Customs, Excise & Service Tax Appellate Tribunal,
West Zonal Bench : Ahmedabad, 380004
REGIONAL BENCH- COURT NO. 3

Excise Appeal No. 12133 of 2018-SM

(Arising out of OIA-BHV-EXCUS-000-APP-066-068-2018-19 dated 07/05/2018 passed by Commissioner (Appeals) Commissioner of Central Excise, Customs and Service Tax-RAJKOT)

Atul Bansal Appellant

Plot No. 93, Village-vadia, Tal-sihor,
BHAVNAGAR
GUJARAT

-VERSUS-

C.C.E. & S.T.-Rajkot Respondent

Central Excise Bhavan,
Race Course Ring Road...Income Tax Office,
Rajkot,
Gujarat, 360001

AND

Excise Appeal No. 12451 of 2018-SM

(Arising out of OIA-BHV-EXCUS-000-APP-066-068-2018-19 dated 07/05/2018 passed by Commissioner (Appeals) Commissioner of Central Excise, Customs and Service Tax-RAJKOT)

Bansal Castings Pvt. Ltd. Appellant

Plot No. 93, Village-vadia, Tal-sihor,
BHAVNAGAR
GUJARAT

-VERSUS-

C.C.E. & S.T.-Rajkot Respondent

Central Excise Bhavan,
Race Course Ring Road...Income Tax Office,
Rajkot,
Gujarat, 360001

WITH

Excise Appeal No. 12559 of 2018-SM

(Arising out of OIA-BHV-EXCUS-000-APP-066-068-2018-19 dated 07/05/2018 passed by Commissioner (Appeals) Commissioner of Central Excise, Customs and Service Tax-RAJKOT)

Himanshubhai Nandlal Jagani Appellant

38, Vihar Complex, Fourth Floor, Near Sahakari Hat, Waghawadi Road,
BHAVNAGAR
GUJARAT
364001.

-VERSUS-

C.C.E. & S.T.-Bhavnagar Respondent

Central Excise Bhavan,
Race Course Ring Road...Income Tax Office,
Rajkot,
Gujarat, 360001

Appearance:

For the Appellant : Shri Rahul Gajera with Shri Sarju Mehta, Adv

For the Respondent : Shri L. Patra, Asst. Commr. (AR)

CORAM:
HON'BLE MEMBER (JUDICIAL) , MR. RAMESH NAIR

FINAL ORDER NO.A/ 11554-11556/2019

Date of Hearing: 23.07.2019

Date of Decision:21.08.2019

RAMESH NAIR

The brief facts of the case are that the appellant are engaged in the manufacture of rolled products namely TMT bars, etc. On intelligence search operation at the premises, S/s Himanshu Nandlal Jagani and Yogesh R. Sanghvi, both brokers of round TMT bards at Bhavnagar was conducted and recovered documents from them. Thereafter the search operation was also conducted at the premise of M/s Bansal Casting P. Ltd. and various incriminating documents were recovered. On the basis of the investigation, the Revenue was of belief that the appellant M/s Bansal Casting Pvt. Ltd. through brokers cleared the goods clandestinely without payment of duty. Therefore, the Show cause notice dated 16/02/2016 proposing demand of Central Excise duty of Rs. 33, 90,573/- under section 11A(4) of Central Excise Act, 1944 along with interest under section 11AA of the Act and imposition of penalty under section 11AC of the Act read with Rule 25 of the Central Excise Rule, 2002 upon M/s Bansal Casting Pvt. Ltd., personal penalty under Rule 26(1) of the Central Excise Rules,2004 imposed upon appellant Shri Atul Bansal & Shri Himanshu Nandlal Jagani. The Show Cause Notice was adjudicated by the Adjudicating Authority whereby Central Excise Duty of Rs. 33,90,573/- was confirmed under section 11A(10) of the Act, along with interest under section 11AA of the Act and penalty of Rs. 33,90,573/- was imposed under section 11AC of the Act read with Rule 25 of the Central Excise Rules upon M/s Bansal Casting Pvt. Ltd. with option of reduced penalty as per section 11AC(1)(b) of the Act, penalty of Rs. 33,90,573/- on Shri Atul Bansal, Director of Bansal Castings Pvt. Ltd. and penalty of Rs. 16 lakh on Shri Himanshu Jagani were imposed under Rule 26(1) of the Central Excise Rules. Being aggrieved by the said OIO, appellants preferred appeals on various grounds. Ld. Commissioner (Appeal) upheld the OIO in respect of M/s Bansal Castings but reduced penalty impsed on Shri Atul Bansal and Shri Himanshu Jagani to Rs. 5 lakhs each. Being aggrieved by the OIA, all the three appellants filed these appeals.

2. Shri Rahul Gajera, Ld. Counsel with Shri Sarju Mehta, Ld. CA appearing on behalf of the appellants submits that the entire demand was confirmed relying on the diaries/private records allegedly recovered from the premises of the broker Mr.

Himanshu Nandlal Jagani and Shri Yogesh R. Sanghvi. There is no corroboration of these records with the records of the appellant, M/s. Bansal Castings. On the basis of third party evidence, case of clandestine removal cannot be established. He submits that the Ld. Commissioner (Appeals) in his finding, stated that the transaction recorded under assessee's private record was found talyling with the statutory records/ transaction of the appellant which prove the authenticity of the transactions. In this regard, he submits that the said finding of the Commissioner (Appeal) is factually incorrect. He submits that the Show Cause Notice was issued by preparing Annexure E which is based on alleged seized diary and assessee's records which do not tally with the statutory records/sales register of the appellant. In other words, none of the entries of the seized records from the premises of brokers were found tallying with the statutory records/sales register maintained by the brokers. Therefore, the finding of the Ld. Commissioner (Appeal) is factually incorrect. He submits that Ld. Commissioner (Appeal) has gravely erred in not appreciating that there was no individual corroborative evidence of clandestine removal in the form of statements of buyers, transportation of goods, receipt of payments from buyers and consumption of excessive raw-material and consumption of excess electricity, etc. The Ld. Commissioner (Appeal) erred in not following the decision of Tribunal in the case of Arya Fibres Pvt. Ltd. vs. CCE reported as 2014 (311) ELT 529 which laid down that findings of the of clandestine removal cannot be arrived at based merely on statements particularly in absence of corroborative evidence showing transfer of goods, receipt of goods by buyers, receipt of payments from buyers, seizure of goods, consumption of excess electricity and raw material. He further submits that there is no evidence of transport of goods in respect of entries in the diaries recovered from the brokers Mr. Himanshu Jagani and Yogesh Sanghvi was addused. None of the transporters in their similarly worded statements have stated specifically that any of the entries from the diaries the removal of goods from the factory of the appellant to any particular buyers premises. He further submits that the appellant M/s Bansal Castings requested for cross examination of the brokers whose statement was solely relied upon in the entire case. The adjudicating authority rejected the request which was also supported by Ld. Commissioner (Appeal). He submits that the entire case is based on third party evidence and their statements. Then it is necessary to grant the cross-examination. He also submits the statement of Shri Atul Bansal, Director of the M/s Bansal Castings is ex-culpatory. In support of his submission he placed reliance on the following judgments:

(1) Vishva Traders Pvt. Ltd. v/s CCE, Vadodara 2012 (278) E.L.T. 362 (Tri.-Ahmd.). The same was upheld by Hon'ble Supreme Court in the case of reiterates at CCE vs. Vishwa Traders Pvt. Ltd. 2014 (303) E.L.T. A24 (SC).

(2) Sulekhram Steels Pvt. Ltd. Vs CCE, Ahmedabad-II 2011(273) E.L.T. 140 (Tri.-Ahmd.)
(3) Charminar Bottling Co. Pvt. Ltd. 2005 (192) E.L.T. 1057 (Tri.-Del.)
(4) Rama Shyama Papers Ltd. Vs. Commissioner of C.Ex., Lucknow 2004(168) E.L.T. 494 (tri.-Del.)

3. On the other hand, Shri L. Patra, Ld. Asst. Commissioner (AR) appearing on behalf of the Revenue reiterates the findings of the impugned order. He submits that the record recovered from the brokers bearing the details of clearances which tallied with the statutory records maintained by the appellant. There is a clear corroboration of the evidence. Hence, the demand was rightly confirmed by the lower authorities. He placed reliance in the following judgments:\

(1) SM steel ropes VS CCE, 2014 (304) ELT 591 (tri- Mum)
(2) Umesha Textiles P Ltd. Vs CCE, Mumbai 2014 (314) ELT 176 (Tri- Mum)
(3) Haryana Steel & Alloys Ltd. Vs CCE, New Delhi - 2017 (355) ELT 451 (Tri-Del.)
(4) Rakesh Kumar Garg Vs .CCE- 2016 (331) ELT 221 (Del.)
(5) CCE, Raipur Vs Hi Tech Abrasives 2017 (346) ELT 606 (Tri- Del.)

4. I have carefully considered the submissions made by both the sides and perused the records. I find that entire case was made out on the basis of search conducted with the third party which is the broker and the records recovered the from the broker. The records of the broker bearing some entries related to some of the goods. Some statement was recorded from the broker. I find that despite the appellant requested for cross examination, the lower authorities have rejected the request. In the present case, the entire evidence was relied upon are documents recovered from the brokers and their statement. In this case, no evidence was found with M/s Bansal Casting Pvt. Ltd. It was incumbent on the Ld. Commissioner to grant the cross examination of the broker as it is mandatory under section 9D. Without cross-examination of the evidence, their statements cannot be relied upon. In the judgment of Rama Shyama Papers Ltd. (supra). cited by Ld. Counsel, he pointed out following para 9 & 10:

> ***9.*** *We have considered the submissions of both the sides. The Revenue has charged the Appellants with clandestine manufacture and removal of paper mainly on the basis of documents seized from the premises of Chitra Traders and Transporters and the various statements recorded from the Proprietor of Chitra Traders, transporters and labourers working in the factory of the Appellants and also the driver or cleaner of the Truck which was in the process of loading on 22-6-2001 when the Central Excise Officers visited their factory premises. The Appellants, on the other hand, have contended that most of the persons whose statements have been relied upon have not been produced for cross-examination and the documents seized from third parties' premises have not been corroborated by adducing evidence of any of the customers though the enquiries were conducted at different places as*

deposed by Shri Anurag Sharma, Inspector, in his cross-examination on 4-3-2002. Out of 19 consignments said to have been cleared by the Appellant No. 1 without payment of duty on the basis of five transporter, we observe that in respect of two consignments, it has been mentioned by the Revenue that the same may not pertain to the Appellants. Further, only one transporter Shri Sanjay Garg of M/s. Balaji Transporter Co. was produced for cross-examination which accounts for only two consignments out of 19 consignments in question. Shri Garg, it is observed from the record of cross-examination, has deposed that they generally work as commission agent and provide transport to Appellant No. 1; the payment is used to be received directly by the drivers after delivery of the goods at the consignee's end and in case the driver did not report back for the next 3-4 days, it was presumed that the goods had reached the consignees end. Further, the name of the Applicant No. 1 on one GR No. 34 had been written not by Shri Sanjay Garg, but by his brother, whose statement has not been recorded and on GR 187, there is no mention of the name of the Appellant No. 1 at all. No statement of the drivers concerned has been recorded by the Revenue to establish that the finished goods manufactured by the Appellants were removed without payment of duty. The other transporters have not been produced for the purpose of cross-examination nor the statements of drivers who might have actually carried the goods, had been recorded. Moreover no statement of any of the recipients of the goods had been brought on record. Thus the statements of the transporters have remained uncorroborated and also suffers from the short coming of being not being cross-examined by the Appellants. It has been the settled law that the liability cannot be fastened on an assessee on the strength of documents seized from the possession of third party. There should be some corroborative evidence/material. The Tribunal has in the case of Emmtex Synthetics Ltd., supra, when the charge of clandestine removal was made against the Appellants therein out of yarn received from a third party based on the diary, loose documents and packing slips allegedly recovered from Shri B.M. Gupta, Vice President of the Supplier Company, held that "no presumption on the basis of uncorroborated, uncross-examined evidence of B.M. Gupta and the alleged entries made by him in the private diary, loose sheets, charts, packing slips could be drawn about the receipt of polyester yarn by the Appellants from the company, M/s. HPL, in a clandestine manner during the period in question. Similarly, no inference could be legally drawn against the Appellants of having manufactured texturised yarn out of the said polyester yarn and the clearance thereof, in a clandestine manner without the payment of duty." The Tribunal had also referred to the decision in Oudh Sugar Mills Ltd. v. Union of India, 1978 (2) E.L.T. (J172) wherein "the Apex Court has observed that no show cause notice or an order can be based on assumptions and presumptions. The findings based on such assumptions and presumptions without any tangible evidence will be vitiated by an error of law". The Tribunal also took note of the decision in Kamal Biri Factory and Shri Khushnuden Rehman Khan v. CCE, Meerut - 2003 (161) E.L.T. 1197 (T) = 1997 (23) RLT 609 (CEGAT) wherein view has been taken that the allegations of clandestine removal of the goods will not stand established when based on the entries made by the assessee's employee in a diary or on the basis of third party's record in the absence of any corroborative evidence. It has also been the consistent view of the Tribunal that the statements of the witnesses, without allowing the assessee to test the correctness of the same by cross-examining those witnesses; cannot be made the basis for holding the allegation against the assessee. (Takshila Spinners v. CCE, supra). Similar views have been expressed by the Tribunal in the case of Haryana Petrochemicals Ltd., supra wherein the Tribunal has held that reliance cannot be placed on the documents maintained by a third party "who did not have the courage to come forward for cross-examination in order to test the veracity and correctness of the private record maintained by him." It has also been held by the Tribunal in the case of Kothari Synthetics Industries v. CCE, Jaipur, 2002 (141) E.L.T. 558 (T) that entries made in the transport Register of the transport company could not be accepted as a conclusive proof of clandestine receipt of goods from that transport company for want of corroboration from any tangible evidence. Following the ratio of these decision, the duty demand cannot be upheld solely on the basis of uncorroborated statements and records of transporter. The statements tendered by the labourers can also not be relied upon by the Revenue as these persons were not produced for being cross-examined. Moreover, there is no corroboration of their statements with regard to the Trucks by which the goods were allegedly removed or the persons who received the goods.

The Truck driver Shri Shiv Bahadur Yadav has also not been cross-examined and cleaner Shri Rakesh Kumar had deposed that the Bills/Invoices are supposed to be with the Driver and he being cleaner had no knowledge.

10.*The confirmation of duty in respect of 149 consignments is also based on the records seized from the premises of M/s. Chitra Traders and not on the basis of any record seized from the premises of the Appellant-company. The Revenue has not been able to adduce any corroborative evidence to show the movement of goods from the premises of the Appellant-company to the premises of M/s. Chitra Traders or the Customers whom the goods were sent directly to as per the direction of Chitra Traders. No inquiry has also been made into these Customers who ultimately received the goods. There is no substance in the reasoning given by the Commissioner in the impugned order to the effect that "as the party did not challenge the fact of their business association with M/s. Chitra Traders, Delhi, the enquiry further down the line was not considered necessary." The onus of proof that the goods were removed by the Appellants without payment of duty and without entering the same in their records is upon the Revenue which cannot be discharged merely on the strength of the entries made in the records of a third party without linking the removal of goods from the premises of the Appellant-company. The mere fact that the Appellant-company had business relation with Chitra Traders, does not mean that they will be liable to each and every entry made by Chitra Traders in their books of account. It is also noted that none of the transporters and none of the labourers whose statements have been relied upon by Revenue have mentioned that the goods in question were delivered to Chitra Traders from the premises of the Appellants. The material brought on record may at the most create a doubt only. But doubt cannot take the place of evidence. The Revenue has, thus, not proved its case against the Appellants in respect of 149 consignments. We, therefore, set aside the demand of duty and penalty imposed on Appellant-company and consequently the demand of interest.*

From the above decision which is based on various Supreme Court decisions, it is clear that when the brokers whose statements were recorded are not produced for cross examination such statements cannot be relied upon against the assessee. Therefore, as per the settled legal position, since in the present case witnesses, i.e. brokers and transporters were not allowed for cross examination, their statements cannot be relied upon. In such a case, the only evidence left is the diaries/private records of the brokers. Since the statements cannot be relied upon, these records in isolation has no evidentiary valued particularly when the same was not corroborated with the statutory records of the appellant. In the case of M/s Charminar Bottling Co. (P) Ltd. (supra) on the issue of third party evidence, Tribunal has observed as follow:

6. *Considered the submissions of both the sides. We have the charge of clandestine removal of bags-in-boxes by the Appellants has not been established by Revenue which has mainly relied upon the difference in figures of sale of the impugned product reflected in PMX Reports. It is not disputed by Revenue that these reports are prepared by M/s. Hyderabad Beverages and not by the Appellants. No evidence has been brought on record to show any excess production of the impugned product by the Appellants by way of procuring necessary raw materials. In a similar situation in the case of Moon Beverages wherein the charges of clandestine removal was made on the basis of computerized sheets of sales figures maintained by M/s. Parle Exports Ltd. whom the figures were sent by the assessee, the Tribunal has held that "the charge of clandestine removal cannot be established on the basis of one single factor.....Other corroborative evidence such as evidence of other inputs required for manufacture of aerated waters namely sugar, carbon dioxide being purchased and utilized in the manufacture of the final*

> *product during the period in dispute is required. There is no such corroborative evidence in the present case. There is also no evidence of higher electricity consumption." In the present appeal before us also there is no corroborative evidence except the PMX Reports. Revenue has also not contradicted the submission of the learned Advocate that the Managing Director of the Appellants was not even questioned about these reports. In the case of Rama Shyama Papers Ltd, supra, wherein the records were seized from the premises of one of the customer of the assessee, the Tribunal did not uphold the charge of clandestine removal as "the Revenue has not been able to adduce any corroborative evidence to show the movement of goods from the premises of the Appellant's company to the premises of M/s. Chitra Traders or the Customers when the goods were sent directly to as per the directions of Chitra Traders... The onus of proof that the goods were removed by the Appellants without payment of duty and without entering the same in their records is upon the Revenue which cannot be discharged merely on the strength of the entries made in the records of a third party without linking the removal of goods from the premises of the Appellant Company." In the present matter also the Revenue has not brought any material on record to show that the excess bag-in-boxes said to have been sold by M/s. Hyderabad Beverages were removed from the premises of the Appellants. As show cause notice alleging clandestine removal cannot be issued based on assumption and presumption and as held by the Supreme Court in Oudh Sugar Mills Ltd. v. U.O.I., 1978 (2) E.L.T. (J 172), the findings based on assumption and presumption without any tangible evidence will be vitiated by an error of law. We, therefore, set aside the demand on charge of clandestine removal.*

In view of above judgment, only on the basis of third party records, the demand cannot be confirmed alleging the clandestine removal. I also observe that despite the investigating officers recovered the diaries/ private records from the brokers no investigation was conducted to the effect who are the buyers of the goods, whether any payment was received by the appellant against the alleged clandestine removal. No effort was made to find out that whether the appellant have procured the excess raw materials to meet out the clandestinely manufactured and clearance of the goods. No excess electricity consumption was brought on record. Therefore, merely on the basis of third party evidence, that too not corroborated with any other evidence of the appellant, case of clandestine removal cannot be established. It is also observed that the appellant, Shri Atul Bansal, Director of M/s Bansal Castings has given ex-culpatory statement and he has not accepted any clandestine removal. In the case of Sulekhram Steels Pvt. Ltd. (supra), the Tribunal has considered that if there is no discrepancy in the raw material and finished goods, no incriminating documents recovered from the assessee, no record showing procurement of raw material for manufacturing of goods, extra payment to labourers, electricity consumption, transportation, etc. the clandestine removal was set aside. The facts more or less of the above judgment is similar to the facts of the present case. Similarly, in the case of Vishva Traders Pvt. Ltd. (supra), the Tribunal has held that in absence of the record to show purchase of raw material for manufacture of final products but when there is no statement of raw material suppliers, in this regard, the persons whose statements were recorded have not been produced for cross-examination, there is no investigation to indicate unusual use of electricity, it was held that no tangible goods to indicate that there was clandestine removal of goods. Accordingly, the demand and penalty were set aside. It was also observed that even though the transporter's statement was recorded but the transporter has not specifically accepted that the goods were transported from assessee's factory and only general statement was given by the transporter, particularly, when the transporters were not allowed a cross-examination, there is no evidence of transport of goods also. As regard Revenue's submission and case laws relied upon, I find that the case of clandestine removal is based on its individual facts. Therefore, as per examination of the facts of the present case, I find that the facts of the cases relied upon by the Revenue are not applicable in the present case. As per my above discussion and findings which is based on the settled legal position as per above cited judgments, I am of the view that Revenue could not establish the case of clandestine removal beyond any doubt. Therefore, the impugned order cannot be sustained. Hence, I set aside the impugned order and allow the appeals.

(Pronounced in the open court on 21.08.2019)

(Ramesh Nair)
Member (Judicial)

Diksha