

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE  
TRIBUNAL, KOLKATA  
EASTERN ZONAL BENCH : KOLKATA**

REGIONAL BENCH - COURT NO.2

**Excise Appeal No.392 of 2012**

(Arising out of Order-in-Original No.14/Commissioner/CE/Kol-II/2011 dated 29.02.2012 passed by Commissioner of Central Excise, Kolkata-IV.)

**M/s. S.A. Enterprise**

(5/1, Clive Row, 2<sup>nd</sup> Floor, Room No.34, Kolkata-700001.)

**...Appellant**

*VERSUS*

**Commissioner of Central Excise, Kolkata-II**

**.....Respondent**

(15/1, Strand Road, Custom House, M.S. Building, Kolkata-700001.)

**WITH**

**(i) Excise Appeal No.409 of 2012 (M/s. S.A. Enterprise v. Commissioner of Central Excise, Kolkata-II); (ii) Excise Appeal No.410 of 2012 (Shri AayushRungta v. Commissioner of Central Excise, Kolkata-II); (iii) Excise Appeal No.77127 of 2017 (M/s. S.A. Enterprise v. Commissioner of Central Excise, Kolkata-II); (iv) Excise Appeal No.77128 of 2017 (Shri AayushRungta v. Commissioner of Central Excise, Kolkata-II); (v) Excise Appeal No.78084 of 2018 (M/s. S.A. Enterprise v. Commissioner of CGST & CX, Howrah Commissionerate); (vi) Excise Appeal No.78085 of 2018 (Shri AayushRungta v. Commissioner of CGST & CX, Howrah Commissionerate);**

(i) & (ii) (Arising out of Order-in-Original No.15/Commissioner/CE/Kol-II/2011 dated 21.03.2012 passed by Commissioner of Central Excise, Kolkata-IV.)

(iii) & (iv) (Arising out of Order-in-Original No.01-05/COMMR/CGST & CEX/HWH/Adjn/2017-18 dated 22.09.2017 passed by Commissioner of Central Tax (GST & CEX), Howrah Commissionerate.)

(v) & (vi) (Arising out of Order-in-Original No.01-02/COMMR/CGST & CEX/HWH/Adjn/2018-19 dated 01.05.2018 passed by Commissioner of Central Tax (GST & CEX), Howrah Commissionerate.)

**APPEARANCE**

Shri J.P.Khaitan, Sr.Advocate AND Shri AgnibeshSengupta& Shri Indranil Banerjee, both Advocates for the Appellant (s)  
Shri S.Mukhopadhyay, Authorized Representative for the Revenue

**CORAM: HON'BLE SHRI P.K. CHOUDHARY, MEMBER(JUDICIAL)**  
**HON'BLE SHRI K. ANPAZHAKAN, MEMBER(TECHNICAL)**

**FINAL ORDER NO. 75848-75854/2023**

DATE OF HEARING : 23 June 2023

DATE OF DECISION : 27 June 2023

**Per : Bench**

1. The present appeals by M/s. S. A. Enterprise (hereinafter "appellant firm"), details whereof are given in the table below, involve identical questions of fact and law and are taken up together for disposal :-

Sl. No.	Appeal No.	Impugned Order-in-Original No. and Date	Period involved	Amount (Rs.)
1.	E/392/2012	14/Commissioner/CE/ Kol-II/2011 dated 29.02.2012	December, 2005 to March, 2010	Central Excise duty of Rs. 4,16,25,199/- along with interest and equivalent penalty
2.	E/409/2012	15/Commissioner/CE/ Kol-II/Adjn/2011-12 dated 21.03.2012	April, 2010 to January, 2011	Central Excise duty of Rs. 1,42,57,448/- along with interest and equivalent penalty
3.	E/77127/2017	01-05/Commr/CGS T & CX/HWH/Adjn/2017-18 dated 22.09.2017	February, 2011 to November, 2015	Central Excise duty of Rs. 13,94,46,610/- along with interest and equivalent penalty
4.	E/78084/2018	01-02/Commr/CGS T & CE/HWH/Adjn/2018-19 dated 01.05.2018	December, 2015 to March, 2017	Central Excise duty of Rs. 3,93,25,766/- along with interest and equivalent

*Excise Appeal Nos.392, 409 & 410 of 2012*  
*Excise Appeal Nos.77127, 77128 of 2017*  
*And*  
*Excise Appeal Nos.78084 & 78085 of 2018*

Sl. No.	Appeal No.	Impugned Order-in-Original No. and Date	Period involved	Amount (Rs.)
				penalty

2. In the individual appeals being Appeal Nos. E/410/2012, E/77128/2017 and E/78085/2018, the authorized representative of the appellant firm, Sri AayushRungta has challenged the confirmation of personal penalties by the respective Orders-in-Original dated 21.03.2012, 22.09.2017 and 01.05.2018.

3. The facts of the case, briefly stated, are as follows:

- i. The appellant firm, a supplier of transmission line accessories and hardware fittings, used to submit bids when tenders were floated by different power supply corporations across India. The appellant firm also used to deal with various private parties. If the rates quoted by the appellant firm were accepted by a power supply corporation, the appellant firm received the order. It was stipulated in the tenders/contracts of the power supply corporations that orders will be placed on the manufacturers. The appellant used to represent and declare to the power supply corporations that it was a manufacturer and that its premises at 207/7, Belilious Road, Howrah-1 was its factory/place of manufacture. However, the appellant firm had not been registered with the Central Excise authorities.
- ii. Between March, 2007 and December, 2010 officers of the Directorate General of Central Excise Intelligence and Headquarter, Anti-Evasion Unit conducted investigations

into the activities of the appellant firm, visited the aforesaid premises at Howrah as well as the appellant firm's office at 5/1, Clive Row, Second Floor, Room No. 34, Kolkata - 700 001, carried out search and seizure and recorded statements. In course of the said investigations, the appellant firm had clarified that it had not undertaken manufacture of any goods sold to the aforesaid power supply corporations, though it had represented itself as a manufacturer to them. The appellant also submitted copies of its purchase records, particulars of the suppliers, copies of records in respect of job workers, particulars of the job workers, particulars of the goods sold etc. and further clarified that it did not have any trade mark or brand name. The appellant also made over two post-dated cheques for an aggregate sum of Rs. 10.50 lacs. Subsequently, the appellant's constituted attorney clarified in his statements dated 24.05.2010 and 01.12.2010 that such payment had been made under misconception and to buy peace.

- iii. On conclusion of investigations, the Central Excise Department was of the opinion that the appellant firm was actually a 'manufacturer' and not a trader. On 24.12.2010 a show cause notice was issued to the appellant firm alleging that it had always declared to its customers that it was a manufacturer of transmission line accessories and hardware fittings, but in order to evade payment of Central Excise duty, the appellant firm had been showing the goods manufactured by it as traded goods. The appellant had purportedly contravened, amongst others, the provisions of Rules 4, 6, 8, 10, 11 and 12 of the Central Excise Rules, 2002 (hereinafter

“Rules”), Sections 91 and 93 of the Finance Act, 2004 and Sections 126 and 130 of the Finance Act, 2007 and it was directed to show cause as to why Central Excise duty amounting to Rs. 4,05,32,570/- with Cesses payable thereon along with interest and penalty should not be recovered in terms of various provisions of the Central Excise Act, 1944 (hereinafter “Act”). It was also proposed in the show cause notice that the amount of Rs. 10.50 lacs already paid should be appropriated. Sri Dinesh Rungta, constituted attorney and authorized representative of M/s S. A. Enterprise, was also directed to show cause as to why personal penalty should not be imposed on him under Rule 26 of the Rules.

- iv. Subsequently, periodic show cause notices were issued raising demands of Central Excise duty together with interest and penalty against the appellant firm on similar grounds. It was also proposed in the said show cause notices that personal penalty should be imposed on the appellant firm’s authorized representative, Sri Aayush Rungta for his alleged acts/omissions.
- v. On confirmation of demands vide two Orders-in-Original dated 29.02.2012 and 21.03.2012, appeals were preferred before this Tribunal by the aggrieved parties, namely, M/s. S. A. Enterprises and Shri Aayush Rungta, which were registered as Appeal Nos. E/392/2012, E/409/2012 and E/410/2012. The connected stay petitions filed by the appellants-applicants were disposed of vide an order dated 20.07.2015 passed by this Tribunal by directing deposit of Rs. 20 Lakhs. The said directions were duly complied with.

- vi. In the meanwhile, further investigations were carried out. By an Order-in-Original dated 22.12.2015 passed by the Commissioner of Central Excise, Kolkata-II Commissionerate, adjudication proceedings in respect of show cause notices dated 21.02.2014, 28.03.2014, 16.10.2014 and 20.08.2015 were concluded and the all the proposed demands were confirmed against the respective noticees.
- vii. Being aggrieved by the abovementioned Order-in-Original dated 22.12.2015, M/s. S. A. Enterprise and Shri Ayush Rungta aforesaid filed a writ petition bearing W.P. No. 392 of 2016 (Smt. Manjari Rungta & Anr. v. Commissioner of Central Excise & Anr.) before the Hon'ble High Court at Calcutta. By a judgement and order dated 27.06.2016 the Hon'ble High Court, inter alia, set aside the aforesaid Order-in-Original dated 22.12.2015 and directed for deciding the matter afresh.
- viii. De-novo adjudication as well as adjudication of a subsequent show cause notice dated 29.04.2016, covering the cumulative period from February, 2011 to November, 2015, was disposed of vide an Order-in-Original dated 22.09.2017, whereunder the proposed demands were confirmed against each noticee-appellant. Another adjudication order was passed on 01.05.2018 by confirming the demands proposed in the periodic show cause notices dated 19.12.2016 and 10.08.2017.

ix. The aforesaid Orders-in-Original dated 22.09.2017 and 01.05.2018 were challenged by the noticees-appellants by way of further appeals filed before this Tribunal.

4. In the hearing before this Tribunal the appellants were represented by Shri J.P. Khaitan, Sr. Adv., assisted by Shri Agnibesh Sengupta and Shri Indranil Banerjee, Advocates. The Department was represented by Shri S. Mukhopadhyay, D.R.

5. The main arguments advanced on behalf of the appellants are summarized below :

A. That Central Excise duty could not have been charged on presumption basis. The inventory dated 08.02.2010 at page 53 of the Paper Book relating to Ex. Appeal No. 392/2012 clearly showed that there was only one forging machine, one part of landis machine and one brick furnace inside the premises at 207/7, Belilious Road, Howrah-1. The Central Excise officers who had visited the appellant firm's factory had recorded in the said inventory that all the aforesaid machines were old and covered with dust and filth, and the landis machine had not even been installed. The appellant firm's stand was further supported by the certificate of the Chartered Engineer (page nos. 2628-2629 in Part 6 of the combined Paper Book filed before this Hon'ble Tribunal), wherein it had been certified that the goods dealt with by the appellant firm could not have been manufactured using the aforesaid machines at the Belilious Road premises. The adjudicating authority had gravely erred in holding that there was no evidence in support of the claim that the aforesaid machinery had been lying unused for a long period of time or had not been used for manufacturing the goods in question.

- B. That the appellant firm could not have been treated as a manufacturer for central excise purposes simply on the basis of declarations or representations made to certain purchasers, namely, different power supply corporations and/or on the basis of warranty provided in respect of the goods in question. In this regard, reliance was placed on the decision of *Aska Equipment Pvt. Ltd. v. Commissioner of Central Excise*, reported in 2006 (202) ELT 795, against which Departmental appeal had been dismissed by the Hon'ble Supreme Court on the ground of delay as well as on merit, as reported in *Commissioner v. Aska Equipment*, 2010 (254) ELT A37.
- C. That, even otherwise, the appellant firm had not made any representation of being a manufacturer of the goods sold by her to any private party. In the initial show cause notices, sales of wire as also sales of hardware to private parties had not been included for raising demands. Surprisingly, sales of hardware to private parties had been included for raising demands in the subsequent show cause notices.
- D. That the Commissioner had failed to consider the brief note of submission filed at the time of personal hearing, wherein the appellant had made exhaustive submissions. It had been specifically pointed out that the appellant firm had paid Central Excise duty of Rs. 5,11,69,847/- in respect of the goods purchased, in support whereof duty paying documents had been submitted. The appellant had furthermore adduced specific evidences as follows, which had not been properly appreciated -
- a) Purchase and sale invoices;
  - b) Documents proving dispatch of goods directly to the customers from the suppliers' premises;

- c) Reports showing that only visual/physical inspection had taken place at the Belilious Road premises and that testing had been done by external agencies;
  - d) Annexure 'G' to reply against show cause notice dated 21.02.2014 showing that goods had been accepted by several customers without embossing and that, only in some cases, initials like "S", "SA", or "SAE" were embossed by the suppliers or job workers for purpose of identification.
- E. That the quantum of goods obtained through job work was quite small in value over the period from April, 2011 to March, 2013 as against trading sales of about Rs. 47 Crores. In this regard, kind attention was invited to page nos. 2099 to 2197 in Part 4 of the of the combined Paper Book filed before this Hon'ble Tribunal. No job work was gotten done during April, 2013 to November, 2015 and, in any event, the appellant could not have been treated as the manufacturer in respect of the job workers' activities.
- F. That the Commissioner's finding regarding the appellant firm's failure to produce supporting documents proving physical movement of goods purchased from SubhLabh Enterprises to Viswanath Projects Ltd. was incorrect. Page nos. 702-711 of Annexure "A" of the reply against show cause notice dated 21.02.2014 clearly showed that the goods had been transported from the premises of SubhLabh Enterprises to the premises of Viswanath Projects Ltd. by truck bearing no. AP-16TX/9879. The appellant had also submitted challans along with the invoices in all other cases to show the movement of goods, for instance, the documents at page nos. 528 and 530 in Part-3, Volume I of the combined Paper Book filed before this Hon'ble Tribunal showed the movement of goods purchased by the appellant firm from Deepak

Industries to M. P. Poorv Kshetra Vidyut Vitaran Co. Ltd., Chhatarpur in truck no. MP-15-HA-0282.

- G. That the Commissioner's findings in relation to the appellant firm's failure to produce evidence proving the existence of her suppliers were perverse. None of the show cause notices except the one dated 21.02.2014 had remotely suggested that the appellant firm's suppliers had not actually existed. In fact, the appellant firm's purchases had been investigated and no adverse evidence could be found qua most purchases. Even as regards the said show cause notice dated 21.02.2014, the purported allegations regarding the four suppliers namely, M/s. B. K. Enterprises, M/s. Shiv Shakti Trade Center, M/s. Hari Om Enterprises and M/s. Evergreen Enterprises, had been fully met by the appellant firm in her defense, however, the supporting documents and explanations had not been looked into.
- H. That, there was no concrete evidence on record establishing clandestine manufacture or clearance or surreptitious sales or surreptitious purchases at any point of time. It was prayed that all the purported demands of duty, interest and penalty deserved to be set aside.
- I. That the demands of personal penalty against Shri Aayush Rungta were also unsustainable in law.

6. On the other hand, learned DR for the revenue reiterated the findings in the impugned adjudication orders and prayed that all the appeals be dismissed. He fairly submitted that the legal dispute in the matters fell within a narrow compass and that all the evidences on record may be appreciated. For assistance of this Tribunal, reference

was drawn to the recent decision dated 28.04.2023 passed by this Bench of the Tribunal in the case of M/s Comet Technocom Pvt. Ltd. and Ors. v. Commissioner, Appeal Nos.199-201 of 2009.

7. We have carefully perused the records of the cases and noted the submissions urged on behalf of each side. Before proceeding further, we must record our appreciation for Shri Khaitan, learned Sr. Adv. who explained the crucial points involved most lucidly and by painstakingly taking this Bench through the voluminous Paper Books filed by his clients. We also record our appreciation for the learned DR for the revenue who was quite fair in his submissions.

8. Having given our anxious thoughts to the various issues involved in the appeals and upon appreciation of the entire gamut of evidence adduced by the parties, we are inclined to hold in favour of the appellants. We find that the legal issue arising for consideration in these appeals falls within a narrow compass – Whether a noticee can be charged with Central Excise duty solely on the basis of certain declarations/ representations made to its customers and without it being shown that the said noticee is a manufacturer within the meaning of Section 2(f) of the Act which defines “manufacture” and states that, amongst others, the word “manufacturer” is required to be construed accordingly?

9. We find that the show cause notice dated 24.12.2010, which was the first show cause notice in the matter, had been issued by primarily relying on the representations to various power supply corporations by the appellant firm that she was the manufacturer of the goods supplied by her. After referring to the statements given during the course of investigations by the appellant firm’s authorized representative, the said show cause notice had relied on the stipulations and conditions of the tender documents/ contracts, as

would appear from a reading of page nos. 55 to 75 of the Paper Book filed in relation to Ex. Appeal No. 392 of 2012. We note that the appellant firm had taken the factual stand that the declarations/representations to the power supply corporations had been made only for the purpose of procuring business and that they had always engaged in trading and supply of the goods in question. The appellant firm had also clarified that the factory at the Belilious Road premises lacked the infrastructure to manufacture any transmission line accessory or hardware equipment and that there was no testing facility inside the said premises. Surprisingly, in the adjudication order dated 29.02.2012, it had been held that upon investigation by the revenue authorities, manufacturing facility had been found at the Belilious Road premises, which had also been admitted by the noticee no. 2 in his statement dated 21.05.2010 and that no contrary evidence could be adduced by the noticees. Such findings had clearly been rendered in disregard of the inventory dated 08.02.2010 drawn up by the Central Excise officers, which established the point of lack of manufacturing facilities. The appellant firm's defence was further supported by the Chartered Engineer's Certificate filed in the subsequent stages.

10. Further, it is noticeable that between the year 2007, when investigations had been initiated and the year of 2010, when investigation was resumed, no additional evidence was brought on record by the revenue in order to counter the appellant firm's contentions. Likewise, the revenue could not adduce any positive evidence of clandestine manufacture by the appellant firm or incriminating evidence showing procurement of unaccounted raw materials/ semi-processed goods for purpose of further manufacturing/ job work, for example, discovery of undisclosed manufacturing facility, incriminating statement from any supplier of the appellant firm and the like. A careful perusal of the various

statements given by the appellant firm's authorized representative shows that she had maintained a consistent stand regarding her defense of trading against the charge of manufacturing. In such circumstances, the Commissioner of Central Excise, Kolkata- IV Commissionerate had been unjustified in holding "..... excisability and dutiability of the impugned materials have never been disputed..." at paragraph no 11.8 at page no. 30 of the Order-in-Original dated 29.02.2012. In arriving at his findings against the appellant firm, the Commissioner of Central Excise, Kolkata- 4 Commissionerate had disregarded the actual course of dealing between the parties concerned and, on the other hand, attached overwhelming importance to the appellant firm's declaration/representation given to power supply corporations of being a manufacturer and to the stipulations/ conditions of the tenders/ agreements. We agree with the submissions of Shri Khaitan on behalf of the appellant firm that the decisions of Aska Equipment, 2006 (202) ELT 795 --- 2010 (254) ELT A37 fully supported the appellants' case.

11. We observe that the enquiry and investigations leading up to issuance of the show cause notices dated 24.12.2010 and 24.03.2011, though giving rise to suspicion against the appellant firm, were insufficient to justify the confirmation of demands. We must bear in mind the fundamental principle of law that suspicion, howsoever grave, cannot take the place of proof. The appellant firm had consistently maintained its defence and, furthermore, no inconsistency could be pointed out to us between the statement dated 15.03.2011 of Appellant No.2/Shri Aayush Rungta and the statements given earlier by Shri Dinesh Rungta. In our opinion, the Department has not been able to prove its case with the help of concrete evidences.

12. We are also constrained to hold that the observations in the Order-in-Original dated 29.02.2012 as well as the observations in the

Order-in-Original dated 21.03.2012 in relation to alleged inspection and testing at the factory premises, embossing of trademark on the materials supplied, voluntary payment of Rs. 10.50 Lakhs in admission of liability by the appellant firm and job work gotten done by the appellant firm in contravention of the Central Excise law are unsustainable due to the following reasons –

- I. Only physical verification of the items used to be carried out at the Belilious Road premises/ godown premises and other tests were conducted in the approved laboratories of third parties like M/s. Analyst, Benaras Road, Howrah, M/s. S. B. Steels, Liluah, Howrah. The said positions had been clarified in answer to question no. 13 of statement dated 25.01.2010 given by Shri Dinesh Rungta, as appears at page no. 63-64 of the Paper Book relating to Ex. Appeal No. 392 of 2012. None of the test reports relied on by the appellant firm had challenged by the revenue.
- II. The appellant firm did not have any trademark or brand name and in some cases, marks like "S", "SA" etc. had been embossed on the goods supplied to the various power supply corporations solely for identification purpose. In reply to question nos. 3 - 5 of his statement dated 01.12.2010, Shri Dinesh Rungta had categorically explained why the aforesaid marks/symbols could not be treated as any 'trademark', notwithstanding that the same had been declared as trademarks in the Guaranteed Technical and Other Particulars for supply of the disputed items. No cogent evidence had been adduced to contradict the appellant firm's defence.
- III. As appears from the answer to question no. 18 of statement dated 25.01.2010 given by Shri Dinesh Rungta read with the answer to question no. 11 of his statement dated 01.12.2010,

there had been no acceptance of liability on part of the appellant firm and the alleged voluntary deposit had been made under misconception and to buy peace. This is further evidenced from use of the phrase "... towards our duty liability if accrued and on ad-hoc basis ..." in the appellant firm's letter dated 11.07.2007, under cover whereof the cheques for Rs. 10.50 Lakhs had been made over to the Department. In the said facts and circumstances, we must hold that the payment of Rs.10.50 Lakhs had been made without prejudice to the appellant firm's rights and contentions.

- IV. Quantum of goods obtained through job work was quite small as compared to the quantum of trading sales. No incriminating statement had been obtained from any job worker or specific evidence adduced by the revenue establishing unaccounted supply of raw materials/semi-processed goods to job workers by the appellant firm or clandestine receipt of finished goods from the job workers over and above the declared quantities. In any event, we hold that the appellant firm should not have been held liable to duty in respect of job work activities by the job workers on a principal-to-principal basis.

13. As regards the Orders-in-Original dated 22.09.2017 and 01.05.2018, our conclusions and reasoning are stated in the following manner which would also summarize the crucial aspects of the matters: -

- A. Co-relatable purchase and sales : We find that the appellant firm's claim of trading is borne out from records such as purchase invoices and corresponding sale invoices. We find that the appellant firm has submitted voluminous documents in this regard, however, the same had not been properly appreciated while

passing the impugned Orders-in -Original. On specimen basis, we have examined the documents at page nos. 2632 to 5148 in Part 7 of the combined Paper Book, covering the period from February, 2011 to March, 2013 and are satisfied about the appellant firm's explanations. The said documents being purchase and sale invoices contain all relevant information such as supplier's details, description of goods, payment of central sales tax, vehicle number for transportation of goods etc., which the adjudicating authorities neglected to examine. Thus, we cannot uphold the finding at page no. 21 of the impugned Order-in-Original dated 22.09.2017 to the effect that the appellant firm "...could not produce any document which settles the fact they have trading sales...". Similarly, the finding in the impugned Order-in-Original dated 01.05.2018 that transmission line hardwares were manufactured after the appellant firm received purchase orders from her customers is also incorrect.

- B. Duty paid on purchases : We find that the appellant firm had already paid central excise duty in respect of a substantial part of its purchases. That the appellant firm had provided all the necessary details in this behalf, is evident from the written submissions filed before the Commissioner of Central Excise, Kolkata-II Commissionerate, as appears at page nos. 15549 to 15550 in Part 38 of the combined Paper Book filed before this Tribunal. To such extent of duty paid purchases, it follows that no demand of Central Excise duty can survive.
- C. Job work : We find that the appellant firm had also traded in items obtained through job work. However, as compared to the total turnover of the appellant firm, the quantum of sale of job worked goods was quite low in value. To support such conclusions, we have perused the details and documents submitted by the appellant firm in relation to job worked goods for the period 2011-

12 and 2012-13. We find that during the said period the appellant firm had maintained separate set of sale bills for sale of goods manufactured by job workers which the appellant firm referred to as 'manufacturing sales' and in respect of the others sale of goods purchased and sold as such, the appellant firm had maintained during the said two years a separate set of sale bills referred to as 'trading sales'. Notwithstanding that the appellant firm may have flouted the procedures under central excise law relating to job work, no duty liability could have been fastened on the appellant firm as regards job work activities undertaken by the job workers on principal-to-principal basis.

- D. Testing at third party premises : The adjudicating authorities should have observed that only visual/ physical inspection of the goods had taken place at the appellant firm's premises and that tests like galvanization test, mechanical test, slip load test etc. had been conducted in outside laboratories. Such position is evident from the documents relied upon while issuing the show cause notice dated 21.02.2014 such as Annexures 'X' and 'B1' as also the test reports filed by the appellant firm in their defense, such as the documents at page nos. 5149 to 5400 (Part 8), page nos. 7897 to 7944 (Part 14), page nos. 8761 to 8786 (Part 17) of the combined Paper Book filed before this Tribunal.
- E. Demand on sale of materials to private parties and sale of wires, channels, angles etc. : We find that the Department has raised demands on the sale of materials to private parties and sale of wires, channels, angles etc. for the period on and from February, 2011, although, the appellant firm had never held itself out as a manufacturer in respect of such supplies. It must be noted here that, in the earlier two show cause notices dated 24.12.2010 and 24.03.2011 no such demand had been raised. In this regard, we

agree with the appellant firm's contentions that the basis and computation of demand in the subsequent show cause notices were contrary to those of the earlier two show cause notices dated 24.12.2010 and 24.03.2011. While passing the Order-in-Original dated 01.05.2018 the Commissioner ought to have appreciated that, whether the private parties to whom the appellant firm had supplied the goods in question further supplied the goods to electricity distribution companies was of no consequence for determining the appellant firm's liability. We also find that, qua such supplies of wires, channels, angles etc. as well as supplies to private parties, there is no evidence at all that the appellant firm had undertaken manufacturing activities.

- F. Non-existence of alleged four suppliers : As regards the issue of non-existence or untraceability of the four disputed suppliers, namely, M/s. B.K. Enterprises, M/s. Shiv Shakti Trade Centre, M/s. Hari Om Enterprises and M/s. Evergreen Enterprises, we observe that the appellant firm had provided sufficient clarifications in their reply to the show cause notice dated 21.02.2014 as well as in their written submission filed before the Commissioner of Central Excise, Kolkata-II Commissionerate. In fact, the Department had investigated the appellant firm's purchases covering a substantial period of time and dispute was raised only as regards the aforesaid four suppliers and not the remaining several suppliers. Moreover, the Department cannot hold the appellant firm liable solely on the basis that the aforesaid four disputed suppliers may have discontinued their business or failed to renew their enlistment with the Kolkata Municipal Corporation when investigations had been undertaken. We do not find sufficient justification for doubting the purchase transactions entered into by the appellant firm much prior to the date of investigation by the Department, especially when payment for the said purchases had been made by the appellant

firm through banking channels. At paragraph nos. 7.12 and 7.26 at page nos. 21 and 26 of the impugned Order-in-Original dated 22.09.2017 sweeping observations have been made against the appellant firm to the effect that the appellant firm had failed to prove the existence of its supplier and that "...the suppliers/vendors list, who gave the Noticee No. 1 manufactured goods for trading purpose, proved to be non-existent thereby indicating to be an afterthought and thereby creating paper trail..". In our opinion, the said observations cannot be confirmed and are liable to be set aside.

- G. Physical movement of goods : We do not find proper justification to confirm the findings that the appellant firm had not adduced evidence of the physical movement of goods purchased by her or gotten manufactured on job work basis or that the bills referred to by the appellant firm as trading sales did not contain any sort of supporting documents to prove conclusively that the subject sales were trading sales or that the submitted documents did not bring forth evidence of the physical movement of goods. The Commissioner failed to hold that the appellant firm had submitted not only invoices but also challans covering movement of the goods in question and the challan mentioned the mode of transport as also the registration number of the motor vehicles. Job work challans and documents showing movement of goods to and from the job worker's premises had been duly submitted by the appellant firm. In such circumstances, the adjudicating authority should not have faulted the appellant firm for failing to produce documents like agreement with suppliers, consignment notes, transporters' bill and their payment details, loading/unloading slips, weighment slips etc. To take an example, the Commissioner had held that the appellant firm could not establish physical movement of the goods purchased from SubhLabh Enterprises to Vishwanath

Projects Ltd. which was incorrect. During the course of hearing before us, it was demonstrated as to how the said purchased goods had been transported to the premises of Vishwanath Project Ltd. by truck bearing no. AP-16TX/9879. Further and in any event, such issues were alien to the show cause notices and had been raised for the first time in the Order-in-Original dated 22.09.2017, which is illegal and unacceptable.

14. Regarding penalty, the Appellant contended that the Notice demanding duty for the period 2005 to 2009-10 was issued on 24.12.2010. Since they have not suppressed any information from the department, Notice cannot be issued by invoking extended period. We observe that the Appellant has not taken any Central Excise Registration on the ground that the activities undertaken by them did not amount to manufacture. The investigation concluded that the activities amounts to manufacture and demanded duty by invoking extended period. In view of the above discussion, it is our considered view that the activities undertaken by the Appellant would not amount to manufacture. Hence the demand of duty in the normal period itself is not sustainable. Accordingly, the question of invoking extended period for demanding duty does not arise since the activities undertaken by the Appellant does not amount to manufacture. In view of the above, the question of alleging suppression and invoking extended period does not arise. Accordingly, penalty also not imposable on the Appellant as well as its Authorized Representative Shri Aayush Rungta.

15. In view of the aforesaid discussions, we answer the legal question in favour of the appellants and hold that the demands of duty, interest and penalty against the appellant firm cannot be sustained. The confirmation of personal penalties against Shri Aayush Rungta/Appellant No.2 is also liable to be set aside. Accordingly, the

impugned Orders-in-Original dated 29.02.2012, 21.03.2012, 22.09.2017 and 01.05.2018 are set aside.

16. In the result, all the appeals are allowed with consequential reliefs.

(Order pronounced in the open court on 27 June 2023.)

Sd/

**(P.K. CHOUDHARY)**  
**MEMBER (JUDICIAL)**

Sd/

**(K. ANPAZHAKAN)**  
**MEMBER (TECHNICAL)**