CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

REGIONAL BENCH

Excise Appeal No. 1084 of 2009

(Arising out of Order-in-Original No.25/M-I/2008 dated 31.12.2008 passed by the Commissioner of Central Excise, Central Excise Bhawan, 115, Maharishi Karve Marg, Mumbai-I)

Mehul Gandhi ....Appellant

129-B, Anto Hill Warehousing Corporation
Berkatali Marg, Wadala(E), Mumbai-400037

VERSUS

Commissioner of Central Excise, Mumbai-I ... Respondent

115, New Central Excise Building,
Maharshi Karve Road,
Churchgate, Mumbai-400020

WITH

Excise Appeal No. 1085 of 2009

(Arising out of Order-in-Original No.25/M-I/2008 dated 31.12.2008 passed by the Commissioner of Central Excise, Central Excise Bhawan, 115, Maharishi Karve Marg, Mumbai-I)

M/s. Midpoint Software & Electro Systems Pvt. Ltd. ....Appellant

D-22/8, TTC Industrial Area, MIDC,Thane, Belapur Road
Turbhe, Navi Mumbai-400705

VERSUS

Commissioner of Central Excise, Mumbai-I .....Respondent

115, New Central Excise Building, Maharshi Karve Road,
Churchgate, Mumbai-400020

AND

Excise Appeal No. 1086 of 2009

(Arising out of Order-in-Original No.25/M-I/2008 dated 31.12.2008 passed by the Commissioner of Central Excise, Central Excise Bhawan, 115, Maharishi Karve Marg, Mumbai-I)

M/s. Fifth Generation Electro Systems Ltd. ....Appellant

129 B,Antop Hill Warehousing Corporation, Berkatali Marg,
Wadala (E), Mumbai-400037

VERSUS

Commissioner of Central Excise, Mumbai-I .....Respondent

115, New Central Excise Building, Maharshi Karve Road,
Churchgate, Mumbai-400020

<u>APPERANCE:</u>

Shri Chirag Shetty, Advocate for the Appellant

Shri P.K. Acharya, Authorised Representative for the Respondent

CORAM:

HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

FINAL ORDER NO. 86156-86158/2023

Date of Hearing:02.06.2023
Date of Decision:28.07.2023

PER: Dr. Suvendu Kumar Pati

In this second round of litigation, confirmation of duty demand of Rs.2,63,171/- on Fifth Generation Electro Systems Pvt.Ltd, Rs.4,53,742/- on M/s.Midpoint Software & Electro Systems Pvt.Ltd. both under section 11(A) of the Central Excise Act, 1944 alongwith equal penalty under Rule 173Q of Central Excise Rules and a penalty of Rs.1,75,000/- on Shri Mehul Gandhi, Managing Director of both the companies under Rule 209A of Central Excise Rules, 1944 by the Commissioner, Central Excise, Mumbai-I is assailed in this appeal.

2. Fact of the case, in a nutshell, is that Appellants were engaged in the business of development and marketing of packaged softwares and also they were trading in peripheral/parts of computers system. To develop packaged software and to carry out in house research

and development, the Appellants had purchased computer systems for in house use and software development purposes. They assembled computer systems in house but not traded those hardwares. During search conducted in January 1995 in Midpoint Software Company, several documents of the Appellants were taken up by the respondent department and were never returned back to the appellants despite several requests made in writing to the concerned Assistant Commissioner. Ultimately show cause notice dated 13.7.1995 was issued to the Appellants with proposal for recovery of duty and penalty. Common show cause notice dated 22.12.1995 was issued to these Appellants with another M/s.Compac Computer demanding above referred duty and penalty on the Appellants that could not be contested by the appellants for want of documents which were taken into their custody by the department and never returned back. Order-in-Original No.10/97 dated 20.10.1997 was passed after adjudication process that confirmed proposed demands and penalties which were challenged by the Appellants before this Tribunal. This Tribunal, vide order dated 11.8.1998, remanded the matter back to the respondent department with directions to provide copies of relied upon documents and other seized documents and to readjudicate. As no documents were provided, the appellants consistently requested the respondent department through letters to supply the necessary relied upon documents but in December 2006, only part record was received by the appellants. They submitted reply to the show cause notice vide covering letter dated 29.5.2008 with list of witnesses to whom they intended to cross examine but only two witnesses were made available on 12.9.2008, out of whom one could not be examined as documents connected to his evidence were not provided by the department. Order-in-Original dated 31.12.2008 was passed, which were never received by the Appellants and on the request made through letter dated 10.07.2009, Order-in-Original No. 25/M-I/2009 was supplied to the Appellants wherein the duty and equal penalties were recalculated on the basis of documents available with respondent department and confirmed alongwith applicable interest on these Appellants.

3. During the course of hearing of the appeals, learned Counsel for the appellant, Shri Chirag Shetty submitted that the demands were confirmed merely on the basis of statements of witnesses without the same being corroborated with documentary evidence and none of these witnesses except the previous Manager Shri Amit Patel was subjected to cross examination as the Respondent Department failed to produce the witnesses, namely, alleged suppliers for cross examination and only one supplier who was produced for cross examination could not be cross examined by the appellants for want of connecting documentary evidence basing on which he had allegedly deposed his evidence. In placing reliance on the judgements in the case of CCE, Ahmedabad v.Sakeen Alloys Pvt.Ltd.- 2014 (308) ELT 655 (Guj.), Shalimar Rubber Industries v. Collector of Central Excise, Cochin-2002 (11) TMI 91- Supreme Court, Bihariji Manufacture Co.Pvt.Ltd. (SC) and CC.Ex, Delhi-II v. Bass Electronics Industries, 2015 (323) ELT 241 (S.C.), he argued that it would be

trite of law that allegation based purely on statements of witnesses without corroboration with documentary evidence to support such statements cannot be said to have established the allegations for which the demands are liable to be set aside and the Commissioner had perhaps for this apparent reason, dropped the entire demands against M/s. Compac Computer, another assessee in this proceeding since documentary evidence were not available but erroneously had confirmed the demands against these appellants by accepting few available documents, which were otherwise favouring the appellants.

4. To elaborate the same, learned Counsel also had drawn attention of this Bench to para 49 of the Commissioner's order *vis-à-vis* the seized documents to justify those documents were nothing but few invoices issued to different parties through which components of computers were sold together but such invoices clearly indicated that those computers were subjected to 'second sale' that would justify the Appellant's stand that those were old computer peripherals.

5. Learned Counsel for the appellants further submitted that contrary to the judgements passed in the case of Sanket Food Products Pvt.Ltd. vs. Commissioner of Central Excise, Aurangabad-2005 (188) ELT 107 (Tri.-Del.), Tulsyan NEC Ltd. vs. Commissioner of Customs, Chennai-2003 (157) ELT 627 (Mad.) and Shalimar Agencies vs. Commissioner of Customs, Kandla-2000 (120) ELT 166 (Tri.) and on the basis of statements of witnesses who were not presented for cross examination, even after the matter was

remanded by this Tribunal for confirmation of demand, order was passed and those statements were not supported by any evidence that would outweigh the oral evidence. Moreover, in citing judicial decision of Hon'ble Hight Courts and by this Hon'ble Tribunal passed in the case of *Commissioner vs. Swati Polyester-2015 (321) ELT 423 (Guj), Brims Products vs. Commissioner of Central Excise, Patna-2001 (130) ELT 719 (Tri.-Kol.)* and *Kothari Synthetics Indus vs. Commissioner of Central Excise, Jaipur-2002 (141) ELT 558 (Tri.-Del.),* he advanced his argument that it is a settled law that the charge of clandestine removal must be proved with positive evidence of removal of unaccounted goods and in the absence of any such proof, demands in the present case are unsustainable in law and facts.

6. On penalty imposed under Rule 209A of Central Excise Rules, 1944 and Rule 173Q of Central Excise Rules ,1944 placing reliance on the judgement of *Jai Bhawani Metal Industries vs. Commissioner-2004 (176) ELT 733 (Tri.-Mum), Euro Cotspin Ltd. vs. Commissioner-2001 (130) ELT 85 (Tri.-Del.), Sudhir Seth vs. Commissioner-2015 (326) ELT !128, Castrol India Ltd. vs. Commissioner-2008 (222) ELT 408 (Tri.-Mumbai) and Amrit Foods vs. Commissioner-2005 (190) ELT 433,* he also argued that in the absence of any observation that goods are liable for confiscation and without reference to the specific sub-rule of Rule 173Q of Central Excise Rules, 1944 in the show cause notice to have been contravened as well as in the absence of any specific ground for which penalty was imposed on Shri Mehul Gandhi, no such order on confirmation of penalty would be

sustainable. On imposition of interest on the demand raised for the period 1994-95, in citing the decision of this Tribunal passed in the case of *Shri Ukai Pradesh Sahakari Khand Udyog Mandll Ltd. vs. CCE, Surat-2009 (247) ELT 184 (Tri.-Ahmd.),* he argued that the provisions for realisation of interest being introduced for the first time in 1996, its retrospective application on the Appellants from 1996 is unsupported by provisions of such Statue for which the entire order of confirmation of demand and penalty including order for realisation of interest is liable to be set aside.

7. In response to such submissions, learned Authorised Representative Shri P.K.Acharya submitted that in the second round of adjudication, due importance was given to the non-availability of documents by the adjudicating authority and only on the basis of documents which were supplied to the Appellants vide letter dated 7.5.2008 were taken into consideration to confirm only a portion of demand. He further submitted that there is plethora of case law referred in the field that cross examination is not mandatory and confessional statement recorded would be sufficient to confirm the demand and in the instant case not only suppliers have deposed in their statements that they had supplied computer parts and not the entire system that has also been confirmed by Shri Amit Patel, Hardware Engineer, who stated to have been engaged in assembling computers alongwith 3 other Hardware Engineers employed by the appellants and they sell one computer system per month. Additionally, Learned AR was keen to point out that owner/directors of the Appellants company agreed with the statement of Shri Amit

Patel that they were assembling computer systems and sale was effected from their units for which the demands were rightly confirmed by the adjudicating authority. Moreover, he pointed out that Shri Amit Patel himself admitted that "second sale" mentioned in the sale bill had no relevance as there was no second sale involved in the transaction and proof of clandestine clearance, being executed with utmost secrecy, documentary proof of open transaction is difficult to procure but on that score no benefit could be extended to the Appellants.

8. Perused the case record. Admittedly it is second round of litigation before this Tribunal and in the first round of litigation *vide* order dated 11.08.1998 matter was remanded back to the original authority with a direction to provide copies of all the documents relied upon and seized by the Department and also to pass the order on merit but only few documents could be supplied to the Appellant and complete attendance of only one witness could be procured. However, learned Commissioner (Appeals) had passed his order only on the basis of the documents supplied and the statement of the witness who was cross examined. It is pertinent to reproduce his finding made at para 49 of the order, that would speak a lot about the merit of the present proceedings. It reads:-

> *"49. After scrutinizing the annexures to the show cause notice showing list of documents based on which duty demanded is worked and scrutiny of the concerned documents I find that at least in some cases duty has been demanded for goods traded by them without involving any manufacture. Examples of invoices showed*

> *invoice no. 031 dated 21.05.1992 which was for monitor and key Board, and Invoice No. 57 dated 16.07.1992 for Rs.55,000/- for Data Security Package, are relevant in this context. There is also an issue that duty is demanded for the value inclusive of accessories like printers for which no manufacturing activity is involved. So far finalizing the duty to be demanded it is necessary to scrutinize each of the invoices quoted in the SCN.* ***But I find that out of the seized documents all the documents relating to Compac and many of the documents of FGESPL are missing I Hold that it is not consistent with principle of natural justice to confirm any demand based only on the statements recorded. So I do not propose to deal with replies given by Compac.*** *I have to only deal with the replies given by MSESL and FGESPL."*

9. On close scrutiny of the above observation made by the Commissioner, it goes without saying that (i) some of the duty demand were mistakenly made on the goods traded by the Appellant; (ii) duty was also demanded on Monitors, Key-Boards, other peripherals and data security packages; (iii) alongwith the computer system, duty was also charged on the printers though those where accessories; (iv) his ultimate observation is that confirmation of demand would require necessary scrutinisation of each invoices mentioned in the show-cause notice; (v) confirming demand solely on the basis of statement of witnesses would be inconsistent with the principle of natural justice. After making these observations, he noted that as because documents relating to M/s. Compac Computers was not available, no demand could be

confirmed against it, for which he restrained to himself from analysing the replies given by M/s. Compac Computers.

10. Learned Counsel for the Appellant has rightly argued that this being the observation of learned Commissioner, basing on the invoices available through which old computers were sold out as second sale, demand could not be raised since second sale are neither subjected to excise duty nor to the State VAT. He also pleaded parity that could be extended to these Appellants on the basis of the observation made on M/s. Compac Computers, while dropping demand against it.

10.1 To counter this, learned Authorised Representative for the Respondent-Department referred to the Statement of the sole witness Amit Patel, whose evidence could have been treated as completed in view of his cross examination made by the Appellant, and pointed out that Amit Patel had categorically stated during recoding of his statement that the word “second sale” written on the sale-deeds have no relevance as no “second sale” was involved and that the very silence of Amit Patel after his cross examination in response to the query from the adjudicating authority while confronting previous statements recorded on 27.01.1995, 03.06.1995, 27.06.1995, 17.01.1995 and 21.01.1995 as to if he had stated in those statements that he was assembling computer for these two Appellants and for M/s Compac Computers that had led the adjudicating authority to accept his silence as acceptance of his previous statement to be true and correct. However, going by the evidentiary value of the statement of witnesses concerning their silence during evidence, if could amount to admission, the settled position of law is that such silence can be treated as acceptance in favour of a defence primarily made under the Laws of Contract but not against a third person and can never be taken as admission of proof of guilty of another person. Furthermore, as could be observed from the Order-in-Original, denial of witness Amit Patel concerning any second sale being made by the Appellant, it can be said that the Order-in-Original is silent about his rebutting back from his statements. On the other hand, discarding the description made in the invoice as 'second sale' on the ground that 'primary sale' or 'first sale' invoices were not available cannot be said to be logical in view of the fact that only scanty documents were available at the time of second adjudication and not the wholly relied upon documents referred in the show-cause notice. Therefore, it would also be erroneous to accept the argument of the learned AR that at some point of time, those documents were available for which their existence and evidentiary value could not be discarded in unacceptable proposition. I am, therefore, of the considered view that the proposition available in the findings of Commissioner in absolving M/s Compac Computers from its liability would squarely made applied to the present Appellants for the reason that from the invoices copy supplied to the Appellant, that form part of the record, no sale of new computers are noticeable, to justify taxability against them. Further, it would not be out of place to record that even if taxability would have been justified, direction for payment of interest on the duty demand that was made much prior to the introduction of Section 11AB in 1996 is hit by its sub-Section 2, as was available then and also the same would be contrary to the judicial precedent set by the Tribunal and by various High Courts including in the case of *Shri Ukai Pradesh Sahkari Khand Udyog Mandli Ltd. Vs. CCE, Surat* reported in *2009 (247) ELT 184 (Tri.-Ahmd.)* that has received affirmation by the Hon'ble High Court of Gujarat in 2011. Hence the order.

The Order

11. The appeals are allowed and the order passed by the Commissioner of Central Excise, Central Excise Bhawan, 115, Maharishi Karve Marg, Mumbai-I *vide* Order-in-Original No. 25/M-I/2008 dated 31.12.2008 is hereby set aside.

(Order pronounced in open court on 28.07.2023)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

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