CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI

REGIONAL BENCH - COURT NO. I

EXCISE APPEAL No. 86501 of 2013

(Arising out of Order-in-Original No. 530/08/V/COMMR/ANS dated 31.12.2012 passed by Commissioner of Central Excise, Mumbai-V Commissionerate, Mumbai.)

Gupta Warehousing & Forwarding Agency .....**Appellant**
Godown Nos. 1 to 4, No.400, Gupta Compound
Rahnal Village, Anjur Phata
Bhiwandi, District Thane
Maharashtra – 421 302.

VERSUS

Commissioner of CGST, Bhiwandi .....**Respondent**
(Earlier Commissioner of Central Excise, Thane-I/Mumbai-V)
11th & 12th Floor, Lotus Infor Centre
Station Road, Parel (East)
Mumbai - 400 012.

APPEARANCE:

Shri Mukesh Subhash Chandra Soni, Chartered Accountant for the Appellant
Shri Xavier Mascarenhas, Authorised Representative for the Respondent

CORAM:

HON'BLE MR. M.M. PARTHIBAN, MEMBER (TECHNICAL)

FINAL ORDER NO. A/85806/2025

Date of Hearing: 31.01.2025
Date of Decision: 15.05.2025

PER : M.M. PARTHIBAN

This appeal has been filed by M/s Gupta Warehousing and Forwarding Agency through its partner Shri Ashish S. Gupta (herein after, referred to as 'the appellant'), assailing Order-in-Original No. 530/08/V/COMMR/ANS dated 31.12.2012 (herein after, referred to as 'the impugned order') passed by Commissioner of Central Excise, Mumbai-V Commissionerate, Mumbai.

2.1 Brief facts of the case, leading to this appeal, are summarised below:

2.2 The appellant herein, M/s Gupta Warehousing and Forwarding Agency, is a partnership firm providing warehousing facility to various traders/ manufacturers including M/s Bhagyashali Textile Mills (P) Limited, Murbad, Thane District (BTMPL). An intelligence was developed by the officers of the Directorate General of Anti-Evasion (DGAE) that the said BTMPL were indulging in evasion of excise duty payable by undervaluation and also by clandestine clearances of Polyester Texturised Yarn (PTY) by maintaining two sets of records, one for the purpose of payment of central excise duty at grossly undervalued rates, and the other showing collection of actual sale proceeds at higher rates in respect of the said goods. The said intelligence also indicated that BTMPL had been clearing their final product PTY at very low value, by showing fictitious factory gate sales; through actually transferring the goods to the appellant's Godown at Bhiwandi for actual sales at higher values. In this regard the Godown premises of the appellant were searched on 07/07/1999, and certain records were seized along with the PTY/goods that were available at the warehouse totally amounting to 13925.450 Kgs. valued at ₹11,83,663/-. Detailed investigation was conducted by the DGAE and statements were recorded from various persons concerned with the alleged evasion of duty. On completion of the investigation, Show Cause Notice (SCN) reference No. DGAE/BZU/203/ 12(4)93/99 dated 28.09.2000 was issued to BTMPL for demand of duty and imposition of penalty; and to the appellant alleging that they had aided and abetted with BTMPL, by allowing the later to use the appellant's name as a consignee in the delivery orders issued by them. Therefore, the department had alleged in show cause proceedings against the said manufacturer of PTY i.e., BTMPL, that the appellant had abetted with BTMPL for evasion of duty proposing for imposition of penalty on the appellant under Rule 209A of the Central Excise Rules, 1944.

2.3 In adjudication of the aforesaid SCN, learned Commissioner of Central Excise had confirmed the proposals made in the SCN dated 28.09.2000, by issue of Order-in-Original No.17 of 2001 dated 30.03.2001. All the noticees to the SCN including the appellant had preferred an appeal before the Tribunal under appeal numbers being E/2353,2409 & 2410/2001, wherein after hearing the case, the Tribunal vide Final Order dated 30.03.2001 had remanded the case back to the adjudicating authority for fresh adjudication of the case, on the grounds of contravention of principles of natural justice. Accordingly, the said case came up before the Commissioner of Central Excise, Mumbai-V as it was specifically allocated to him for adjudication vide CBIC Order No.16-C.E. dated 15.12.2008. In the *de novo* adjudication proceedings, learned Commissioner of Central Excise, Mumbai-V had confirmand all the proposals made in the SCN, besides imposition of penalty on all the conoticees. Feeling aggrieved, the appellants had filed an appeal before the Tribunal. The Tribunal in its Order S/1024-1026/12/EB/C-II dated 09.04.2012 had again ordered for remanding back the case to the original authority, since part of the documents sought for by the appellant were not given to the appellant as ordered by the CESTAT in its order 08.11.2021, and as these were made available to the appellant later, the matter should be remanded for fresh consideration by the original authority. Accordingly, the matter was again taken up for consideration and in adjudication of the same, the impugned order was passed. In the impugned order dated 31.12.2012, besides confirmation of the demand of central excise duty along with interest on BTMPL under Section 11AB of the Central Excise Act, 1944 and imposition of mandatory penalty under Section 11 AC ibid and imposition of penalty of Rs.50,00,000/- under Rule 173Q of the Central Excise Rules, 1944 on BTMPL, also imposed personal penalty on the Managing Director of BTMPL for Rs.25,00,000/- and on the appellant for Rs.12,50,000/- under Rule 209A of the Central Excise Rules, 1944. Feeling aggrieved with the impugned order imposing the above penalty, the appellant has filed this appeal before the Tribunal.

3.1 Learned Chartered Accountant submitted that the appellant is in the business of warehousing and storage service starting from the year 1988. The appellant provided warehousing services to BTMPL from March 1998 onwards. During investigation, the appellant had stated that they were only providing storage and warehousing services of the goods supplied to them and such warehoused goods were released upon production of delivery order, duly signed by authorised signatory of BTMPL, as per the arrangement agreed vide letter dated 20.02.2008. Similarly, they were providing such warehousing and storage services for nine different manufacturers/traders. The appellant was only performing the services of storage and warehousing and in this regard they were maintaining the records of all inward receipts and outward delivery of the goods. As the manufacturers or traders generally have the unit in the city of Mumbai, they were keeping the goods in the warehouse situated in the outskirts of the city for the reason that octroi is payable only as and when the goods are purchased by the buyer, and its delivery given from the warehouse, in order to save the cost involved in payment of octroi prior hand at the time of clearance of the goods to the warehouse. Learned Chartered Accountant also stated that the adjudicating authority had mentioned in the impugned order that the appellant was only doing the warehousing and storage services and had not given any concrete evidence for having been abetted with BTMPL in evasion of central excise duty. The finding given by the said adjudicating authority on the role of the appellant is that the appellant without the knowledge of quality of the yarn, could not have delivered the goods to the purchasers and required details of quality and quantity of yarn to be delivered, though mentioned in their delivery orders, but were never shown in the excise invoices. In this regard, learned Chartered Accountant pleaded that the role of the appellant was limited to give delivery of the goods as per instruction contained in the delivery order and that they appellant had no prior knowledge that the goods are being undervalued or the central excise duty has not been discharged properly on such goods, enabling those goods liable for confiscation. Further, as the BTMPL were showing the appellants warehouse as their own storage facility/warehouse and the ownership of the goods were held by them, the Chartered Accountant pleaded that the appellant had no role in improper payment of central excise duty or in fabrication of the documents enabling for evasion of Central Excise duty. Accordingly, he pleaded that there is no sufficient grounds for imposition of penalty.

3.2 Learned Chartered Accountant had relied upon the decision of the Tribunal in the case of *Nirmal Transports Vs. Commissioner of Central Excise, Pune-II* – 2014 (312) E.L.T. 803 (Tri.-Mumbai) to state that penalty is not imposable on the appellant, in the absence of any evidence of abetment or knowledge of evasion; mere allegation of clandestine removal or abetment is not sufficient and there is no presumption that the warehouse owner was having knowledge of clandestine removal by BTMPL. Hence, he pleaded that on this ground alone, the impugned order is liable to be set aside.

3.3 Learned Chartered Accountant also stated that the department was well aware of the fact that there is no evidence of any forgery or fake nature of the documents to state that the appellant had an intent abetting with BTMPL for evading payment of Central Excise duty. Therefore, he pleaded that imposition of penalty on the appellant is incorrect and in this regard he relied upon the decision of the Tribunal the case of *R.C. Jain Vs. Commissioner of Central Excise & Service Tax, Surat* – 2016 (334) E.L.T. 115 (Tri.- Ahmd.).

3.4 In view of the above, it was prayed that there is no case for imposition of penalty on the appellant in this case and accordingly learned Chartered Accountant requested for allowing the appeal filed by them.

4. On the other hand, learned Authorised Representative for Revenue reiterated the findings recorded by the Commissioner in the impugned order, and stated that since the manufacturer BTMPL have issued the central excise invoices in the name of the appellant, from where the goods were actually delivered to their customers, the role of the appellant in abetting with BTMPL has been proved and therefore penalty has been rightly imposed on the appellant. Therefore, he claimed that the appeal is liable to be dismissed.

5. Heard both sides and perused the records of the case.

6. The short issue for consideration before the Tribunal in this case is,

(i) whether the appellant is in any way involved in the alleged Central Excise duty evasion of Polyester Texturised Yarn (PTY), which was manufactured and cleared by M/s Bhagyashali Textile Mills (P) Limited through the warehouse of the appellant, by mis-declaration and undervaluation, or not?

(ii) whether the appellant is liable for imposition of penalty under Rule 209A of the Central Excise Rules, 2004 or not?

The period of dispute relates to financial years 1997-98, 1998-99.

7. In order to address the above issues, I would like to refer the relevant legal provisions contained in the Central Excise Act, 1944 and the Central Excise Rules, 1944.

The Central Excise Act, 1944

"Section 3. *Duties specified in the schedule to the Central Excise Tariff Act, 1985 to be levied.-*
(1) There shall be levied and collected in such manner as may be prescribed duties of excise on excisable goods other than salt which are produced or manufactured in India and the duty on Salt manufactured in, or imported by land into, any part of India as, and at the rates, set forth in the Schedule to the Central Excise Tariff Act, 1985:…."

The Central Excise Rules, 1944

"Rule 9. Time and manner of payment of duty.-
(1) No excisable of goods shall be removed from any place where they are produced, cured or manufactured or any premises appurtenant there to, which may be specified by the Collector in this behalf, whether

for consumption, export or manufacture of any other commodity in or outside such place, until the excise duty leviable thereon has been paid on such place and in such manner as prescribed in these Rules or as the Collector may require and except on presentation of an application in the proper form and on obtaining the permission of the proper officer on the form:

Provided that such goods may be deposited without payment of duty in the store-room or other place of storage approved by the Collector under Rule 27 or Rule 47 or in the warehouse appointed or licensed under Rule 140 or may be exported under bond as provided in Rule 13:…….

Rule 173Q. Confiscation and penalty.-
(1) If any manufacturer, producer or licensee of a warehouse—
(a) removes any excisable goods in contravention of any of the provisions of these rules; or
(b) does not account for any excisable goods manufactured, produced or stored by him; or…..
(d) contravenes any of the provisions of these rules with intent to evade payment of duty,
then, all such goods shall be liable to confiscation and the manufacturer, producer or licensee of the warehouse, as the case may be, shall be liable to penalty not exceeding three times the value of the excisable goods in respect of which any contravention of the nature referred to in clause (a)…. (d) has been committed, or five thousand rupees, whichever is greater…..

Rule 209. Confiscation and penalty.-
(1) Notwithstanding anything contained in any other provision of these rules save and except rule 173Q, if any manufacturer, producer or licensee of a warehouse,—
(a) removes, any excisable goods in contravention of any of the provisions of these rules; or
.....
(d) contravenes any of the provisions of these rules with intent to evade payment of duty,
then all such goods shall be liable to confiscation and the manufacturer, producer or licensee of the warehouse, as the case may be, shall be liable to penalty not exceeding three times the value of the excisable goods in respect of which any contravention of the nature referred to in clause (a)…. (d) has been committed, or five thousand rupees, whichever is greater…..

Rule 209A. Penalty for certain offences.-
(1) *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 is 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 penalty not exceeding three times the value of such goods or five thousand rupees, whichever is greater.”*

8.1 From plain reading of the legal provisions under the Central Excise Act, 1944 and the Central Excise Rules, 1944, it is clear that a penalty may be imposed on any person under Rule 209A ibid, if it is established that in relation to 'excisable goods' which are liable to confiscation under Rule 173Q ibid or Rule 209A ibid, such a person had knowledge or had reason to believe, that any act or omission to do an act by him, would enable violation of Central Excise statute, and would lead to confiscation of such excisable goods. In fact, the appellant is the warehouse operator, and had actually stored the excisable goods manufactured by BTMPL before its delivery to the customers of BTMPL, on the basis of Delivery Orders and Central Excise Invoices issued by BTMPL. Thus, it is not the case of the Revenue, that in the factual matrix of the present case, that the impugned excisable goods were clandestinely removed by the appellant, or that the appellant is in any way concerned with preparation of documents for undervaluation or misdeclaration of the excisable goods alleged to have been removed clandestinely without payment of appropriate central excise duty.

8.2 Learned Commissioner of Customs, had discussed about the role of appellant, in detail at paragraph 77 of the impugned order, for coming to the conclusion on imposition of penalty on him. The same is extracted and given below:

> *"77 The role of GWFA[1] (noticee no.3) is also suspicious for the reason that the goods were delivered to purchases as per DO's containing details of quality and quantity of yarn to be delivered however, it is on record that quality is of yarn in cartons never shown in the invoices. Without the knowledge of quality of yarn, the goods could never be delivered to purchasers. Therefore, noticee no.3 has actively convened (connived) with noticee no.1, in evasion of excise duty. This act on the part of noticee no.3 has rendered them liable for penalty under Rule 209A of the Central Excise Rules, 1944.*
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> *78 The demands of the evaded payable duty of excise, aggregating Rs.2,53,69,110/- (Rupees two crores fifty three lakhs sixty nine thousand one hundred ten only), therefore, would become liable to be determined and is determined or along with the payable accrued interest under Section 11A(2) and Section 11AB of the Central Excise Act, 1944."*

On perusal of the above findings in the impugned order, along with various documents shown as evidences, it is noticed that in an illustrative case shown in the impugned order that the actual amount collected for the sale of the impugned goods as per Delivery Order No.927 dated 21.10.1997 was shown as Rs.100/ per kg., whereas the corresponding central excise

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[1] A*bbreviated the appellant's name of M/s Gupta Warehouse & Forwarding Agency for short as GWFA*

invoice No.272 dated 11.10.1997 to such DO, indicate that duty of excise was paid on the assessable value of Rs.62/- per kg. establishing clearly the presence of gross undervaluation by BTMPL, the manufacturer of excisable goods. I also find from the records that in the appeal preferred by BTMPL and the co-appellant Shri Omprakash Agarwal, along with stay petition before the Tribunal vide appeal number E/86403/2013, since the pre-deposit of the admitted duty liability of Rs.1.36 crore and 10% of the penalty, ordered vide Stay Order No. S/1239-1240/EB/C-II dated 16.12.2013, BTMPL had failed to comply with payment of such pre-deposit, and therefore the appeal filed by them was dismissed for non-compliance vide Order No. A/167/14/EB/C-II dated 25.02.2014. However, Co-appellant had complied with required pre-deposit and the same was noted by the Tribunal in the said order. Therefore, it is a settled position that the confirmation of demands against BTMPL had attained finality in the appellate proceedings.

8.3 Further, Shri Kishanchand S Gupta, Partner of appellant warehouse had given his voluntary statement recorded on 07.07.1999, explaining the procedure followed by them in storage of the PTY/goods manufactured by BTMPL in their godowns, in which he had stated that the appellant had provided only warehousing services to BTMPL, and they have neither purchased the said goods nor did they sell those goods. The appellant held no responsibility for the warehoused goods, and in the event of theft or fire, it is the responsibility of the manufacturer BTMPL, and accordingly the goods were insured by themselves. Upon receipt of the PTY/goods from BTMPL for warehousing/storage in their godowns, they use to enter the receipt of materials in general ledger book and prepare Goods Receipt Notes (GRNs), copies of which were given to the manufacturer/BTMPL. The transporters who come for receiving delivery of PTY to the customers, present two copies of the delivery orders issued by BTMPL along with challan, one copy of Lorry Receipt. On the basis of those documents and after its verification with the documents available with them, the appellant used to give delivery of the goods and permit loading on the vehicle. It is also recorded in the said statement that the appellants were unaware of the exact details of the consignee, even though the incoming transporters carry documents like central excise invoices, delivery challans/Lorry receipts. For the storage of the goods in the appellant’s warehouse, they collected rental charges as was mutually agreed by them. From the above facts, it transpires that the appellant had provided the services of warehousing or storing the goods/PTY, which were manufactured by BTMPL and in which, there was clear case of undervaluation and the mismatch of complete details of address etc. with respect to the consignee/end customer. However, in the letter dated 20.02.1998, and 06.04.1998, BTMPL had instructed the appellant that without the valid signature of the authorised persons viz., Mr. Omprakash Agarwal, Mr. Shushil Kumar Nahata and Mr. Sashi Kumar Pillai, who specimen signatures were authorised by the director of BTMPL, no material should be issued to the party and as per agreement entered into between them the bilty charges will be Rs.25 per carton. Further, it is also explained by the learned Chartered Accountant that BTMPL received the goods from BTMPL in bags or cartons, on which numbers are written by BTMPL. Whenever any Delivery Order was issued by BTMPL, they used to give the reference numbers of the bags/carton which should be delivered to their customers. Since, the appellant had maintained record of such numbers on bags/ cartons which were initially received from BTMPL, when these were to be sent to BTMPL's customers through transporters, they simply followed the instructions of BTMPL. From the aforesaid factual matrix of the case, I find that appellant was unaware of the exact quality/description of the goods and followed the numbers printed/written on the bags/carton by BTMPL for recognising the identity of the goods and for its delivery, in providing warehousing and storage facility to BTMPL. Further, I find that there is no specific finding given in the impugned order, for proving that the appellant having been done an act or omitted to have done certain act, or having a reasonable belief or understanding that such action done or omitted to have been done by him would lead to confiscation of impugned goods. From the above factual position, I am of the considered view, that penalty under Section 209A ibid cannot be imposed on the appellant.

8.4 Further it is also on record, that the SCN did not propose for confiscation of the seized goods under panchanama dated 07.07.1999, which was subsequently released provisionally upon execution of bond and bank guarantee by BTMPL, and the learned Commissioner also did not confiscate the impugned goods. In the absence of confiscation of goods in the impugned order under Rule 173Q ibid or Rule 209 ibid, which are alleged to have been undervalued and clandestinely removed, it is not feasible to fasten the liability on the appellant on the ground that they had knowledge of such goods being liable to confiscation, when those were stored in their warehouse on behalf of BTMPL. Hence imposition of penalty under Rule 209A ibid without providing such an important ingredient of the existence of knowledge on the part of the appellant or reasonable ground to believe that their act of storage/warehousing would lead to confiscation of impugned goods does not have the sanction of law and thus, to this extent the impugned order imposing penalty under Rule 209A of the Central Excise Rules, 1944 on the appellant, is not legally sustainable.

9.1 Further, in the case R.C.Jain (supra) the Co-ordinate Bench of this Tribunal have held that the penalty under Section 112(b) of the Customs Act, 1962 and Rule 209A of the Central Excise Rules, 1944 is not sustainable in the absence of establishing that the appellant was aware for forgery or fake nature. The relevant paragraph of the said order is extracted and given below:

> *"**6.** With respect to remaining appeals, we have gone through the records of the present appeals and the Order No. A/1491 to 1492/WZB/AHD/2012, dated 10-10-2012 passed by this Bench in the case of Shri T.S. Makkar v. CCE, Surat [2014 (312) E.L.T. 427 (Tri.-Ahmd.). On a comparison of the facts of the present proceedings and the facts involved in the case before this Bench while passing order, dated 10-10-2012, we find that the same are more or less similar. It is thus held that as the appellant has not dealt with or transported the goods in any manner. Nor it was established that appellant was aware of the forged/fake nature of license, then no penalties are invokable under Section 112(b) of the Customs Act, 1962 and or Rule 209A of the erstwhile Central Excise Rules. Accordingly, we allow the appeals filed by the appellants holding that the same are covered as per ratio laid in our Order No. A/1491 to 1492/WZB/AHD/2012, dated 10-10-2012 passed in the case of Shri T.S. Makkar v. CCE, Surat. Appeals filed by these appellants are allowed."*

9.2 I further find that in the case Nirmal Transports (supra) the Co-ordinate Bench of this Tribunal have held that the penalty under Rule 209A of the Central Excise Rules, 1944 is not imposable on mere allegation and the act of aiding and abetting of the appellant is to be proved by the department. The relevant paragraph of the said order is extracted and given below:

> *"10.1 …….Further, we have gone through the impugned order, wherein the Commissioner has held that the warehouse of M/s. Nirmal Warehouse is the place of removal of the goods. In that it cannot be presumed that the transporter or the warehouse's owner was having any knowledge of the removal of the goods without paying Central Excise duty. Moreover, from statement of Shri Nakate, it is clear that delivery was made to the customers and as per the delivery orders received from M/s. MMSL and on their directions, delivery of goods were being made. In that the appellants had no occasion to deal with the duty paying documents. Further, the reliance placed by the learned Advocate on case law is*

appropriate as in the case of Chawla Highway (supra) this Tribunal had held that awareness of bad documentation/defective documentation, did not establish the involvement of the transporter in evasion of Central Excise duty. In the absence of evidence to show that the transporter was aware that he was aiding and abetting evasion of Central Excise duty, penalty was not imposable. In this case also, there was no finding in the impugned order that the appellants had any knowledge of evasion of Central Excise duty by M/s. MMSL. It is the duty of the department to prove that the transporter/warehouse owner had dealt with these goods knowing that the goods were non-duty paid. Department has failed to discharge this onus in this case. Mere allegation that the appellants had aided and abetted is not sufficient. Accordingly, we hold that the penalties imposed on the appellants namely, M/s. Nirmal Transports and M/s. Nirmal Warehouse are not sustainable."

10. In view of the foregoing discussions and analysis, and on the basis of the orders of the Tribunal referred above, I am of the considered opinion that the impugned order imposing penalty on the appellant under Rule 209A of the Central Excise Rules, 1944, is not legally sustainable. Therefore, I am of the considered view, that the impugned order passed by the learned Commissioner of Central Excise does not stand the scrutiny of law to the extent it has imposed penalty on the appellant and therefore such portion of the impugned order is liable to be set aside.

11. In the result, the impugned order dated 31.12.2012 to the extent it had imposed penalty on the appellant is set aside and the appeal is allowed in favour of the appellant.

(Order pronounced in the open court on 15.05.2025)

(M.M. PARTHIBAN)
MEMBER (TECHNICAL)

Sinha