

IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED : 12.03.2021
CORAM

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
and
THE HONOURABLE MS.JUSTICE R.N.MANJULA

Judgment Reserved On 26.02.2021	Judgment Pronounced On 12.03.2021
------------------------------------	--------------------------------------

C.M.A.Nos.1090, 2714 & 2715 of 2016

C.M.A.No.1090 of 2016 :-

A.R.Shanmughasundaram ...Appellant/Appellant

-vs-

- 1.The Customs, Excise and Service Tax
Appellate Tribunal, South Zonal Bench,
Chennai, Shastri Bhavan Annex,
Haddows Road, Chennai-600 034.
- 2.The Commissioner of Central Excise,
No.1, Foulks Compound, Anai Medu,
Salem-636 001. ...Respondents/Respondents

Appeal under Section 35G of the Central Excise Act,
1944 against the order Final order No.41516/15 made in
Appeal No.E961/2005-DB order dated 06.10.2015 on the file
of the Customs, Excise and Service Tax Appellate Tribunal,
South Zonal Bench, Chennai.

For Appellant : Ms.L.Maithili
for M/S.I.Maithili Associates

For Respondents : R1 - Mr.V.Sundareswaran,
Senior Standing Counsel
: R2 - Tribunal

C.M.A.No.2714 of 2016 :-

Commissioner of Central Excise,
No.1, Foulks Compound,
Anai Medu, Salem-636 001. ...Appellant/Respondent

-vs-

M/s.Caress Industries,
No.302 & 303, Hospital Road,
Kavindapadi, Erode-638 456.

...Respondent/ Appellant

Appeal under Section 35G of the Central Excise Act, 1944 against the Final order No.41515/15 made in Appeal No.E960/05-DB order dated 06.10.2015 on the file of the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai.

For Appellant : Mr.V.Sundareswaran,
Senior Standing Counsel
For Respondent : Ms.L.Maithili

C.M.A.No.2715 of 2016 :-

The Commissioner of Central Excise,
No.1, Foulks Compound, Anai Medu,
Salem-636 001. ... Appellant/Respondent

-vs-

A.R.Shanmughasundaram ...Respondent/ Appellant

Appeal under Section 35G of the Central Excise Act, 1944 against Final order No.41516/15 made in Appeal No.961/2005-DB order dated 06.10.2015 the order dated 06.10.2015 on the file of the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai.

For Appellant : Mr.V.Sundareswaran,
Senior Standing Counsel
For Respondent : Ms.L.Maithili

COMMON JUDGMENT

T.S.Sivagnanam, J.

These appeals filed under Section 35G of the Central Excise Act, 1944 (hereinafter referred to as "the Act"), are directed against the order dated 06.10.2015 passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai ("the Tribunal" for brevity) in Appeal Nos.E/961/2005-DB and E/960/2005-DB.

2.C.M.A.No.1090 of 2016 has been filed by the appellant, who was a partner of M/s.Caress Industries,

which was engaged in the manufacture of Acid Slurry for which, Linear Alkyl Benzene (LAB) and Oleum (concentrated Sulphuric Acid) are the main raw materials.

3.The appellant-partner is aggrieved by the order of the Tribunal imposing penalty of Rs.2,00,000/- on him, though the Tribunal reduced the penalty from Rs.50,00,000/- to Rs.2,00,000/-.

4.The appellant-partner has raised the following substantial questions of law, which were admitted on 12.09.2016:-

"i. Whether the Tribunal is right in upholding the imposition of penalty on a partner of the firm, despite holding that the charge of clandestine removal and contravention of law against the firm is not sustainable and the duty demand is consequently set aside?

ii. Whether the provisions of Rules 9(2), 173Q, 226 of the Central Excise Rules, 1944 can be invoked against an individual who is not a manufacturer, producer, registered person of a warehouse or a registered dealer?

iii. Whether any penalty can be imposed under Rules 9(2), 173Q, 226 against the Partner of a firm when the entire duty demand against the firm has been set aside on merits?

iv. Whether penalty under Rules 9(2), 173Q, 226 can be imposed on the appellant without even stating any commissions or omissions of the appellant which would constitute an offence under Rule 173Q of the Central Excise Rule, 1944? and

v. Whether penalty under Rule 173Q can be imposed on the appellant when the appellant admittedly not the owner of the goods ordered to be confiscated and is in no way connected with the manufacture, production or storage thereof?"

5.C.M.A.Nos.2714 and 2715 of 2016 have been filed by the Revenue challenging the order of the Tribunal, insofar

as it has set aside the entire duty demanded from the firm and reducing the penalty imposed on the appellant viz., the partner of the firm.

6.The Revenue has raised the following substantial questions of law, which were admitted on 15.12.2016:-

"1.Whether the order of the Tribunal is perverse and contrary to the provisions of the Central Excise Act, 1944 with regard to the admitted facts and findings rendered by the Adjudicating Authority?

2.Whether the Tribunal was justified in ignoring the factual findings of the Adjudicating Authority with regard to the purchase of Linear Alkyl Benzene (LAB) from Southern Warehouse Corporation (SWC) through non-existence fictitious firms and payment were also made by respondent and received by employees of SWC?

3.Whether the Tribunal was justified in interfering with the factual findings fortified by the deposition made which was not withdrawn by respondents?

4.Whether the Tribunal can ignore the preponderance of probability in absence of any recorded or circumstantial evidence let in by the respondent with regard to the clandestine removal of dutiable goods without payment of duty legally due to the Government? And

5.Whether the Tribunal was correct in reducing the penalty imposed under the provisions of the Central Excise Act, 1944 read with Central Excise Rules without any reasons?"

7.In this judgment, we shall refer to the firm as the 'assessee-firm', the partner as the 'appellant-partner' and the Department as the 'Revenue'.

8.The following facts would be relevant to consider the substantial questions of law, which have been framed. The assessee-firm purchases raw materials from dealers such as

Southern Warehousing Corporation (SWC) and Tamil Nadu Petro Products Ltd., (TNPL). The Firm was registered as a Small Scale Industry and was availing exemption in terms of Notification No.175/86, dated 01.03.1986, as amended. On 12.01.1993, an inspection was conducted by the Officials of the Central Excise Department in the manufacturing unit of the firm and the stock of raw material was verified, a quantity of 440 kgs of Acid Slurry was seized while in transit at Perundurai and another quantity of 140 kgs was seized from the premises of another concern, viz., Baby Star Soap Works, Perundurai.

9.The inspection led to issuance of show cause notice dated 19.04.1994 to the assessee-firm as well as to the appellant-partner and two others alleging that the firm had clandestinely manufactured and removed final product (Acid Slurry) without payment of duty and the others had played a role in the said clandestine removal. The show cause notice proposed to demand a sum of Rs.3,14,65,370/- as Central Excise duty for the Acid Slurry alleged to have been clandestinely removed from the factory and further demand of Rs.7,350/- for the final product, which was seized.

10.In the show cause notice, the allegation was that the firm was manufacturing and clandestinely removing Acid Slurry from its factory in excess of the declared quantity by using LAB, purchased under fictitious names. The authorities proceeded on the basis that the assessee-firm had cleared Acid Slurry valued over Rs.2 Crores during 1992-93 and 1993-94, which resulted in issuance of five show cause notices demanding duty for the period from October, 1993 to February, 1995 by denying the benefit of SSI exemption under Notification No.1/93 dated 28.02.1993. The total duty demanded in the five show cause notices was Rs.5,94,012/-.

11.The show cause notice dated 19.04.1994, along with five show cause notices, was taken up for adjudication by the Commissioner of Central Excise & Customs, Coimbatore (the then jurisdictional Commissioner), which culminated in an Order-in-Original No.146 of 1996, dated 10.09.1996, confirming the demand of excise duty on Acid Slurry and also confirming the demand of duty in the five show cause notices. The Adjudicating Authority imposed penalty of Rs.50,00,000/- on the appellant-partner, penalties were also imposed on the other co-noticees.

12. Aggrieved by such order, the assessee-firm filed appeal before the Tribunal, which remanded the matter for fresh consideration by the Adjudicating Authority, by its order dated 09.08.2002 wherein, certain directions were issued to the Commissioner, pursuant to which, the Commissioner of Central Excise, Salem took up the matter for de novo consideration, which culminated in Order-in-Original No.30 of 2005, dated 03.08.2005 in which, the duties of Rs.2,46,08,652/- and Rs.5,94,012/- were demanded and penalty of Rs.50,00,000/- was imposed on the appellant-partner under Rules 9(2), 173Q and 226 of the Central Excise Rules, 1944. Penalty was not imposed on the assessee-firm.

13. Aggrieved by such order dated 03.08.2005, the assessee-firm as well as the appellant-partner filed appeals before the Tribunal, while the other co-noticees did not challenge the order.

14. The appeal filed by the assessee-firm was allowed by order dated 06.10.2015, setting aside the entire duty demanded on the firm on the ground that the charge of clandestine removal of Acid Slurry was based on assumptions, presumptions and not sustainable. However, the Tribunal upheld the penalty imposed on the appellant, however reduced the penalty from Rs.50,00,000/- to Rs.2,00,000/-, by observing that it is doing so taking into account the over all circumstances of the case and considering that the demand of duty on the firm was set aside. Aggrieved by the order of the Tribunal, upholding the levy of penalty to the extent of Rs.2,00,000/-, the appellant-partner is before us.

15. Since the Revenue is aggrieved by the order passed by the Tribunal in its entirety, viz., setting aside the entire duty demanded from the assessee-firm and reduction of penalty on the appellant-partner, we first take up the grounds canvassed by Mr.V.Sundareswaran, learned Senior Standing Counsel.

16. It is submitted that the Tribunal ought to have considered that adequate evidence was available as clearly brought out in the show cause notice dated 19.04.1994, as well as in the Order-in-Original dated 03.08.2005, to substantiate the allegation that LAB was procured by the assessee-firm in fictitious names and the same has been

used for clandestine manufacture and removal of final product, viz., Acid Slurry. Further, the Tribunal ought to have taken note of the role played by SWC, who were the dealers of LAB for TNPL and the assessee-firm had procured LAB only through SWC and there were enough records to show that cheques were issued in the names of the employees of SWC and these persons encashed the cheques and taken up the jobs for supply of LAB from TNPL in the name of third parties to be ultimately supplied to the assessee-firm.

17. Further, the learned Senior Standing Counsel elaborately referred to the modus adopted while effecting payments for procurement of the raw material and submitted that the connection between the fictitious firms and the assessee-firm was established beyond doubt. Further, it is submitted that there was another company under the name and style M/s. Fintex Chemicals, which was floated by the close relative of the appellant-partner, who was the Managing Partner of the assessee-firm and this firm was utilized for making payments to TNPL through SWC. Further, it is submitted that even without making any purchase of LAB, M/s. Fintex Chemicals had issued cheques to TNPL through SWC and the payments were adjusted only for the supplies made to the assessee-firm in fictitious names.

18. It is further submitted that the Tribunal failed to note that it had been established by investigation that Acid Slurry, clandestinely manufactured by the assessee-firm, had been marketed only through M/s. Fintex Chemicals and therefore, it was only logical that M/s. Fintex Chemicals had paid for supplies of LAB received by the assessee-firm in their own name and in the names of fictitious firms/units. Further, it is submitted that the assessee-firm had mostly used their own tanker vehicle for transportation, which was evidenced in the invoices of TNPL raised in the name of the assessee-firm and also in the names of 12 others, which were non-existing units.

19. The learned counsel also referred to a statement recorded from the Manager of the transport firm. Further, the learned counsel elaborately referred to the factual matrix and submitted that the finding rendered by the Tribunal was utterly perverse and calls for interference. In support of his contention, the learned placed reliance on the decisions of the Division Bench of this Court in the case of Lawn Textile Mills Pvt. Ltd., vs. CESTAT, Chennai [2018 (362) E.L.T 559 (Mad.)]; Commissioner of Central

Excise, Salem vs. CESTAT, Chennai [2019 (366) E.L.T. 647 (Mad.)]; and the decision of the Bangalore Tribunal in Rukmini Industries vs. Commissioner of Central Excise, Hyderabad [2004 (174) E.L.T. 600 (Tri-Bang.)].

20. Ms. L. Maithili, learned counsel appearing for the appellant-partner as well as the assessee-firm submitted that the grounds raised by the Revenue, in their appeals, are entirely factual and there is no substantial question of law arising for consideration and this Court will not re-appreciate the factual aspects, which have been elaborately dealt with by the Tribunal.

21. Insofar as the appeal by the appellant-partner is concerned, the Tribunal having set aside the entire duty demand on the assessee-firm, ought to have vacated the penalty imposed on the appellant-partner and though the Tribunal reduced the penalty, it has not given any reason as to why penalty has to be imposed on the appellant-partner. In support of her contention, the learned counsel referred to the decisions in the case of Commissioner vs. Mahesh Silk Mills [2015 (319) E.L.T. A52 (Guj.)]; Commissioner of C.Ex. Ahmedabad vs. Gopi Synthetics Pvt. Ltd., [2014 (310) E.L.T. 299 (Guj.)]; Commissioner of C.Ex., Meerut-I vs. R.A. Castings Pvt. Ltd., [2011 (269) E.L.T. 337 (All.)]; Commissioner of CGST and Central Excise vs. Wizard Fragrances [2019-TIOL-541-HC-ALL-CX.]; Commissioner of Central Excise, Agra vs. Aman Gupta [2016 (338) E.L.T. 28 (All.)] and Jubilant Agri & Consumable Products Ltd., vs. CESTAT [2016 (41) S.T.R. 8 (All.)].

22. We have heard Ms. L. Maithili, learned counsel appearing for the appellant-partner and the assessee-firm and Mr. V. Sundareswaran, learned Senior Standing Counsel for the Revenue and carefully perused the materials placed on record.

23. The present appeals are challenging the correctness of the order passed by the Tribunal, which reversed the Order-in-Original passed by the Commissioner of Central Excise, pursuant to an order of remand passed by the Tribunal in the earlier round of litigation.

24. In the first round of litigation, when the matter was dealt with by the Tribunal, there was a difference of opinion between the Hon'ble Judicial Member and the Hon'ble Technical Member. The Hon'ble Judicial Member opined that

it is not sufficient for the Department to show the evidence of receipt of only one material and that too, through various sources said to have been received without establishing the quantum said to have been removed by TNPL, the main suppliers of LAB and that the Commissioner ought to have given a detailed finding as to how the assessee-firm have received that much quantity of LAB and as to how the assessee-firm had made arrangements to purchase the raw material LAB, as according to the assessee-firm, they neither had funds, nor they had manufacturing facility, nor manufacturing capacity and apart from that, they had no storage capacity for such quantity of material alleged to have been dealt with by the assessee-firm. The Hon'ble Judicial Member held that the order passed by the Commissioner was not a speaking order and required to be set aside for de novo consideration.

25. The Hon'ble Technical Member held that the Department need not prove the alleged production and clandestine removal of Acid Slurry with clinical accuracy and the facts establish unaccounted production and clandestine clearance by the assessee and once there had been clandestine manufacture and clearance of excisable goods, without payment of duty, the longer period of limitation invoked in the Order-in-Original and the penalty imposed is sustainable.

26. On account of the differing view, the matter was referred to the third member, who agreed with the opinion of the Hon'ble Judicial Member and accordingly by majority opinion, the case was remanded for fresh adjudication to the Original Authority with regard to the issue of clandestine removal.

27. What is important to note is that the order of remand passed by the Tribunal, for de novo adjudication by the Commissioner, is after issuing specific directions as to how adjudication should proceed. It was pointed out that the Adjudicating Authority has failed to take into consideration the most important criteria required for manufacture, that is, LAB and Oleum, in terms of the quantum of raw material required and final product required to be manufactured. Noting that the main contention of the assessee was with regard to the non-receipt of both the ingredients and that the transportation of the raw material requires special tankers and special storage facility and cannot be kept in drums, the Tribunal observed that this

valuable piece of defence and rebuttal evidence has not been taken into consideration and therefore, concluded that the order of the Commissioner dated 10.09.1996 was a non-speaking order.

28.Further, with regard to the allegation of receipt of important item clandestinely and clandestine manufacture and removal of final product, it was held that it is for the Department to show that the assessee had received and clandestinely manufactured with all the raw material and it is not sufficient for the Department to show the evidence of receipt of only one material and that too through various sources said to have been received without establishing the quantum said to have been removed by TNPL. Further, it held that it was for the Department to establish that the entire quantum of raw material was removed and supplied through SWC directly or indirectly and the evidence cannot be oral and it has to be shown through proper documentary evidence. Further, the Tribunal faulted the Commissioner for not giving detailed findings as to how the assessee-firm have received that much quantity of LAB and as to how the assessee-firm had made arrangements to purchase the raw material LAB to the extent of Rs.8 Crores, as according to the assessee, they neither had funds, nor they had manufacturing facility, nor manufacturing capacity. Therefore, the Tribunal observed that the technical aspect of manufacture has not been gone into by the Commissioner except to hold that the defence of the assessee to be an afterthought and such finding has to be rejected.

29.Further, the Tribunal has observed that the Commissioner ought to have analysed the rebuttal evidence and given findings one way or the other, instead of summarily rejecting it as an afterthought. Further, the Tribunal faulted the Commissioner for not having discussed on the aspect of non-receipt of Oleum and that he has not shown as to how the Acid Slurry was manufactured and to whom, it was removed.

30.Further, a prima facie finding was given that the evidence relied on by the Revenue gives an impression that the Department has not established their case of clandestine removal and manufacture of Acid Slurry. After rendering such a finding, the Tribunal held that they are constrained to give directions to the Department to take the electricity consumption figures and to see as to

whether the alleged suppression of receipt of inputs and clandestine manufacture can be established, after giving full opportunity to the assessee. The Tribunal took note of its earlier decision in the case of *Jaya Soap Works vs. Collector of Central Excise* [1995 (79) E.L.T 92 (Tri.)] and while remanding the matter for de novo adjudication, directed that the Commissioner shall re-adjudicate the matter, in the light of the observations made and directions given in *Jaya Soap Works (supra)*, which was held to be a matter identical to that of the assessee's case. Further, the Commissioner was directed to take into consideration the judgments pertaining to confirmation of manufacture of removal of goods and in particular, in the case of *Krishna Bottling (P) Ltd. vs. Commissioner* [1999 (32) R.L.T. 845]. Thus, the order of remand for de novo consideration was in the light of the observations and directions issued in the order.

31. The Adjudicating Authority, being an authority subordinate to the Tribunal, is bound by the directions, as the majority view of the Tribunal confirmed the order of remand for de novo consideration. Thus, if there is any infraction of the directions issued by the Tribunal, then it would be a matter, which can be taken note of by the Tribunal in the second round of litigation and it would call for interference. Thus, we are required to see as to whether the Commissioner, on de novo adjudication, had taken note of the directions issued by the Tribunal, while remanding the matter or merely confirmed the earlier proposal by slightly revising the demand. This aspect of the matter has been elaborately brought out by the Tribunal in the impugned order.

32. Mr. V. Sundareswaran, had elaborately taken us through the entire order of adjudication dated 03.08.2005, in order to impress upon us that there was evidence of clandestine manufacture and clandestine removal and the Tribunal erroneously reversed the elaborate findings rendered by the Adjudicating Authority while demanding duty from the assessee-firm and imposing penalty on the appellant-partner as well as other co-noticees.

33. Per contra, Ms. L. Maithili, learned counsel would contend that the Tribunal had considered the entire matter holistically, re-appreciated the evidence, which was placed on record and has granted full relief to the assessee-firm, but only partial relief to the appellant-partner.

34. We have carefully gone through the show cause notice, the Order-in-Original dated 10.09.1996, as well as the Order-in-Original dated 03.08.2005. On a perusal of the Order-in-Original dated 03.08.2005, more particularly, the findings from paragraph 36 to paragraph 39, we find the same to be almost a verbatim repetition of the findings rendered by the Hon'ble Technical Member in the earlier round of litigation before the Tribunal, which was a minority view. On a reading of the order in its entirety, there appears to be a missing link, which was noted by the Tribunal and the Tribunal observed that the Department failed to establish any link about the payment to the assessee-firm's transactions and that the appellant-partner never admitted any clandestine removal and all that he had accepted was the payment to three persons, who were employees of SWC and that there is no evidence placed by the Department to show purchase of the raw material, Oleum. Further, the important aspect that the appellant did not have sufficient storage facility for such huge quantity of LAB, was also noted to be a very relevant factor. Further, the Tribunal rightly noted that the Adjudicating Authority did not follow the directions issued by the Tribunal while remanding the matter for de novo consideration and it reiterated only the statements of persons with regard to the supply of LAB through SWC and failed to address the issue on the procurement of Sulphuric Acid/Oleum.

35. Further, the Tribunal observed that in spite of specific directions by the Tribunal to establish clear evidence on the receipt of LAB by the assessee, no evidence has been brought out in the de novo order except relying on the statements of the employees of SWC. Further, the Tribunal noted that the period involved in the case relates to April, 1989 to February, 1995, the assessee was registered with the Central Excise Department and therefore, the Adjudicating Authority ought to have given a clear finding on the manufacture of final product and clandestine clearance. Further, the Tribunal noted that both the inputs viz., LAB and Oleum and the final product, Acid Slurry are highly corrosive chemicals, requiring safety for transportation and storage.

36. Further, the Tribunal rightly held that the onus is on the Department to establish the supply of LAB by SWC in various fictitious names pertaining to the assessee-firm and a mere seizure of 449 kgs of Acid Slurry valued at

Rs.16,000/- during transit, cannot be a proof for the Revenue to arrive at a conclusion that huge quantity of Acid Slurry was manufactured and cleared clandestinely.

37.Further, the Tribunal faulted the Adjudicating Authority for having computed the quantity and value purely on mathematical formula and worked out the total quantity of Acid Slurry by adopting the ratio of raw materials, LAB and Oleum without being supported with any evidence. Further, the Tribunal noted that there is no link between the payments made to three employees of SWC with that of the supply of LAB to the assessee-firm and mere statements that those three persons are related and controlled by the assessee-firm is not enough to hold the assessee-firm guilty of having received LAB. Further, the Tribunal also noted that if the assessee had to manufacture such huge quantity of Acid Slurry, it would require huge storage capacity of not only the raw materials, but also the finished products and the spent acid, which is a by-product, which is released during the manufacturing process and the same cannot be thrown out without clearance. Therefore, the Tribunal held that based on statements and private records, the demand of excise duty of clandestine removal cannot be sustained without corroborative evidence. The Tribunal took note of a decision in the case of Nova Petrochemicals vs. CCE, Ahmedabad-II [Final Order Nos.A/11207-11219/2013, dated 26.09.2013] wherein, the Tribunal listed out certain fundamental criteria, which have to be established by the Revenue to prove clandestine manufacture and clearance, they being (i) there should be tangible evidence of clandestine manufacture and clearance and not merely inferences or unwarranted assumptions; (ii) evidence in support thereof should be of; (a) raw materials, in excess of that contained as per the statutory records; (b) instances of actual removal of unaccounted finished goods (not inferential or assumed) from the factory without payment of duty; (c) discovery of such finished goods outside the factory; (d) instances of sales of such goods to identified parties; (e) receipt of sale proceeds, whether by cheque or by cash of such goods by the manufacturers or persons authorized by him; (f) use of electricity for in excess of what is necessary for manufacture of goods otherwise manufactured and validity cleared on payment of duty; (g) statements of buyers with some details of illicit manufacture and clearance; (h) proof of actual transportation of goods, cleared without payment of duty; and (i) links between the document

recovered during the search and activities being carried on in the factory of production, etc.

38. Further, the Tribunal noted a decision of its Coordinate Bench in *Pan Parag India vs. CCE*, [2013 (291) E.L.T. 81 (Tri.)] wherein, it was held that the theory of preponderance of probability would be applicable only when there was strong evidence heading only to one and only one conclusion of clandestine activity and the said theory cannot be adopted in case of a weak evidence of a doubtful nature. Further, the Tribunal rightly pointed out that no attempt has been made to obtain documents and records from TNPL, which is crucial for the sale of LAB instead the Adjudicating Authority relied solely on the statements and records of SWC. Thus, the Tribunal concluded that the entire demand based on alleged clandestine removal is based on assumptions and theoretical calculations by taking notional quantity of LAB and set aside the entire demand.

39. The above findings rendered by the Tribunal would clearly show that a thorough fact finding exercise has been done and the missing links have been pointed out by the Tribunal and we find the entire matter to be fully factual and no question of law would arise for consideration in the appeals filed by the Revenue.

40. In the decision of this Court in the case of *Commissioner of Central Excise, Salem vs. CESTAT, Chennai (supra)*, the Court held that the burden of proof, in a case of clandestine removal, is undoubtedly on the Department. However, at times, in such cases of clandestine removal, clinching documents will be available and if the Department is able to prima facie establish a case of clandestine removal, violation of excise procedure, the burden shifts on the assessee to prove that he is innocent.

41. In the preceding paragraphs, we have noted as to how the matter has proceeded before the Adjudicating Authority and before the Tribunal on both occasions and we find that there is a clear missing link between the allegation of clandestine manufacture/removal with that of the assessee-firm. This is further established by the fact that duty has been demanded based on a notional fixation by adopting a formula that "X" amount of raw material would result in "Y" amount of finished goods, which cannot be a basis for levy of excise duty, when there is an allegation of clandestine manufacturing/removal. Therefore, the said

decision is clearly distinguishable on facts. Equally so is the decision in Lawn Textile Mills Pvt. Ltd. (supra), which was noted in Commissioner of Central Excise, Salem vs. CESTAT, Chennai (supra).

42.The decision of the Tribunal in Rukmini Industries (supra) is a case where on investigation, it was found that Acid Slurry was cleared as soap oil and the source of the product and the storage was accepted by the assessee themselves. Therefore, the decision cannot assist the case of the Revenue.

43.It has been consistently held in various decisions some of which have been referred to by the learned counsel for the assessee in the case of Gopi Synthetics Pvt. Ltd., (supra), Mahesh Silk Mills (supra) and R.A. Castings Pvt. Ltd., (supra) that when the Tribunal came to the conclusion that the Department did not have sufficient evidence to establish clandestine removal and the Tribunal having considered the evidence on record and come to the factual findings, no question of law would arise for consideration in a tax appeal.

44.As already observed, the onus was on the Department to prove that there was clandestine manufacture and removal by the assessee-firm and this having not been established to the extent required, we find no error or perversity in the approach of the Tribunal warranting interference.

45.For the above reasons, we hold that there is no substantial question of law arises for consideration in the appeals filed by the Revenue in C.M.A.Nos.2714 and 2715 of 2016 and accordingly, the same are dismissed.

46.The appellant-partner is aggrieved by that portion of the impugned order whereby, the Tribunal did not give the appellant-partner full relief, but granted partial relief by reducing the penalty imposed on him. If the assessee-firm has been completely exonerated, as the allegation of clandestine manufacture/removal having not been established, then the appellant-partner cannot be mulched with penalty.

47.In the preceding paragraphs of this judgment, we have upheld the findings of the Tribunal, setting aside the entire demand of duty on the allegation of clandestine removal. If that be so, then the appellant-partner also

needs to be exonerated. That apart, we find from the Order-in-Original more particularly, the order dated 03.08.2005, that there is no clinching evidence to link the appellant-partner with that of the allegation made against the assessee-firm except to state that some of them were close relatives and the appellant-partner had control over them. This finding, even in the first round before the Tribunal, was held to be bad and it was pointed out that there should be sufficient evidence to link the assessee-firm with the alleged transaction. In more or less identical circumstances, in the case of Aman Gupta (supra), the penalty imposed on the partner was set aside, as the demand against the assessee-firm was set aside.

48. Thus, the Tribunal ought to have granted full relief to the appellant-partner, instead of restricting the penalty to Rs.2,00,000/-. That apart, we find that no reason has been assigned by the Tribunal as to why it did not vacate the entire penalty and thought fit to reduce it to Rs.2,00,000/-, though the Tribunal had exonerated the assessee-firm entirely. Therefore, the order passed by the Tribunal, insofar as sustaining the penalty to the tune of Rs.2,00,000/- calls for interference.

49. Accordingly, C.M.A.No.1090 of 2016 is allowed and the substantial questions of law raised by the appellant-partner are answered in favour of the appellant-partner.

50. In the result, (i) C.M.A.Nos.2714 and 2715 of 2016 are dismissed, as there is no substantial question of law arising for consideration;

(ii) C.M.A.No.1090 of 2016 is allowed and the penalty imposed on the appellant-partner is set aside and the substantial questions of law are answered in favour of the appellant-partner. No costs.

WEB COPY
Sd/-
Assistant Registrar()

//True Copy//

Sub Assistant Registrar

To

1.The Customs, Excise and Service Tax
Appellate Tribunal, South Zonal Bench,
Chennai, Shastri Bhavan Annex,
Haddows Road, Chennai-600 034.

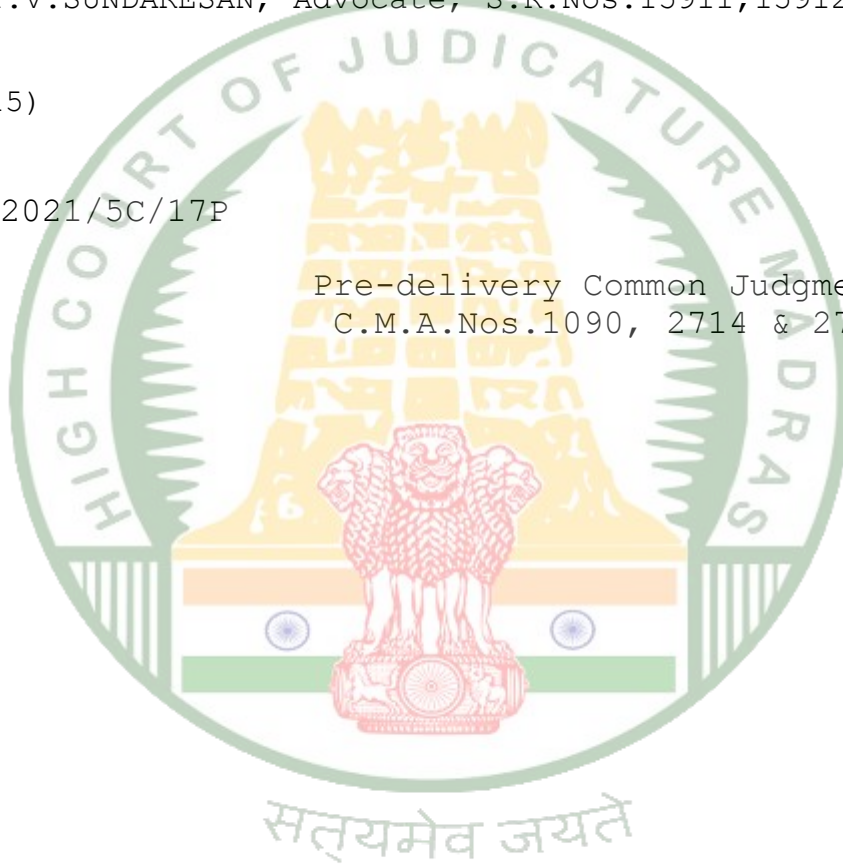
2.The Commissioner of Central Excise,
No.1, Foulks Compound, Anai Medu,
Salem-636 001.

+2cc to Mr.V.SUNDARESAN, Advocate, S.R.Nos.15911,15912

(CO)
CA(/06/2015)
abr

TK/15.04.2021/5C/17P

Pre-delivery Common Judgment made in
C.M.A.Nos.1090, 2714 & 2715 of 2016



WEB COPY