CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI
REGIONAL BENCH

Excise Appeal No. 444 of 2009

(Arising out of Order-in-Original No. 01-02/PD/Th-II/2009 dated 05.01.2009 passed by the Commissioner of Central Excise, Thane-II)

Shri Nitin Patki **Appellant**
Vice President (Operations),
M/s. TVC Sky Shop Ltd.,
Plot No. 20, Mira Indl. Estate,
Mira Road (E), Dist. Thane 401 104.

Vs.

Commissioner of Central Excise, Thane-II **Respondent**
3rd Floor, Navprabhat Chambers,
Ranade Road, Dadar (W), Mumbai 400 028.

WITH

Excise Appeal No. 445 of 2009

(Arising out of Order-in-Original No. 01-02/PD/Th-II/2009 dated 05.01.2009 passed by the Commissioner of Central Excise, Thane-II)

Shri Vinod Mehta **Appellant**
Director of M/s. TVC Sky Shop Ltd.,
TVC House, Khandwala Centre,
Daftary Road, Malad (E),
Mumbai 400 097.

Vs.

Commissioner of Central Excise, Thane-II **Respondent**
3rd Floor, Navprabhat Chambers,
Ranade Road, Dadar (W), Mumbai 400 028.

AND

Excise Appeal No. 446 of 2009

(Arising out of Order-in-Original No. 01-02/PD/Th-II/2009 dated 05.01.2009 passed by the Commissioner of Central Excise, Thane-II)

Shri Vinod Agarwal **Appellant**
Chairman of M/s. TVC Sky Shop Ltd.,
TVC House, Khandwala Centre,
Daftary Road, Malad (E),
Mumbai 400 097.

Vs.

Commissioner of Central Excise, Thane-II **Respondent**
3rd Floor, Navprabhat Chambers,
Ranade Road, Dadar (W), Mumbai 400 028.

Appearance:

Shri Vinay S. Sejpal, Advocate, for the Appellant
Shri Xavier Mascarenhas, Superintendent, Authorised Representative for the Respondent

CORAM:

HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)
HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

Date of Hearing: 21.12.2022
Date of Decision: 21.12.2022

FINAL ORDER NO. A/86262-86264/2022

PER: SANJIV SRIVASTAVA

These appeals are directed against order in original No 01-02/PD/Th-II/2009 dated 05.10.2009 of the Commissioner Central Excise Thane II. By the impugned order following has been held:

"ORDER

A. In respect of the SCN F.No.VI/PI/Th-II/30-16/2006 dated 30.3.2007 --

1. I adjudge that the seized goods as listed in Annexure 'B' to the Show Cause Notice, valued at Rs.2,17,76,550/- (MRP Value) and having assessable value of Rs. 1,29.88,935/-, involving Central Excise duty of Rs.21,19,795/- (Basic Rs. 20,78,230/- + Education Cess Rs.41,565/-) are liable to confiscation under the provisions of Rule 25 of the Central Excise Rules, 2002. Since the seized goods already released provisionally to M/s TVC Sky Shop Ltd on execution of bond for Rs 1,29,88,935/- along with Bank guarantee of Rs 30,00,000/- are not produced before me. I give M/s. TVC Sky Shop Ltd the option to pay in lieu of confiscation a fine of Rs. 30,00,000/- (Rupees Thirty Lakhs Only) in terms of Rule 25 of the Central Excise Rules, 2002 read with Section 34 of the Central Excise Act, 1944. The aforesaid amount if not paid forthwith shall be recovered from M/s. TVC Sky Shop Ltd., by enforcing the provisions of the Bond executed and Bank Guarantee furnished by them. I further order that appropriate Central Excise duty shall be paid on seized goods released provisionally as and when cleared from the factory premises of M/s. TVC Sky Shop Ltd.

2. I impose a penalty of Rs.3,00,000/- (Rupees Three Lakhs Only) on M/s. TVC Sky Shop Ltd., Mira road, Dist. Thane under the provisions of Rule 25 of the Central Excise Rules, 2002.

3. I impose a penalty of Rs.2,00,000/- (Rupees Two Lakhs Only) on Shri. Vinod Agarwal, Chairman of M/s. TVC Sky Shop Ltd., Mira road, Dist. Thane under the provisions of Rule 26 of the Central Excise Rules, 2002.

4. I impose a penalty of Rs.1,00,000/- (Rupees. One Lakh Only) on Shri. Nitin Patki, General Manager, of M/s. TVC Sky Shop Ltd., Mira Road, Dist. Thane under the provisions of Rule 26 of Central Excise Rules, 2002.

5. I do not impose any penalty on Shri. C.S.Kotian, the then Stores Manager, of M/s. TVC Sky Shop Ltd., Miraroad, Dist. Thane under the provisions of Rule 26 of Central Excise Rules, 2002.

B. In respect of the SCN no. VI/PI/Th-11/30-16/2006 dated 28.8.2008 -

1. I hold the process of labelling/re-labelling of package containers including declaration/alteration/affixing of MRP/RSP on the package containers carried out by M/s. TVC Sky Shop Ltd., in respect of goods covered by the Show Cause Notice, as amounting to "manufacture" under Section 2(f)(iii) of the Central Excise Act, 1944.

2. I determine the assessable value of 1,28,225 pieces of consumer goods, notified under Section 4A and also listed in the Third Schedule to the Central Excise Act, 1944, manufactured and cleared during the period 1.9.2003 to 31.12.2007 as Rs. 10.34,50,187/- (Rupees Ten Crore, Thirty Four Lakhs Fifty Thousand One Hundred and Eighty Seven Only) after allowing abatement specified in Notification issued under Section 4A(2), from the MRP/RSP of the said goods of Rs.21,24,53,630/- (Rupees Twenty One Crore, Twenty Four Lakhs, Fifty Three Thousand Six Hundred and Thirty Only), for the purpose of calculation of Central Excise duty payable on the said goods.

3. I adjudge the 1,28,255 pieces of consumer goods, having MRP value of Rs. 21,24,53,630/-, the assessable value of which has been worked out to Rs. 10,34,50,187/-, already removed by M/s. TVC Sky Shop Ltd., as liable to confiscation under the *provisions of Rule 25 of the Central Excise Rules, 2002. However, as the goods are already removed without payment of duty I impose a fine of Rs.3,00,00,000/- (Rupees Three Crores Only) on M/s. TVC Sky Shop Ltd., in lieu of confiscation under Rule 25(1) of Central Excise Rules, 2002 read with Section 34 of the Central Excise Act, 1944 and order that the same shall be paid forthwith.*

4. I confirm, in terms of Section 11A(2) of the Central Excise Act, 1944, the duty demand of Rs. 1,68,53,950/- (Rupees One Crore Sixty Eight Lakhs Fifty Three Thousand Nine Hundred and Fifty Only) (Rs. 1,65,69,243/- Basic + Rs.2,54, 128/- Education Cess+ Rs.30,578/- Secondary and Higher Education Cess) made in the Show Cause Notice under Section 11A(1) by invoking the proviso clause there to on goods manufactured and cleared during the period from 1.9.03 to 31.12.07 as payable by/recoverable from M/s. TVC Sky Shop Ltd. Mira Road, Dist. Thane.

5. I order that M/s. TVC Sky Shop Ltd., shall pay interest at the appropriate rate under the provisions of section 11AB of Central Excise Act, 1944 on the duty amount determined as payable at Sr.No.4 above.

6. I impose a penalty of Rs. 1,68,53,950/- (Rupees One Crore Sixty Eight Lakhs Fifty Three Thousand Nine Hundred and Fifty Only) being amount equal to total duty not paid and determined hereinabove as payable on M/s. TVC Sky Shop Ltd., under the provisions of Section 11AC of Central Excise Act, 1944.

7. I impose a penalty of Rs.5,00,000/- (Rupees Five Lakhs Only) on M/s. TVC Sky Shop Ltd. Mira Road, Dist. Thane under the provisions of Rule 25 of the Central Excise Rules, 2002 for contravening the provisions of Rule 4, Rule 6, Rule 8, Rule 10, Rule 11 and Rule 12 of the Central Excise Rules, 2002.

8. I impose a penalty of Rs.5,00,000/- (Rupees Five Lakhs Only) on Shri. Vinod Agarwal, Chairman of M/s. TVC Sky Shop Ltd., Mira Road, Dist. Thane under the provisions of Rule 26 of the Central Excise Rules, 2002.

9. I impose a penalty of Rs.3,00,000/- (Rupees Three Lakhs Only) on Shri. Vinod Mehta, Director of M/s. TVC Sky Shop Ltd., *Mira Road, Dist. Thane under the provisions of Rule 26 of the Central Excise Rules, 2002.*

10. I impose a penalty of Rs. 1,00,000/- (Rupees One Lakh Only) on Shri. Nitin Patki, General Manager, of M/s. TVC Sky Shop Ltd., Mira Road, Dist. Thane under the provisions of Rule 26 of Central Excise Rules, 2002.

11. I do not impose any penalty on Shri. C.S.Kotian, the then Stores Manager, of M/s. TVC Sky Shop Ltd., Miraroad, Dist. Thane under the provisions of Rule 26 of Central Excise Rules, 2002."

1.2 One more appeal E/447/2009 was filed by M/s TVC Sky Shops Ltd., against the same order. This appeal was abated under Rule 22 of CESTAT Procedure Rules, 1982, vide Final Order No A/86772/2019 dated 30.09.2019. Thus only these three appeals filed by the individual challenging the penalty imposed on them under rule 26 of Central Excise Rules 2002 are pending consideration.

2.1 Investigations were taken against M/s Sky Shops Ltd., which culminated in issuance of the two show cause notices adjudicated by the impugned order referred in para 1 above. By the impugned order penalties have been imposed on the three appellants as detailed below:

Appeal No	Appellant	Penalty imposed		
		1st SCN	2nd SCN	Total
E/446/2009	Vinod Agarwal, Chairman	2,00,000	5,00,000	7,00,000
E/445/2009	Vinod Mehta, Non Executive Director	-	300,000	3,00,000
E/444/2009	Nitin Pataki, General Manager	1,00,000	1,00,000	2,00,000

2.3 Aggrieved by the penalties imposed Appellants have preferred these appeals.

3.1 We have heard Shri Vinay S Sejpal, Advocate for the Appellants and Shri Xavier Mascarenhas, Superintendent, Authorized Representative for the revenue.

3.2 Arguing for the appellant learned counsel submits that-

- The appellants i.e. Mr. Vinod Agarwal and Mr. Nitin Patki in their Statement have explained that they were not aware of the activity amounting to manufacture nor were they aware that they were required to take Central Excise Registration and they were not aware of any compliances to be made under excise.
- Mr. Vinod Mehta in his statement has pointed out that he was an honorary non-executive director and was not involved in any company activity nor participates nor responsible for any of the day to day business activity.
- the penal provisions under Rule 26 are applicable only if the following two conditions are cumulatively satisfied;
  - The person subjected to penalty has dealt with the goods physically in the manners specified; and
  - The person has so dealt with the goods with the knowledge or reasons to believe that they are liable to confiscation.
- To sustain the imposition of penalty under Rule 26 it is essential that both the principle conditions above are alleged and found against the person. It is also a well settled that the onus of establishing the essential ingredient of Rule 26 is on the department, which is required to discharge this onus on the basis of evidences brought on record.
  - Cherukuri Vijayamohan [2016 (342) ELT 272 (Tri.-Hyd.)]
  - Kamdeep Marketing Pvt. Ltd. [2004 (165) ELT 206 (Tri.-Del.)

3.3 Learned authorized representative reiterates the findings recorded in the impugned order.

4.1 We have considered the impugned order along with the submissions made in appeals and during the course of arguments.

4.2 The case against M/s TVC Sky Shops Ltd., is of altering MRP post importation on which the Customs duty/CVD has been paid on the basis of declared MRP. The demand has been made from M/s TVC Sky Shops Ltd., in respect of the duty due on the basis of the altered MRP. The appeal filed by the M/s TVC Sky Shops Ltd. has been abated in terms of Rule 22 of CESTAT procedure rules. The appeals under consideration by us are in respect of the penalty imposed on the three individuals/ employee under Rule 26 of the Central Excise Rules, 2002. For imposing the penalty on the three appellants before us impugned order records as follows:

"131. As regard penalty on other noticees, it is seen that penalty has been proposed under Rule 26 of the Central Excise Rules, 2002 in the first Show Cause Notice on S/Shri. Vinod Agarwal, Nitin Patki and C.S. Kotian, Chairman, General Manager and Stores Manager respectively of the assessee company. Similarly, penalty is also proposed in the second Show Cause Notice under Rule 26 ibid on S/Shri. Vinod Agarwal, Vinod Mehta, Nitin Patki and C.S. Kotian, Chairman, Director, General Manager and Stores Manager respectively of the assessee company. Though the Show Cause Notices have brought out the role played by each of them in carrying out manufacturing activities at their premises without obtaining "Registration" and in undertaking clearances of excisable goods (covered by the second Show Cause Notice) without proper accountal, without proper documents and without payment of appropriate duty, these have to be analysed specifically keeping in mind the intent of each person, that is, whether there was any mens rea on the part of such noticee to carry forward the offence for his own pecuniary benefits. In this direction, I find that Shri. C.S. Kotian was an ordinary employee of the assessee who merely carried out in toto the instructions given by his superiors, more specifically the ones given by his immediate superior Shri Nitin Patki. It is seen that Shri. C.S. Kotian was an employee at the material time in the lower rung of the hierarchy of the company and hence he had no alternative than to obey his superiors. It has nowhere come out in the show cause notices that Shri. Nitin Patki had made known the malafide intentions behind the activities to Shri. C.S. Kotian. Therefore, before discussing the role played by others, I am inclined to take a view that no penalty is imposable under Rule 26 on Shri. C.S. Kotian, who has in fact thrown light on the assessee's misdeeds. As regards, role played by other

noticees, the case is very strongly made out against them. It is for this reason that the roles played by all these other noticees in abetting the assessee in committal of the offence are clearly forthcoming from various statements (and also from documents pertaining to imports, purchases and sales) that the assessee and the said Noticees have attempted - in futility - to retract from their statements by claiming that these were recorded on the sly or under duress. Since the goods seized from the assessee's premises on 15.6.06 as well as those goods already removed without payment of duty have already been adjudged as liable to confiscation, the aforesaid co-noticees to the Show Cause Notices, (except Shri. C.S. Kotian) who have been concerned in depositing, keeping (and in removing, transporting, selling also in respect of the goods covered in the second show cause notice) and in general dealing with these manufactured excisable goods - found stored as well as already removed - which they knew or had reasons to believe were liable to confiscation under the provisions of the Central Excise Act and Rules issued thereunder, are individually liable to penalty under Rule 26 of the Central Excise Rules, 2002 for their roles briefly discussed below duly taking into consideration their defence.

132. Shri. Vinod Agarwal, in the submissions filed in reply to the Show Cause Notices, has argued that from the statements recorded of various persons during investigations nothing has come to prove mens rea or guilty mind on his part, which is an essential ingredient to impose penalty under Rule 26 of the Central Excise Rules, 2002. On perusal of the records, it is seen that Shri. Vinod Agarwal in his statement recorded on 17.4.06 has stated that he was aware that RSP means retail sale price which is nothing but MRP and that products cannot be sold to the ultimate consumers for a value more than RSP declared to the customs and giving specific example in respect of one of the product, he confirmed that the product Split Ender was imported by themselves, i.e., TVC Sky Shop and was not procured by them from any other importer as in certain cases and that in respect of this product Split Ender the RSP declared to customs was Rs.914/- and whereas these goods were sold to M/s. Hindustan Motors, Raipur for Rs. 1990/-. Similarly as regard the *product Handy Vaccum Cleaner, the same was imported by M/s. TVC Sky Shop Ltd., themselves, declaring RSP of Rs.1000/- and thereafter sold to their customers at prices ranging from Rs.2490/- to Rs.1990/-. Further, he himself has admitted in his statement dated 9.0.07 that the sale details initially given by his General Manager, Shri. Nitin Patki during the course of investigation were not true and thereby the investigations were misled/hampered. (This aspect is being cited here not only as an admission of Shri. Vinod Agarwal about the knowledge of the offence but also about the fact that Shri Nitin Patki was a man concerned and involved in the committal of the offence and this is why he tried to give misleading information during the initial part of investigation. It is also on record that Ms Lydya Rodrigues of M/s TVC Sky Shop Ltd., vide letter did. 16.1.2003 forwarded MRP stickers to Shr Bushan Salaskar of M/s. Kamino International Logistics Pvt. Ltd., for affixing the same on the goods to be cleared from customs. This also goes to prove that RSP of the imported goods were decided by M/s. TVC Sky Shop Ltd., and alteration of RSP on unit containers was undertaken by re-labelling to put into effect sale at higher MRP/ RSPs. Shri. Pareen Bharat Parikh, Dock In-charge of M/s. Sri Radhakrishan Pvt. Ltd.. in his statement recorded on 9.3.07 has stated that goods imported on behalf of M/s. TVC Sky Shop Ltd., arrived at the docks without RSP stickers and thereafter on the instructions of Shri. Vinod Agarwal they got the RSP stickers printed locally and pasted them on each and every unit pack in the Customs area before clearance from customs. Shri. C.S.Kotian, the Stores Manager in his statement dated 21.8.06 has admitted that all the statements called for from him under summons were not submitted and that the same are in the possession of Mr. Vinod Agarwal, Chairman and the reason as to why the same were not being submitted to the department was not known to him. Further the Director of the Company Shri. Vinod Mehta has disclosed in his statement dated 11.9.06 that after receiving summons he contacted Shri. Vinod Agarwal requesting to handover the documents called for under the said summons but the documents which were under the control of Shri. Vinod Agarwal were not given to Shri. Vinod Mehta and therefore he could not submit the same. All the above are being cited here to* *show that Shri. Vinod Agarwal was the main person and brain behind evasion of payment of duty and has knowingly dealt with the excisable goods - found stored and seized as well as those already removed - which he knew were liable to confiscation as the goods were manufactured without obtaining registration and stored (in case of first show cause notice) and removed (in case of second show cause notice) without payment of duty. Shri. Vinod Mehta has also toed the defence of Shri. Vinod Agarwal by contending that he was not at all responsible for any evasion of duty alleged against M/s. TVC Sky Shop Ltd., As regards his contention that he has not benefited from such duty evasion, I find that he, as the Director of the Company, enjoyed the ill gotten fruits of evasion all along and no evidence has been brought before me to show that he particularly stayed away from the illegal activities. It is only when the department started investigations into the affairs of the assessee that he attempted to plead that he was ignorant about the deeds of the Chairman of the Board of Directors. Therefore, it is clear that Shri. Vinod Mehta, Director of the assessee company has also knowingly dealt with the afore discussed goods liable to confiscation. Shri. Nitin Patki, the then General Manager and presently Vice President (Operations), has claimed that he was not in any way involved in the illegal activities of the company and of its Directors. Interestingly, a person who so claims has now risen to the rank of Vice President making it difficult to believe that he was not at all involved in any of the malafide activities of the company undertaken during the past five years. This apart, the role of Shri. Nitin Patki has been clearly spelt out in the Show Cause Notice. Further, as already discussed, it is as per his directions that Shri.C.S. Kotian, the then Stores Manager (who was working under Shri. Nitin Patki), was supervising the activities of the assessee in connection with removing the original labels and re-labelling the unit packs, including alteration of MRP, which process has already been held as manufacture. Hence, Shri. Nitin Patki cannot absolve himself by merely pleading ignorance of law. Hence I hold that Nitin Patki has knowingly dealt with the afore discussed goods held as liable to confiscation. Finally, for the reasons already discussed above, I do not order for imposition of any penalty on Shri. C.S. Kotian,* *the then Stores Manager of the assessee company. I, therefore, hold that, excepting Shri. C.S. Kotian, the other co-noticees of both the Show Cause Notices, (i.e. Noticee Nos. 2 & 3 of the first show cause notice and Nos. 2, 3 & 4 of the second show cause notice) have knowingly dealt with goods being adjudged as liable to confiscation under Rule 25 of the Central Excise Rules, 2002 and hence each of them is individually liable to penalty under Rule 26 of the Central Excise Rules, 2002."*

4.3 Rule 26 of the Central Excise Rules, 2002 read as follows:

"Any person who acquires possession of, or is in any way concerned in transporting, removing, depositing, keeping, concealing, selling or purchasing, or in any other manner deals with, any excisable goods which he knows or has reason to believe are liable to confiscation under the Act or these rules, shall be liable to a penalty not exceeding the duty on such goods or rupees ten thousand, whichever is greater."

Interpreting the similar provisions as per rule 209A of the Central Excise Rules,1944, tribunal has held as follows:

"3.2 What remains to be considered in all these appeals is whether the penalties imposed on the appellants are sustainable or not. The penalties are under Rule 209A which reads :

"Penalty for certain offences. - Any person who acquires possession of, or is in any way concerned in transporting, removing, depositing, keeping, concealing, selling or purchasing, or in any other manner deals with, any excisable goods which he knows or has reason to believe are liable to confiscation under the Act or these rules, shall be liable to a penalty not exceeding three times the value of such goods or five thousand rupees, whichever is greater."

The sine qua non for a penalty on any person under the above rule is that either he has acquired possession of any excisable goods with the knowledge or belief that the goods are liable to confiscation under the Central Excise Act or Rules or he has been in any way concerned in transporting, removing, depositing, keeping, concealing, selling or purchasing or has in any other manner dealt with any excisable goods with such knowledge or belief. Acquisition of possession of goods is, indisputably, a *physical act, and so is each of the various ways of dealing with goods, specifically mentioned in the rule. The expression "any other manner" should be understood in accordance with the principle of ejusdem generis and would, then, mean "any other mode of physically dealing with the goods". This position has been recognized in Godrej Boyce & Mfg. Co. (supra) which has been followed in A.M. Kulkarni (supra). The decision in Ram Nath Singh (supra) is also to the same effect. Any person to be penalized under the above rule should also be shown to have been concerned in physically dealing with excisable goods with the knowledge or belief that the goods are liable to confiscation under the Act/Rules. He should have done the act with mens rea."*

A larger bench of Tribunal has in case of Steel Tubes of India Ltd. [2007 (217) E.L.T. 506 (Tri. – LB)]

"8. The ratio as laid down by Hon'ble High Court squarely covers the issue referred to the larger bench in as much that for imposition of penalty under Rule 209A of the Central Excise Rules, 1944, the person must have dealt with the excisable goods with knowledge that they are liable for confiscation..."

So mens rea is necessary ingredient which need to be there for invoking the provisions of Rule 26 of the Central Excise Rules, 2002.

4.4 Para 8, 9 & 10 of the impugned order refers to the three statements of Shri Vinod Agarwal Chairman. Para 18 records the manner in which he has hampered the investigations being made. These paras are reproduced below:

"8. During the course of investigation / enquiry statement of Shri Vinod Agrawal, Chairman of M/s TVC Sky Shop Ltd. was recorded on 17.04.2006, under Section 14 of the Central Excise Act, 1944, in which he, interalia, stated that Mr. Nitin Patki, General Manager, was looking after the General Administration and Mr. Kotian, Store Manager was looking after warehousing and dispatches; that he was having only one warehouse at Plot No. 20, Mira Industrial Estate, Mira Road (East), Dist Thane 401104, that they had not filed any declaration to Central Excise authority nor obtained any registration from Central Excise

authority for the above premises; that the sourcing of the products and negotiations with the local as well as overseas suppliers was carried out by him, that they do not sell any product without pasting MRP stickers and Bar Code, which were procured locally and pasted on all the products in their warehouse at Mira Road.

9. In his further statement recorded on 31.01.2007, Mr. Vinod Agrawal, interalia, stated that he decides pricing policy for each and every product; that he is aware that RSP means retail sale price at which the product is sold to the ultimate consumer and that the product cannot be sold for a value more than RSP declared to the Customs; that the RSP of the product 'Split Ender' was Rs.914/- and the Company had sold the same at Rs. 1990/-; that they have imported 3504 pieces of Handy Vaccum Cleaner' under Bill of Entry No. 432782 dtd. 4.2.2004 declaring RSP Rs. 1000/ and sold it to their Customers for Rs. 2490/-, a price more than the RSP declared to the Customs.

10. In his further statement recorded on 02.02.2007, Mr. Vinod Agrawal, stated that, as per their policy decision, the MRP stickers were pasted on the product sold by them. by his staff under supervision of store manager, that in respect of RSP based assessed goods, the Company should have declared RSP to the Customs at which the goods is to be sold to ultimate Customers and he admitted that the goods were sold to Customers at an enhanced price than the RSP declared to the Customs; that he has seen and perused the provisions of Section 2(1)(m) of Central Excise Act, 1944, that he agrees that they have sold the goods falling under Third Schedule after pasting MRP and "imported & marketed by stickers in their godown that he pasted MRP stickers to fulfill the requirement of Weight and Measures Act, that in case of self import the MRP, as per The WRP sticker pasted on the unit packs are different from the RSP(s) declared to the Customs at the time of their import.

18. Further investigations in the case was hampered as Mr. Vinod Agarwal, Chairman of the assessee company did not respond to six summons issued to him for tendering evidence / documents required to quantify the duty evaded. He filed a Criminal Writ Petition bearing No. 6990 of 2006, before the

Hon'ble Allahabad High Court and a Writ Petition bearing No. 4912 of 2006 before the Hon'ble Bombay High Court, for quashing and setting aside the seizure made under panchanama dated 15.06.2006. The Hon'ble Bombay High Court on 20.9.2006 while not admitting the Writ Petition gave an option to the Department to issue Show Cause Notice after investigation. It also directed Mr. Vinod Agrawal to co-operate with the investigation."

He has in his statement dated 17/04/2006 has stated as under;

"I have to state that after starting our business activities in September 2003 obtained a registration from Central Excise authorities for above premises. We were of the opinion that since we are in trading business we do not come under the purview of Central Excise. Further we were not knowing that some of our products are assessed by the Central Excise authorities on the basis of MRP and we were unaware in respect of such items putting our own MRP amounts to manufacturing."

The role of Shri Vinod Agarwal has been in a lucid manner discussed in the impugned order in para 132 of the impugned order and in our view the findings recorded about his knowledge and role played in evasion of the duty and also rendering the goods liable for confiscation cannot be faulted with. In our view penalty under Rule 26 of Central Excise Rules, 2002 has been rightly imposed on him. However in the interest of justice and taking note of the fact that M/s TVC Sky Shops Ltd., in which he was Chairman has been liquidated we reduce the penalty to 25 % of the penalty imposed on him by the impugned order. Accordingly the total penalty imposed on him is reduced to Rs 1,75,000/- (Rupees One Lakh Seventy Five Thousand Only).

4.5 Three statements of Shri Nitin Patki, General Manager were recorded on 10.04.2006, 08.05.2006 and 29.01.2007. He has in statement dated 08/05/2006 stated as under;

"I have to state that after going through aforesaid definition of manufacture given in Section 2(f)(iii) of Central Excise Act, 1944, if appears that the activity of labeling of MRP stickers on the container / Unit pack amount to manufacture. I admit that we are labeling MRP stickers on the goods sold by us from our

warehouse. We were not aware that removing of importers MRP stickers and putting our MRP sticker amounts to manufacture in light of provisions of Section 2(f)](iii) of Central Excise Act, 1944".

Categorically in this statement he has stated that he was not aware of the legal provisions and the fact that the process undertaken by them amounted to manufacture as per Section 2 (f) (iii) of the Central Excise Act, 1944. Further he was an employee who had joined the company, only in 2004 and used to look into the work of company under the supervision of Shri Vinod Agarwal, Chairman. No evidence has been put forth to establish that he was having any personal knowledge about the liability to confiscation of the goods which he dealt with as the employee. Commissioner has interestingly found Shri S Kotian who to dealt with the same goods in same manner as not liable to penalty under Rule 26, whereas he found Shri Nitin Patki, General Manager to be liable to penalty without recording the evidences on basis of which he could have established mens rea on his part. In our view the penalty imposed on Shri Nitin Patki cannot be justified.

4.6 Shri Vinod Mehta Non- Executive Director in his statement dtd. 05.07.2006 stated as under;

"I am honorary non-executive Director and do not participate in the day to day a face and activities of the Company. I do not know much about Mr. Steven Fortado, the other director. On being ask I have to state that entire activities of the Company TVC Sky Shop Ltd. are entirely and exclusively being handled by Mr. Vinod Agarwal who is the Chairman and MB of the Director. All day to day decisions and activities are managed by Mr. Vinod Agarwal. Also all the policies & planning & execution is managed by Chairman, Mr. Vinod Agarwal."

"Further I have to state that I do not visit the Company. Being non-executive director, I don't look after any affairs of the Company. Only the year ending financial statements are signed by me, as it requires 2 signatures to be signed, the other being Mr. Vinod Agarwal. I hereby under take to present the B/S of the Company for last 5 years by 5 to 6 days."

Para 43 of impugned order records as follows:

"Statement of Mr Vinod Lalchand Mehta, Director of M/s TVC Sky Shops Ltd Mira Road was recorded on 05.07.2006 and 11.09.2006, under the provisions of the Section 14 of the Central Excise Act, 1944 wherein he stated that he was honorary non executive director of M/s TVC Sky Shops Ltd., but did not have any financial interest therein nor was he paid any salary and that the entire activities of the firm were handled by Mr Vinod Agarwal but affirmed that he was aware that they were into tele-shoppy business having a Call Center at Malad. He also expressed his inability to tender documents for investigation because of refusal of Mr Vinod Agarwal to give him."

From the above para it is quite evident that Shri Vinod Agarwal was only an Honorary Non Executive Director in the company and was totally unaware of the activities of the company. It is also interesting to note that in the show cause notice proposing to confiscate the goods he has not even been made noticee, then how mens rea existed in the other case is not understood. In our view no knowledge about any kind could have been inferred in view of the above. Accordingly we are not in position to uphold the penalty imposed upon him under Rule 26 of the Central Excise Rules, 2002.

4.7 In the case of Manohar Singh Rana [2017 (357) ELT 1163 (T-Del)] following has been held:

"6. After going through the facts of the case and submissions of both the sides, it appears that both appellants have been made liable for the penalty under Rule 26 of Central Excise Rules, 2002 based only on the statement of Shri Rajiv Saini, CMD of the assessee company. There are no specific documentary evidences or even the statements of these two appellants indicating that they had a guilty mind, and they had personal knowledge and involvement in the evasion of duty/taxes. As per the provisions of Rule 26 of Central Excuse Rules, 2002, element of personal knowledge or mens rea is an essential prerequisite for imposing the penalty thereunder. The Tribunal in the case of Z.U. Alvi v. Commissioner of C. Ex., Bhopal (supra) observes that employee of the manufacturer does not have any existence independent as far as Central Excise Law is concerned.

6.1 When the Department fails to establish that these two appellants had personal knowledge and guilty mind (mensrea) in respect of the activities of the assessee leading to evasion of duty of Central Excise, the penalty imposed under Rule 26 of Central Excise, 2002 on the appellants is not sustainable. Therefore, following Tribunal's decisions in the case of Z.U. Alvi v. Commissioner of Ex. Bhopal (supra) and in case of O.P. Agarwal v. Commissioner of Customs, Kandla (supra), the penalty of Rs. Five lacs each imposed on both the appellants under Rule 26 of Central Excise Rules, 2002 is hereby dropped."

4.8 In view of discussions as above we summarize our findings in table below:

E/444/2009	Nitin Pataki, General Manager	Penalty set aside
E/445/2009	Vinod Mehta, Non Executive Director	Penalty set aside
E/446/2009	Vinod Agarwal, Chairman	Penalty Reduced to Rs 1.75 lakhs

5.1 Appeal No E/444/2009 and E/445/2009 are allowed.

5.2 Appeal No E/446/2009 is partly allowed to the extent of reducing the penalty to Rs 1,75,000/- (Rupees One Lakh Seventy Five Thousand Only).

(Order pronounced in the open court)

(Sanjiv Srivastava)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

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