Accountant of M/s HRPL in his statement dated 09.08.2004 and 29.07.2005 inter alia stated that the firms M/s Kalyan Chemicals and M/s Prasad Chemicals were created at the instance of Shri S. Rajsekhar to cover up the clandestine clearance of M/s HRPL. He was working as Accountant of M/s HRPL and also handled the work of M/s Priya Chemicals and

some other firms belonging to Shri S. Rajsekhar and his relatives. He further admitted that he created the proprietorship concern M/s Prasad Chemicals at the instance of Shri S. Rajsekhar, obtained the Sales Tax registration, opened the bank account, signed the blank cheques and everything at the instance of Shri S. Rajsekhar. He has no personal interest in M/s Prasad Chemicals or in the bank account No. 29000 -18190 opened in Global Trust Bank, Vijayawada. He further affirmed that the said account was used for depositing the unaccounted amounts (flow back) from the sale of resin removed clandestinely by M/s HRPL under the invoices of M/s Prasad Chemicals or M/s Kalyan Chemicals. He also stated that he has not received any additional consideration in this matter.

51. In the course of enquiry made with M/s Oilchem India, they admitted that they have supplied raw materials to M/s HRPL as well as M/s Prasad Chemicals on receipt of payment by way of demand draft.

52. Further, the clandestine purchase of raw materials by M/s HRPL, is also established from several payments made from the aforementioned bank accounts of Shri V. B. Durga Prasad and Shri M. Kalyan Chakraworty during the year 2002-2003 in the name of Shri K. Rajeswar Rao and Shri K. Rajnikant. These payments aggregate to about Rs. 32 lakhs which were mainly credited in the name of these two persons in their bank account held with Global Trust Bank at Hyderabad. The copy of the account statement obtained by Revenue from Global Trust Bank, Hyderabad with respect to the said accounts being No. 1111011-4983 and 1111011-

7088, shows receipt of money in the said accounts from the employees of M/s HRPL namely Shri V. B. Durga Prasad and Shri M. Kalyan Chakraworty. In the account opening forms of these two accounts Phone No. 24557077 appeared which belongs to 'M/s Sandhya Trading Company' who are brokers in oils, oilseeds etc and find mention also in certain acknowledged courier receipts available in made up File No. 77/2, recovered from the factory of M/s HRPL. In his statement recorded under Section 14, Shri K. Prabhuraj, Prop. M/s Sandhya Trading Co., on perusing the bank documents, confirmed that Shri K. Rajeshwar Rao and Shri K. Rajnikant were his two sons and the amount credited in their account in Global Trust Bank were received from M/s HRPL towards payment of supplies of castor oil, soya oil and cotton oil etc. which were arranged by him. He also stated that as per request of Shri S. Rajsekhar the supplies were arranged by him on commission, without any bills. He also confirmed that the payment for such clandestine supplies to M/s HRPL were received by him in the bank account of his sons, as aforementioned. He further stated that the documents of the transactions with M/s HRPL were not available with him as he has periodically destroyed on completion of the transaction.

53. Further, several buyers of the clandestinely removed goods by M/s HRPL, like M/s Balaji Enterprises, Chennai through its Prop. N. Natarajan have admitted to received resin from M/s HRPL under the invoices of M/s Prasad Chemicals/ M/s Priya Chemicals etc. He further stated that demand drafts were taken in the name of the firm as per the invoice and the difference amount was collected in cash by

Shri S. Mahesh of M/s HRPL or deposited by his employee in the bank account in the name of Shri Kalyan Chakraworty. He also identified the entries in Diary No. 3 pertaining to the payment made by him on various dates to HRPL, including those through Shri S. Mahesh, particularly for procurement of 30 barrels during 2003 for which no bills were issued and he had scored out the entries, as HRPL clandestine confirmed the receipt of amount in cash. He also accepted the clandestine transactions recorded in the resumed private records vide Mahazar from V. S. Mahesh and V. B. Durga Prasad.

54. Similar confirmation was made by other buyers of clandestinely removed goods namely - M/s Sujatha Paints, Chennai through its Partner Shri M. Mohan, by M/s Vee Kay Jay Paints & Chemicals, Chennai through its prop. V. Veeraraghavan, M/s Star Paints, Chennai through its Prop. Shri R. Radhakrishnan, M/s Raja Paints, Chennai through its Prop. R. Karthikeyan etc.

55. From the aforementioned documentary facts which were revealed in the course of investigation and enquiry, I find that the statements of various persons are supported by documentary evidence. Such documentary evidence have been admitted by the concerned employees of M/s HRPL and also admitted by Shri S. Rajsekhar, the Managing Director of M/s HRPL. Both clandestine purchases of raw materials, clandestine removal of finished goods, evidence of transport, flow back of sale proceeds of the clandestinely removed goods have been established. I further hold that retraction of the statements by some of the persons at the later stage as well

as non appearance of some of the witness in the adjudication proceedings, is of hardly any consequence in view of the overwhelming documentary evidence discussed hereinabove. Revenue in this matter has established the full cycle of the clandestine activity, which is normally not easy to establish. In this view of the matter, the appeals are fit to be dismissed.

56. Accordingly, I uphold the impugned order-in-original and dismiss both the appeals filed by the appellant company and its Managing Director Shri S. Rajsekhar.

(Anil Choudhary)
Member (Judicial)

Pant

DIFFERENCE OF OPINION:

In view of the difference of opinion, the following questions arise for consideration by learned third Member:-

1. There is lack of sufficient evidence, as evidence being the statement of some of the persons given in the course of investigation is not reliable, as such persons have not stood by their earlier statement at the time of cross examination or not appeared for cross-examination, as held by learned Member (Technical)

Or

The statements of the persons recorded at the time of investigation is based or co-relatable with documentary evidence. Such documentary evidence having not been denied, the denial of clandestinely removed goods in cross-examination is of no avail to the appellant and such evidence is reliable for the purpose of adjudication as held by Member (Judicial).

2. The case of Revenue is not proved on the principle of preponderance of probability and accordingly the appeals are fit to be allowed as held by learned Member (Technical)

Or

In view of the documentary evidence brought on record in the course of investigation and duly supported by oral evidence of several persons and also supported by some of the key persons involved in the transaction, including in the course of cross-examination, the allegation of Revenue is established and accordingly the appeals are fit to be dismissed as held by Member (Judicial).

The Registry is directed to put up the appeal record before the Hon'ble President for nomination of learned third Member to consider the aforementioned questions and difference of opinion, for his opinion.

(Pronounced in the open court on 18.11.2020)

(Anil Choudhary)
Member (Judicial)

(P. Venkata subba Rao)
Member (Technical)

Pant

INTERIM ORDER No. I/8-9/2021

Per Ms. SulekhaBeevi C.S.

57. I have gone through the orders recorded by brother Member (Judicial) as well brother Member (Technical). Since the facts and evidence have already been narrated in detail in both the orders, I do not think it necessary to repeat the same in this order. Brother Member (Technical) after his finding of facts in para 21, has reached the conclusion that the Revenue could not establish the case based on preponderance of probabilities and statements. He thus set aside the impugned order allowing the appeals. On the contrary, brother Member (Judicial) after considering the evidence has held that there is enough evidence apart from the statements recorded and therefore held against the appellant by dismissing the appeals.

58. The questions referred to me are based on the above discussions and conclusions made by both the Members.

59. The appellant company had Central Excise registration both as 'manufacture' and 'dealer' and was clearing goods by paying duty at concessional rate availing SSI exemption. The gist of the allegations in the Show Cause Notice is that appellant company manufactured resins more than the quantity accounted by them and cleared such goods clandestinely under fictitious bills issued in the name of 'Kalyan Chemicals' and 'Prasad Chemicals'. On perusal of paragraph 21 of the order

recorded by brother Member (Technical), it is recorded that the Revenue has been able to establish that M/s. Kalyan Chemicals and Prasad Chemicals are dummy firms of the appellant-company. However, in sub-clause (b) of this paragraph, it is concluded by him that there is no evidence for transportation of clandestinely manufactured goods for sale to the buyers. It is his view that the transporter and buyers have all negated their statements during cross-examination and therefore original statement recorded cannot be relied. So also with the allegation of flow back of money in sub-clause (c) of the said paragraph, Member (Technical) has concluded that there is some evidence regarding cash deposits and counterfoils of demand drafts but it is not sufficient to establish flow back of money to the appellant. Whereas, after explaining the evidence in the case, Member (Judicial) in paragraph 55 held that there is sufficient evidence for clandestine purchase of raw materials, clandestine removal of finished goods, evidence of transports and flow back of sale proceedings of clandestinely cleared goods. He is also of the view that the retraction to the statement by some of the persons at a later stage as well as non-appearance of some of the witnesses in the proceedings is of no consequence in view of the voluminous documentary evidence.

60. At the outset, it has to be stated that there is consensus by both Members on the fact that M/s. Kalyan Chemicals and

M/s. Prasad Chemicals are dummy firms floated by the appellant company. Simultaneous searches were conducted by the officers of DRI in the factory premises of the appellant (HRPL), Shri V. Srinivas Mahesh and Shri V.B.S. Durga Prasad and certain other premises on 21.10.2003. During the course of search conducted in the premises of transporter M/s. SRMT Ltd. Chennai, 10 barrels of resin were found of which invoices were raised in the name of M/s. Kalyan Chemicals and the goods were described / declared as 'Orthozylene' at a price of Rs.10/- per kg. These barrels were seized under mahazarand samples were drawn for chemical analysis. The Chemical Examiner's report revealed that the barrels contain 'resin' and not 'orthozylene' as declared. This fact of seizure of the goods belonging to M/s. Kalyan Chemicals and mis-description of goods would sufficiently establish the allegation that the appellant company was clearing finished product (resin) in the guise of other products on lesser value through their dummy unit in order to evade excise duty. The link of transportation is clear as the goods were seized at the premises of the transporter M/s. SRMT. The register recovered from this transporter also reveals various instances where goods have been lifted in the name of Kalyan Chemicals and Prasad Chemicals. Para 6.2 and 6.3 and 7.4 of Show Cause Notice dated 31.10.2005 explains this in detail. Further, the proprietor of M/s. Kalyan Chemicals is Mr. Kalyan Chakravarthy who is a clerk cum typist of appellant-company. It is also revealed from evidence that this unit M/s. Kalyan Chemicals was functioning within the premises of appellant-company.

61. M/s. Kalyan Chemicals was started only in 2001. Prior to June 2001, the other firm Prasad Chemicals was started by the appellant. The proprietor of Prasad Chemicals is Shri Siva Durga Prasad who is an employee of HRPL and Priya Chemicals. This is another alleged dummy unit floated by appellant company of which Ms. Varalakshmi, wife of M.D. of appellant company is the proprietor. In a court document relating to Priya Chemicals, Shri S. Durga Prasad is shown as accountant of Priya Chemicals. In their statements recorded by the officers,they have stated that M/s. Kalyan Chemicals and M/s. Prasad Chemicals were started by them on the instructions of SamaRajasekhar, Managing Director of the appellant-company. The relevant portion of the cross-examination of ShriKalyanChankravarthy and Siva Durga Prasad done on 8.12.2010 is as under:-

RECORD OF CROSS-EXAMINATION

Shri S. Venkatachalam, Learned Advocate posed questions to M. Kalyan Chakravarthy, Dr. No. 21-10-2, 2nd Floor, Lakshmi Nilayam beside of Dwaraka Nag Apartment, Sri Nagar, 3rd Line, SN Puram, Vijayawada – 11.

Ques.) Advocate: Please explain your nature of Business?

Ans.) M. Kalyan Chakravarthy: Replied that I was joined in 2000 as clerk-cum-typist at M/s. Harika Resins

1) Ques.) Advocate: Did you start a unit in the name of M/s. Kalyan Chemicals?

Ans.) M. Kalyan Chakravarthy: Replied that Yes, as per instructions of Shri Raja Sekhar, MD.

2) Ques.) Advocate: Did you do your business?

Ans.) M. Kalyan Chakravarthy: No

3) Ques.) Advocate: Did M/s. Harika Resins remove resins without invoice?

Ans.) M. Kalyan Chakravarthy: No

4) Ques.) Advocate: Did you file Sale Tax Returns and Income Tax Returns during that period for M/s. Kalyan Chemicals?

Ans.) M. Kalyan Chakravarthy: The Auditor was looking after all those and M/s. Prasad Chemicals and M/s. Kalyan Chemicals are sister concerns of M/s. Harika Resins."

RECORD OF CROSS-EXAMINATION

Shri S. Venkatachalam, Learned Advocate posed questions to Ch. Siva Durga Prasad, Dr. No. 24-14-4, Durgapuram, Vijayawada – 3.

Ques.) Advocate: Please explain your nature of Business?

Ans.) Ch. Siva Durga Prasad: Replied that I was only employee in M/s. Harika Resins till 2005.

2) Ques.) Advocate: Did you start a unit by name M/s. Prasad Chemicals?

Ans.) Ch. Siva Durga Prasad: Replied that Yes, under the instructions of Shri Raja Sekhar, MD.

3) Ques.) Advocate: Did you file Sale Tax Returns and Income Tax Returns during that period?

Ans.) Ch. Siva Durga Prasad: The auditor may file as, the unit is group of companies of M/s. Harika Resins."

62. It is seen that the proprietor of both these units are employees of the appellant-company and also that these units were dealing on goods similar to the goods manufactured by the appellant-company. When it is established that these are dummy units operated by employees of the appellant, the

strong inference that can be drawn is that these dummy units were used by the appellant-company for clandestine removal of finished goods so as to evade payment of excise duty. The appellant company was availing SSI exemption and the aggregate turnover was suppressed by clearance of goods through these dummy units.

63. With regard to the evidence of the transportation, as mentioned earlier, during the search, 10 barrels were seized from premises of M/s. SRMT Ltd., Chennai which is also a transporter for appellant company. The fact that the goods in the bills seized at the premises of transporter were declared as 'orthozylene' instead of 'resin' and also as these bills were raised in the name of M/s. Kalyan Chemicals would prove the clandestine clearance of goods. The other transporter Inter City Cargo Movers (ICCM) has not filed any reply clarifying their position as noted by the adjudicating authority in para 115 of Order in Original. Though it is seen that Shri S.S. Abrar, Proprietor of ICCM in his statement dated 28.7.2005 stated that they were carrying goods from the consignors'godown only, he negated his own statement during cross-examination. Without any pleadings in the form of filing a reply to the Show Cause Notice, such statements during cross-examination cannot be of any help to the appellant. Statements were recorded from various buyers also. Out of these 8 witnesses, 6 buyers were

cross-examined in the denovo adjudication proceedings. All of them stated in cross-examination that they purchased only resin from appellant-company under proper invoices. Though such statements may be against their earlier statements recorded under section 14 of Central Excise Act, 1944, the same has to be examined and appreciated on the background of other evidences produced and proved.

64. The learned Member (Technical) has concluded that indeed there is some evidence for flow back of money and that this is not sufficient evidence to establish flow back of sales proceeds from clandestine clearances. Documents in the nature of counterfoils of deposit slips pertaining to deposits by cash and cheques into the savings bank account of Shri V. Srinivas Mahesh, who is an employee of the company were recovered. Some of the counterfoils issued for demand drafts were obtained favouring the appellant and M/s. Priya Chemicals. The proceedings relating to M/s. Priya Chemicals have been completely dropped. The amount collected as cash as well as chequesfrom customers were deposited in the personal savings bank account of ShriV. Srinivas Mahesh. In his statement dated 21.10.2003, V. Srinivas Mahesh has stated that three different accounts in Canara Bank were maintained by him as per instructions of Shri Sama Rajasekhar. Savings accounts were also opened in the name of ShriKalyanChakravarthy, Shri Siva

Durga Prasad and Sri V. Durga Prasad. The amounts deposited in these accounts were relatable to the payment / realization details in the private books maintained by ShriSrinivas Mahesh and V. Durga Prasad. It is also revealed that appellant company indulged in tactics to cover up the purchase of raw materials to avoid detection of clandestine clearance. They adopted the practice by which buyers of finished products obtained demand drafts directly favouring the raw material suppliers / agents and these amounts would be payment made indirectly to appellant company towards clandestine supply of resin / finished product.The notebook maintained by Shri V. Srinivas Mahesh and also the notebook maintained by Shri V.B.S. Durga Prasad indicates various instances of clandestine clearance of resin. From the totality of the facts and evidences, I am of the view that the department has succeeded in establishing the allegation of clandestine clearance of finished products by appellants by raising fictitious invoices bills in the name of dummy units.

65. The two types of standards of proof applied in proceedings are ‘proof beyond reasonable doubt’ and ‘proof of preponderance of probability. The appreciation of evidence in either of these types of standards of proof differs depending on the facts involved. In a serious case such as evasion of duty by fraud, the degree of appreciation of evidence has to be higher

than in a case of allegation of mere delay in payment of duty though in both cases the evidence has to be appreciated on the preponderance of probability.

66. In adjudication proceedings, there may be factors established in favour of appellant and some in favour of Revenue. The established factors will lead or indicate whether the unestablished factors are probable or not. Needless to say that the conclusion has to be drawn on established facts and probable facts and not on presumption of facts. In grave cases of forgery, fraud, conspiracy etc. seldom direct evidence would be available. In a case of fraud there is always an intention to hide / delete / eliminate or cover up the acts of fraud. Such violations of law go undetected for a long period by tactful ways of hiding, deleting or covering up the fraud. For the same reason, the process of investigation and collecting evidence also become humongous and challenging. This would equally apply to the requirement to prove and establish such evidence in court. While applying the standard of proof of preponderance of probability, in the present case though some of the witnesses have negated their original statements in the cross-examination, the statement ofShriKalyanChakravarthy, ShriDuraga Prasad, the misdeclaration of the goods seized from the premises of transporter SRMT, Chennai, discrepancies / reconciliations in accountsmaintained by V. Srinivas Mahesh

and others would sufficiently prove the allegations raised in the Show Cause Notice.

67. In para 100 of the Order in Original, the adjudicating authority has discussed the defect of non-supply of relied upon documents. Even without considering the evidence of such documents there is enough evidence to establish the case put forth by department. The role of the Managing Director in such activity is also clear.

68. In the result, I agree with the findings of Member (Judicial) and hold that the appeals have to be dismissed.

(SulekhaBeevi C.S.)
Member (Judicial)

Rex

FINAL ORDER No. A/30245-30246/2021

In view of the order of Hon'ble Third Member, the appeals are rejected.

(Order pronounced on 14/07/2021.)

(ANIL CHOUDHARY)
MEMBER (JUDICIAL)

(P.V. SUBBA RAO)
MEMBER (TECHNICAL)

PK