

**Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench at Ahmedabad**

REGIONAL BENCH-COURT NO. 3

EXCISE Appeal No. 106 of 2012 - DB

(Arising out of OIA-22/MP/VAPI/2011 dated 21/10/2011 passed by Commissioner of Central Excise, Customs and Service Tax-VAPI)

Phoolchand Metals Pvt Ltd

.....Appellant

Survey No. 46/1, Plot No. 12,
Daman Ganga Indl Estate, Athal,
Silvassa, U T Of Dadra & Nagar Haveli

VERSUS

C.C.E. & S.T.-Vapi

.....Respondent

4th Floor...Adharsh Dham Building,
Opp. Town Police Station, Vapi-Daman Road, Vapi
Vapi Gujarat- 396191

With

EXCISE Appeal No. 107 of 2012 - DB

(Arising out of OIA-22/MP/VAPI/2011 dated 21/10/2011 passed by Commissioner of Central Excise, Customs and Service Tax-VAPI)

Rakesh Jain

.....Appellant

Director Of M/s, Phoolchand Metals Pvt Ltd,
Survey No. 46/1, Plot No. 12, Daman Ganga Indl Estate, Athal,
Silvassa, U T Of Dadra & Nagar Haveli

VERSUS

C.C.-Kandla

.....Respondent

Custom House,
Near Balaji Temple,
Kandla, Gujarat

APPEARANCE:

Shri Ankur Upadhyay, Advocate for the Appellant

Shri Ashok Thanvi, Assistant Commissioner(AR) for the Respondent

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

HON'BLE MEMBER (TECHNICAL), MR. RAJU

Final Order No. 10262-10263/2024

DATE OF HEARING: 30.11.2023

DATE OF DECISION: 30.01.2024

RAMESH NAIR

These appeals are filed by the Appellants against the impugned Order-In-Original No. 22/MP/VAPI/2011 dated 21.10.2011.

1.1 The brief facts of the case are that the Appellant is engaged in manufacture of articles of copper. An intelligence collected by the officers of DGCEI, Vapi indicated that Appellant were using non-duty paid scrap for the manufacture of their final products and in order to avail the Cenvat credit,

they were obtaining duty paid invoices of different inputs and were wrongly availing Cenvat credit on the strength of such documents without actual receipts of the inputs against such documents. The intelligence indicated that since the duty paid raw-materials as shown in the duty paying documents were not physically received in their factory for being used by them in or in relation to manufacture of finished goods, the Cenvat credit in such cases was not admissible to them. Accordingly, the factory premises of the appellant was searched by the officers and statements of various persons were recorded. The investigations revealed that 10 imported consignments of Brass Scrap/Shredded Brass Scrap/ Re-melted copper Ingots and 2 consignments of copper ingots procured from the Unit of Jammu were not physically received in the factory premises of Appellant or in the premises of their job workers. Therefore, such consignments of Brass Scrap/ Shredded Brass Scrap/ Re-melted Copper Ingots/ Copper Ingots intended as an input for the manufacture of finished goods were never used in the manufacture of finished products. After the detail investigation a show cause notice dated 07-05-2009 was issued to Appellant for disallowance and recovery of Cenvat Credit along with interest and penalty and also imposition of penalty on Shri Rakesh Jain, Director of Appellant. In Adjudication, Learned Commissioner vide impugned order confirmed the Cenvat demand alongwith interest and imposed the equal amount of penalty under Rule 15 of the Cenvat Credit Rules, 2004 read with Section 11AC of the Central Excise Act, 1944. He also imposed the penalty of Rs. 20 Lakhs on Shri Rakesh Jain under Rule 26 of the Central Excise Rules, 2002. Hence, the Appellants filed these present appeals against the impugned order passed by the Learned Commissioner.

2. Shri Ankur Upadhyay Learned Advocate appearing on behalf of appellants submits that the adjudicating authority committed grave error and wrongly disallowed the cenvat credit to the appellant as there is no dispute that the appellant have appropriately deposited the duty in respect of imported re-melted copper ingots, brass scrap and shredded brass scrap at the time of import and have rightly availed cenvat credit in respect of the said inputs on the basis of bills of entry. The allegation of the department is based upon assumption and presumption that the inputs after clearance from Nhava Sheva has been diverted to Bhiwandi and Surat as said allegation is not supported with any corroborative evidence. Hence the contention made by the department by denying the cenvat credit is frivolous and without any basis.

2.1 He further submits that the allegation of divergence of inputs to Bhiwandi and Surat by the appellant is solely made on the statements of the transporter Shri Naresh D. Bhanushali and Shri Ashok N. Bhanushali for confirming the demand. However the said statement cannot be relied upon in the present case because the statements of transporters is not signed by the gazetted officer who recorded the said statement and thus the said statement does not have any evidentiary value and cannot be considered as evidence. Thus the whole case of the revenue which is based only on the statements of transporter is frivolous and does not hold any water. He placed reliance on the following judgments:-

- State Vs. Yakub Ahmed – 2000(125)ELT 113(Bom.)
- Satpushp Steels (P) Ltd. Vs. CCE, Jaipur -2006(196)ELT 105 (Tri. Delhi)
- Coolwels Automobile Engineers Vs. CCE, New Delhi – 2007(207)ELT 615 (Tri. Del.)

2.2 He also submits that the Ld. Adjudicating authority in gross violation of principle of natural justice have denied the cross-examination of the transporter to the appellant as the statements of the transporter is crucial and it is the only basis for making the allegation of divergence of inputs to Bhiwandi or Surat. Hence the statement of the transporter cannot be relied upon in the interest of the justice as the said statement has not been cross-examined. Further statement of the transporter is not corroborated with any other evidences thus demand cannot be confirmed on the basis of third party statements only. He placed reliance on the following decisions:-

- Motabhai Iron & Steel Industries Vs. CCE, Ahmedabad –II- 2014(302)ELT 69 (Tri. Ahm.)
- Commissioner Vs. Motabhai Iron & Steel Industries - 2015(316)ELT 374 (Guj.)
- AVM Brothers & Others Vs. CCE. Bhopal – Final Order No. A/58354-58358/2017 dtd. 13.12.2017

2.3 He also argued that no investigation was made from the driver of the vehicles who transported the goods as statement of the driver of the transporter who had loaded the goods from the port and the actual place of delivery if any other than the factory premises of the appellant could have been determined. Thus inquiry made by the department is incomplete and

the inputs has been genuinely received by the appellant in their factory premises.

2.4 As regarding the denial of Cenvat credit in respect of 2 consignment received from M/s Bhagwati Metal Works, Kathua, Jammu, he argued that the allegation is made on assumption and presumption as only on the basis of check post report demand cannot be confirmed without any corroborative evidence. Also no investigation was made by the department neither from transporter nor from the driver of the transporter. Hence the said demand is also liable to be set aside.

3. On other hand, the Learned AR Shri Ashok Thanvi, Assistant Commissioner for the revenue has reiterated the findings recorded in the impugned order, to support the adjudged demands confirmed in the impugned order, against the appellants.

4. Heard both the sides and perused the records. We have carefully gone through the records, grounds of appeals and submissions of parties and finding of the impugned order and various case laws cited by both the parties. We find that the case of the department against the Appellant is that, appellant had availed the Cenvat credit amounting to Rs. 1,07,71,320/- during the period June 2006 to October 2006 only on the strength of Bills of Entry without actual receipts of imported inputs and Cenvat Credit of Rs. 10,52,131/- during the month of December 2006 only on the strength of invoices issued by the supplier without actual receipts of the goods. The department contended that 10 consignment of imported inputs were diverted in Bhiwandi or Surat. However the freight Bills and LRs were prepared to show the transportation of the goods to the factory premises of Appellant. Further 2 consignment of copper ingots/ wire bars purchased from M/s Bhagwati Metal Works, Kathua, Jammu not entered Gujarat to reach the factory premises of Appellant. Revenue rely upon the statements of transporters and check post report. We find that the entire proceedings have been initiated on the basis of statements of transporter and Check Post report which have been solely relied to conclude that the appellant has not received the goods. The appellant in the course of adjudication have been consistently demanding cross-examination of the witnesses whose statements have been heavily relied upon by the Department. The appellants have pleaded that the goods on which credit have been availed were duly received by them and duly accounted for in the statutory records and that payments have been made through banking channels. It is the

case of the appellant that Cenvat credit has been unjustifiably denied to them by the adjudicating authority merely on the basis of the statements of transporters and other persons whose cross-examination have not been allowed. No other evidence is available on record but the statements which too have not been allowed to be examined.

4.1 On perusal of letter dated 13.07.2021 of the Assistant Commissioner, Central Excise & Customs, Vapi, we find that the request for cross-examination of the persons whose statements have been relied upon has been turned down on the ground that in the facts and circumstances of the case there is no need to give an opportunity to cross-examine the persons and what have been stated by the transporters and panch witnesses are their voluntary statements which have never been retracted by them. In this regard, we find that the reasons assigned by the authorities below to reject cross-examination is clearly unsustainable in legal parlance for the obvious reason that no adverse inference can be drawn against assessee where statements are to be relied by the Revenue without ascertaining the veracity in the absence of cross-examination. Therefore the said statements cannot be relied upon as admissible evidence in terms of the provisions of Section 9D of the Act. The provisions of Section 9D which are reproduced as under:-

“9D. Relevancy of statements under certain circumstances. - (1) A statement made and signed by a person before any Central Excise Officer of a gazetted rank during the course of any inquiry or proceeding under this Act shall be relevant, for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which it contains, -

(a) when the person who made the statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable; or
(b) when the person who made the statement is examined as a witness in the case before the Court and the Court is of opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interests of justice.

(2) The provision of sub-section (1) shall, so far as may be, apply in relation to any proceeding under this Act, other than a proceeding before a Court, as they apply in relation to a proceeding before a Court.”

The above Section deals expressly with the circumstances in which a statement recorded before a gazetted officer of Central Excise (under

Section 14 of the Act) can be treated as relevant for the purposes of proving the truth of the contents thereof. Reliance is placed on the ruling of the Hon'ble Punjab & Haryana High Court in the case of *Jindal Drugs (Infra)*, [2016 \(340\) E.L.T. 67](#) (P & H) wherein the Hon'ble High Court laid down the detailed procedure, *inter alia*, providing for cross-examination of the witness of the Revenue by the Adjudicating Authority and thereafter, if the Adjudicating Authority is satisfied that the statement of the witness is admissible in evidence than the Adjudicating Authority is obligated to offer such witnesses for cross-examination by the other side/assessee. Such view has also been affirmed by the Hon'ble Supreme Court in the case of *Andaman Timber (Infra)* - [2015 \(324\) E.L.T. 641](#) (S.C.) = [2017 \(50\) S.T.R. 93](#) (S.C.).

4.2 We further find that Hon'ble Punjab & Haryana High Court in the case of *Sukhwant Singh* - (1995) 3 SCC 367 has observed as under :-

8. *It will be pertinent at this stage to refer to Section 138 of the Evidence Act which provides :*

“138. Order of examinations. - *Witnesses shall be first examined-in-chief then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined. The examination and cross-examination must relate to relevant facts but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.*

Direction for re-examination. - *The re-examination shall be directed to the explanation of matters referred to in cross-examination; and if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter.”*

9. *It would, thus be seen that Section 138 (supra) envisages that a witness would first be examined-in-chief and then subjected to cross-examination and for seeking any clarification, the witness may be re-examined by prosecution. There is, in our opinion, no meaning in tendering a witness for cross-examination only. Tendering of a witness for cross-examination, as a matter of fact, amounts to giving up of the witness by prosecution as it does not choose to examine him in chief. However, the practice of tendering witness for cross-examination in session trials had been frequently resorted to since the enactment of the Code of Criminal Procedure, 1898.*

4.3 In view of above it is clear that in adjudication, the adjudicating authority is required to first examine the witness in chief and also to form an opinion that having regard to the facts and circumstances of the case, the

statements of the witness are admissible in evidence. Thereafter, the witness is offered to be cross-examined. We find that in the present matter Ld. Adjudicating Authority failed to do such exercise. We also note that Section 138 of the Indian Evidence Act, 1872, clearly sets out the sequence of evidence, in which examination-in-chief has to precede cross-examination, and cross-examination has to precede re-examination. We also note that it was held by Hon'ble Allahabad High Court in the case of *Commissioner of Central Excise v. Parmarth Iron Pvt. Ltd.* [2010 \(260\) E.L.T. 514](#) (All.) (supra) that if Revenue does not allow cross-examination of any prosecution witness then Revenue cannot rely on the statement given by such prosecution witness for confirmation of demand. In the present case cross-examination of none of the witnesses were allowed. Therefore, following the ruling by above judgments, we hold that none of the statements were admissible evidence in the present case and no cenvat demand sustainable on the basis of statements of persons.

4.4 We also perused the statements recorded by the Senior Intelligence Officers of DGCEI, Regional Unit, Vapi. We observe that on two computer typed statements name of Senior Intelligence Officer is appearing and in one statement no name is appearing. Further, there is no signature of the Senior Intelligence officers in the copy of these statements. In this circumstance we agree with arguments of the Ld. Counsel that the said statements are not valid in law under Section 14 of the Central Excise Act, 1944. The statements recorded by the DGCEI are unsigned by any of DGCEI officers. Therefore, the statements cannot be relied upon and no demand sustainable on said unsigned Statements.

4.5 Without prejudice, we find that the Cenvat Credit Rules 2004, deal with the procedure relating to availment of credit. As per Rule 3, a manufacturer or a producer of final products or a provider of taxable service shall be allowed to take credit (hereinafter referred to as Cenvat credit) of the duties specified therein paid on any inputs or capital goods and received by the manufacturer for use in or in relation to the manufacture of final products. Rule 4 of the said Rule stipulates that Cenvat credit in respect of inputs may be taken immediately on receipt of the inputs in the factory of the manufacturer or in the premises of the provider of output service. Rule 9 of Cenvat Credit Rules, 2004 deals with the documents and accounts on the basis of which the Cenvat credit can be taken. From the above provisions of law, it becomes evident that to avail Cenvat credit, the inputs should have suffered the stipulated duty by the producer/manufacturer of such goods

and the goods should be received by the manufacturer availing credit in his factory and the inputs so received should be utilised in or in relation to the manufacture of final products. In the present matter the case of the department is that Appellant as availed the Cenvat credit without receipts of the goods mentioned in Bills of Entry and supplier invoices. We find that the conditions for allowing the Cenvat credit on the inputs used for manufacturing excisable goods are stipulated in Cenvat Credit Rules 2004 and similarly the documents on which the Cenvat Credit be allowed has also been well defined in Rule 9 of Cenvat Credit Rules 2004. What is required to be established, only receipt of the inputs in the factory under cover of valid duty-paying documents and utilization of the goods in the manufacture of the final products cleared on payment of duty. On perusal of the records and facts of the case we find that in the present case itself it is admitted facts that the Appellant shown the receipts of duty paid goods and use of the goods in their factory. Therefore we do not find any reason for disallowance of Cenvat credit in this matter specifically when the supplier of the goods/raw material, nowhere admitted that, they have not supplied the goods to Appellant and any evidence in relation to diversion of disputed imported raw materials. When the inputs are used in the manufacture of dutiable final products, the benefit of Cenvat credit in respect of such input cannot be denied.

4.6 Further, examining the present issue, we find that there is no other evidences on record to show that the Appellant either did not receive the raw materials, on which they have taken the credit or after receiving the same and availing the credit, the same stand removed by them in the open market. Further in the entire case there is no admission in the statements of Appellant's directors or employees to the effect that the raw materials were not actually received by them. There is also no admission in the said statements to the effect that raw materials stand diverted in the open market. Further no corroborative evidence produced by the department in relation to use of alternate raw materials when the disputed goods are not received by the appellant, how they procured the alternate goods which have been used in the manufacture of dutiable goods cleared on payment of duty. We find that the disputed goods were duly found to have recorded in the Appellant's factory and were consumed in the production. In such case we do not find any reason to disallow the credit to the Appellant.

4.7 We further find that that the allegation of cenvat credit wrongly availed on inputs without actual receipts of the goods in factory and without

actually using the said goods in the manufacture of finished goods on the basis of records of transporter and their statements not sustainable. We find that the basis for denial of such substantial amount of Cenvat credit on raw materials is totally unsustainable and beyond reason. Here, again it is not clear, if such quantities of raw materials were diverted without receipts of the factory and use of the same in manufacturing of finished goods, how then can there be production of given quantity of final product. Department in the present matter nowhere produced any corroborative evidences related to the diversion of imported raw materials and raw material supplied by the M/s. Bhagwati Metals Works, Kathua, Jammu. We also find that the Hon'ble Gujarat High Court dealing with the identical issue in the case of *Motabhai Iron Steel Industries* (supra) [2015 \(316\) E.L.T. 374](#) (Guj) agreed with the Tribunal despite the fact available in that case that as per RTO reports the vehicle were not capable of carrying the goods but on the basis of other facts, such as the goods were found duly recorded in the appellants factory and consumed in the production, the payment were made through banking channels, no evidence of non-supply of the goods by the consignor etc. considering these facts, the Hon'ble Gujarat High Court itself upheld the order of the Tribunal.

4.8 In the present matter we also observed that these facts are not under dispute that the Appellant have recorded the receipt of the goods in books of account and payment of the same was made through cheque. The finished goods were cleared on payment of Central Excise duty. Transportation charges were also paid by banking Channel and such payment was accounted for in the books of account. There is no corroborative evidence that the disputed inputs were not used in the manufacture of final product. Department has not disputed the correctness of quantity manufactured by the Appellant recorded in production records. There is no allegation by the department regarding the financial flow back that against the said disputed goods for which the payments were made through cheque, any cash payment was received by the Appellant. With all these undisputed facts, merely on the basis of Check Post report and transporter statements, it cannot be concluded that the inputs were not received by the Appellant. Therefore the facts are established that the Appellant have received the inputs in their factory, used in the manufacture of final product and same was cleared on payment of duty. Therefore, there are no substantial evidence which result the disallowance of credit. From the facts and evidences placed before us, we are of the view that impugned Cenvat demand alleging fraudulent avilment of credit is not sustainable.

4.9 We also observe that Tribunal in case of *M/s. Lloyds Metal Engg. Co. v. CCE, Mumbai*, 2004 (175) E.L.T. 132 (Tri.-Mumbai) has held that burden to prove non-receipt of the inputs is required to be discharged by Revenue by sufficient evidence. Where disputed consignments are entered in RG-23A Part I and Part II in chronological order, the allegations of non-receipt of the inputs cannot be upheld. Further our above findings find support from the Tribunal's order in case of *M/s. Ajay Industrial Corporation v. CCE, Delhi* - [2009 \(237\) E.L.T. 175](#) (Tri.-Del.) as also from the Tribunal's decision in case of *M/s. Shree Jagdamba Castings (P) Ltd. v. CCE, Bhopal*, [2006 \(206\) E.L.T. 695](#) (Tri.-Del.). It has been held in said judgments that the credit availed on the basis of invoices issued by the registered dealer, cannot be denied on the ground that the transporters have admitted the fact of non-transportation of the goods and the addresses of truck owners were found to be fake. Similarly, in the case of *M/s. Malerkotla Steels & Alloys Pvt. Ltd. v. CCE, Ludhiana*, [2008 \(229\) E.L.T. 607](#) (Tri.-Delhi), it was held that a manufacturer cannot be denied the credit on the ground that registered dealer had not received the inputs.

4.10 We also noticed that in the case of *Motabhai Iron & Ispat Indus. v. Commissioner of Central Excise* - [2014 \(302\) E.L.T. 69](#) (affirmed by Hon'ble Gujarat High court) where in respect of CENVAT Credit availed the Revenue had alleged that the invoices are bogus and there has been no actual delivery of goods. It has been held that credit cannot be disallowed on basis of statements not corroborated by other evidence or goods not received by the assessee. Invoices issued by registered dealer duly recorded in statutory record books and payment made through Banking channel and there is no evidence that the said amount was received back by the assessee and that records maintained were not correct. Further, form-40 (Sales Tax paid by supplier) was produced in support of contention that the goods were actually transported. In view of the fact that no investigation was conducted at consignor's place, statement of transporter was held not reliable and accordingly, the disallowance of CENVAT Credit was set aside. Further Tribunal in the case of *Commissioner of Central Excise, Ludhiana v. Nand Mangal Steels Pvt. Ltd.* - [2013 \(298\) E.L.T. 105](#) (Tri.-Del.), wherein Tribunal in the case of CENVAT Credit availed on scrap, used in the manufacture of non-alloy steel ingots, and in fact that inputs were used for manufacture was not disputed, wherein there was allegation of non-receipt of goods based on incorrect vehicle no., it was held that it does not mean that the goods procured by appellants are not same. Further, the movement of goods from

supplier firms and receipt of the same by the assessee was not disputed, but minor discrepancy in the invoice will not result in denial of credit. The tribunal in the case of *Luxmi Metal Industries v. Commissioner of Central Excise, Delhi-II* - [2013 \(287\) E.L.T. 487](#) (Tri.-Del.), wherein the fact that when the buyer purchased goods from registered dealer under proper invoice, there being no dispute about the credentials of the cenvatable invoices issued by the registered dealer and accompanying goods, it was held that the buyer cannot be expected to go beyond that to verify and find out as to whether the registered dealer had purchased the same legally or not and in such facts, the denial of CENVAT Credit was set aside in favour of the assessee.

4.11 We also find that it is an undisputed fact that all the purchases were duly recorded in the statutory books of the Appellant and the goods were also found to be entered in statutory records of the Appellant. There is no evidence which can show that the records maintained by the Appellant are not correct. Only on the basis of statements of Transports and their private records, the huge credit is sought to be disallowed whereas the statements are in isolation with no corroboration. We therefore hold that in the present matter disallowance of credit to the Appellant is not sustainable.

5. As per our above discussion and finding the demand of Cenvat credit is not sustainable. Accordingly, impugned order is set aside and appeals are allowed with consequential relief, if any, in accordance with law.

(Pronounced in the open court on 30.01.2024)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)