CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

SCO 147-148, SECTOR 17-C, CHANDIGARH-160017

SINGLE BENCH

COURT NO.1

Appeal No. E/60439,60442,60443,60002/2017

[Arising out of the Order-in-Appeal No. 01/CE/COMMR/HG/RTK/2016-17 dated 28.04.2016 passed by the CCE (Appeals), Rohtak]

Date of Hearing: 19.07.2017

Date of Decision:

For Approval & signature:

Honble Mr. Ashok Jindal, Member (Judicial)

Shri. Mahalaxmi Distilleries,

Amrit Lal Garg,

Mahender Prasad Bansal,

Kishore Aggarwal Appellants

Vs.

CCE, Rohtak Respondent

Appearance

Shri. Kamaljeet Singh, Advocate- for the appellant

Shri. H. Singh, AR- for the respondent

CORAM: Honble Mr. Ashok Jindal, Member (Judicial)

FINAL ORDER NO: 61556-61559 / 2017

Per Ashok Jindal:

The appellants are in appeal against the impugned order wherein the demand has been confirmed against them on the allegation of clandestine removal of goods, on the basis of statement given by Shri. Kishore Aggarwal one of the appellant here, and the data retrieved from the Laptop of Shri Lalit Aggarwal and Shri. Vikas Varshney, CA/ Accountant of the firm owned by Shri Kishore Aggarwal.

2. The facts of the case are that the main appellant is engaged in the manufacture of packaged drinking water in 20 liters jars under the brand name of Kingfisher, which is owned by the M/s UB Limited and not paying duty and clearing goods clandestinely. M/s Iceberg Foods Limited (IFL for short) and M/s Deo Pvt. Limited which relates to one of the appellant Shri. Kishore Aggarwal was given franchisee of kingfisher to which M/s UB Limited was supplying materials like capes, stickers and empty jars etc. to the appellants through their distributors. The case of the Revenue is that investigation was conducted at the end of M/s IFL and M/s Iceberg Aqua Pvt. Ltd. (IAPL for short), wherein incriminating documents were recovered and statements were recorded. On the basis of those incriminating documents and statements, the case was booked against all the persons dealing with M/s IFL and M/s IAPL. The case is also booked against the appellants on the basis of computer prints outs recovered from CA/Accountant of M/s IFL and M/s IAPL, no investigation was conducted at the end of appellants except Shri. Kishore Aggarwal but the statements were recorded. On the basis of these computer printouts and the statement, the show cause notice was issued to the appellants to demand duty on the ground of clandestine removal of goods during the period April2008 to June 2009. The matter was adjudicated,

demand of duty along with interest was confirmed against the main appellant and penalties of all the appellants were also imposed. Aggrieved from the said order, the appellants are before me.

3. Sh. Kamaljeet Singh, Advocate appeared on behalf of the appellants and submits that sole evidence on which the case made out against the appellants is the computer printouts and the Hard Dist/pen-drive recovered from the possession of Shri. Lalit Aggarwal and Shri. Vikas Varsheny, CA/ Accountant of M/s IFL and M/s IAPL. He submits that no procedure under Section 36B of the Central Excise Act, 1944 has been followed, therefore, the said documents cannot be relied upon to demand duty. Moreover, the statements were recorded under duress and on the basis of the statements and documents recorded from third party, the demand cannot be confirmed without any corroborative evidence, therefore, the impugned order is required to be set aside. To support these contentions, he relied on the decision of this Tribunal in the case of Modern Laboratories Vs. CCE, Indore reported in 2017-TIOL-1827-CESTAT-DEL. He also relied on the decisions in the case of Shivam Steel Corporation reported in 2016 (339) ELT 310 (Tri. Kolkata), Arya Fibers Pvt. Ltd. reported in 2014 (311) ELT 529 (Tri. Ahmd.) and CCE, Raipur Vs. Shree Harekrishna Sponge pvt. Ltd. reported in 2015 (329) ELT 422 (Tri. Del.). He further submits that during the course of adjudication, the appellants sought cross examination of the witnesses whose statements and documents have been relied in the show cause notice but the said cross examination was not allowed, therefore, he prayed that in the light of the decision of the Honble High Court of Punjab and Haryana in the case of Jindal Drugs reported in 2016-TIOL-1230(HC), the impugned order is to be set aside as procedure laid down under section 9D of the Central Excise Act, 1944 has not been followed by the adjudicating authority. He further submits that no investigation was conducted at the end of the appellants premises to ascertain the facts of clandestine manufacturing and clearance of goods.

4. On the other hand, the ld. AR opposed the contentions of the ld. Counsel and submits that in this case the investigation was conducted at the end of M/s IFL and M/s IAPL wherein incriminating documents were recovered and they have admitted that they were indulged in the activity of manufacturing and clearing the goods without payment of duty and those admitted documents were made basis to allege the clandestine removal of goods against the appellant and also statements recorded during the course of investigation of the appellants were relied upon by the adjudicating authority in the impugned order. Moreover, the existence of these documents have not been denied by M/s IFL and M/s IAPL and admitted that these goods (packing material) have been supplied to the appellants without payment of duty and the appellants have also not shown the same recorded in their record. He further submits that M/s IFL and M/s IAPL have gone before the Settlement Commission and paid the duty as per the documents recovered from their possession. In that circumstances, he submits that the demands are to be confirmed against the appellants.

5. Heard both sides and considered the submissions.

6. On careful consideration of the submissions made by both sides, I find that in the case in hand, it is admitted fact that the documents which have been relied upon to confirm the demand of clandestine removal of the goods against the appellants are based on the computer printouts and the hard disk/pen drive recovered from the possession of Shri. Lalit Gupta, CA and Shri. Vikas Varshney of M/s IFL and M/s

IAPL. It is also a fact on record that the statements of the appellants were recorded, no investigation was conducted at the end of the appellants and the transporters were also not investigated to reveal the truth whether the clandestine removal of goods from M/s IFL and M/s IAPL were transported up to the place of appellants. Moreover, no cross examination of the persons whose statement was relied upon and sought by the appellant was granted, therefore, in the light of the decision of Jindal Drugs Pvt. Ltd. (Supra) wherein the Honble High Court observed as under:

In view of the clarification under Section 9D of the Finance Act, 1944, if the adjudicating authority relied on the statement recorded during the course of the investigation, as evidence to prove the facts, it has to be held that the adjudicating authority relied on the irrelevant facts, therefore, the statements are not admissible evidence in the facts and circumstances of the case.

7. As the cross examination is required for proper adjudication, which was not granted to the appellant, therefore, I hold that there is violation of principle of natural justice.

With these observations, the impugned order is set aside, and the matter is remanded back to the adjudicating authority to grant cross examination of the witnesses sought by the appellant as per Section 9D of the Act, and, thereafter, the adjudicating authority shall pass the appropriate order in terms of law.

Accordingly, the appeals are allowed by way of remand.

(order pronounced on)

Ashok Jindal

Member (Judicial)