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

REGIONAL BENCH-COURT NO. 3

Excise Appeal No. 11470 of 2016 - DB

(Arising out of OIO-BHR-EXCUS-000-COM-100-15-16 dated 31/03/2016 passed by Commissioner of Central Excise and Service Tax-Bharuch)

Nahar Colours And Coating Ltd **........Appellant**
Unit No.-3, Dahej Road, Village- Jolwa,
Taluka- Vagra,
Bharuch, Gujarat

VERSUS

C.C.E-Bharuch **......Respondent**
Vadodara-II,GST Bhavan,
Subhanpura,Vadodara
Vadodara, Gujarat- 390023

WITH

Excise Appeal No. 11473 of 2016–DB

(Arising out of OIO-BHR-EXCUS-000-COM-100-15-16 dated 31/03/2016 passed by Commissioner of Central Excise and Service Tax-Bharuch)

Raj Surana **........Appellant**
Director Of M/s Nahar Colour & Coating Ltd,
Unit No.-3, Dahej Road, Village- Jolwa,
Taluka- Vagra,
Bharuch, Gujarat

VERSUS

C.C.E-Bharuch **......Respondent**
Vadodara-II,GST Bhavan,
Subhanpura,Vadodara
Vadodara, Gujarat- 390023

APPEARANCE:
Shri Anil Gidhwani, Advocate for the Appellant
Shri Ajay Kumar Samota, Superintendent (AR) for the Respondent

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

Final Order No.10546-10547/2024

DATE OF HEARING: 09.11.2023
DATE OF DECISION: 06.03.2024

RAMESH NAIR

Brief facts of the case leading to the present appeals are that the Appellant M/s. Nahar Colours and Coating Limited is engaged in the manufacture of Cermic Glaze Frit/Glaze Mix of different grades such as opaque, transparent and satin falling under the Chapter CTH No. 3207 20 10 of the Central Tariff Act, 1985. The Appellant has availed benefit of Cenvat Credit under Cenvat Credit Rules, 2004. It is the case of the

Department that the Appellants are allegedly involved in the clandestine removal of goods on which Central Excise Duty has not been paid by them and that the Appellants have wrongly availed Cenvat Credit. Accordingly, duty, interest and penalty has been imposed on the Appellants. The Adjudicating Authority vide impugned Order – in – Orginal No. BHR/EXCUS/000/COM/100 – 15 – 16 dated 31.03.2016 has upheld the allegations made by the Department and confirmed the demand along with penalty and interest.

Hence the present appeal.

02. Shri Anil Gidwani, Learned Counsel appearing on behalf of the Appellants submits that the demand confirmed by the Department is an extrapolated figure based on the calculation of production by taking the standard production per batch and simply that by the number of batches appearing in the Finished product analysis Dilatometer Register. He submits that the Department has alleged clandestine removal of goods with no corroboration of tangible evidence and has taken an assumptive preponderance of evidence towards such clearance. He submits that the Department has assumed the average production batch as standard production which is of 4000 kg whereas submissions have been made by the Appellant to clarify that the said figure of 4000 kg is an average batch production that is to say that if there is a requirement of say 6000 kg then it will represent a batch of 4000 kg and 2000 kg and as such next production for any other requirement will be taken up afresh and a new batch no. will be allotted for the sake of maintaining uniformity in production procedures. He submits that the Appellants have not consumed any zircon flour in excess as claimed by the Department. He submits that there has been no wrongful availment of Cenvat Credit as the same has been alleged by the Department by simply relying on inferences drawn from statements of subordinate employees who do not possess accounting knowledge and that there was no trail of purchase or sale of such imported zircon sand quantity, transportation details, buyers etc.

2.2 Without prejudice to above, he submits that the Appellants maintain RG 23 part – I/raw material receipt register to maintain records for each type of raw material on a day-to-day basis and since the Appellants are under no statutory requirement to maintain chits that contain breakup of raw material per batch, the same was not preserved by them.

2.3 He further submits that the Department whilst alleging clandestine removal of goods has based the entire demand only on surmises and conjectures and have not considered submissions made by the Appellants. He has relied on the following judgements in support of his claim.

- Commissioner v. Durga Trading Co. 2004 (168) ELT A122(SC)
- Commissioner v Shree Pre-coated Steel Ltd. 2001 (131) ELT A153(SC)
- Commissioner v. Ambika Chemicals 2003 (153) ELT A298 (SC)
- Hingora Industries v. Commissioner or C. Ex. Daman 2015 (0325) ELT 0116
- Suzuki Synthetics v. Commissioner of C. Ex. 2015 (318) ELT 0487
- Mekala Raja Plywoods v. Commissioner of C. Ex. 2014 (308) ELT 0090
- Commissioner of Central Excise v. Salva Chemicals 2014 (299) ELT 0065
- Vishwa Traders v. Commissioner of Central Excise 2012 (278) ELT 0362
- Andhra Cements v. Commissioner of Central Excise 2005 (191) ELT 1046
- Rajasthan Petro Synthetics v. Commissioner of Central Excise 2003 (160) ELT 297.

03. Shri A.K. Samota, Learned Superintendent (AR) appearing on behalf of Revenue reiterates the findings on the impugned order.

04. We have carefully heard both the sides and perused the records. We find that the entire case of clandestine removal of goods was made out on the basis of statements recorded of the Appellants. The Department has not adduced any evidence in support of their claims. We observe that the Department has relied on the theoretical calculation of production and multiplying such assumed standard with no. of batches so appearing in the FDADR Register furthermore relying on some 'chits' apparently indicating proportion of raw material to be used for production process and drawn inference that the Appellants are removing goods in a clandestine manner. We find that clandestine removal of goods is a serious allegation and the reliance of Department on such incorporeal data to support their claim is perverse. Furthermore, no evidence has been brought on record to show

any excess procurement of raw material for the alleged differential production by the Appellants. Corroborative evidence such as evidence of other inputs required for manufacture, transportation, details of buyers etc. have not been provided by the Department. The Tribunal has relied on the case of *Moon Beverages* where a similar situation has been dealt with and the view adopted by the tribunal was that the charge of clandestine removal cannot be established on the basis of one single factor.

4.2 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) 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*. Similar stance has been taken by this Tribunal in the case of M/s. Ambica Organics v Commissioner of Central Excise and Customs 2016 (334) ELT 0097 wherein it was held that statements relied on to establish clandestine removal of goods should hold evidentiary value and with no adequate material available on record, clandestine removal of goods cannot be established. 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"*. In light of the aforesaid, we find that existence of corroborative evidence is essential in order to establish clandestine removal of goods and the same cannot be merely based on assumptions and presumptions. In the present case the Department has not adduced such well-fortified evidence that strengthen the claims of the Department.

4.3 As regards the issue of wrongful availment of Cenvat Credit, we find that the ground for denying Cenvat Credit has been made without recording any statement of the Appellant's staff/directors and without adducing corroborative documentary evidence pertaining to non - utilization of imported Zir Flour. We find that there is no dispute as regards import of material for which credit was taken, took place and goods reached the job worker at their premises for which transportation charges were paid, bills were raised by the job workers post which goods were received by the Appellant at their premises. We observe that it is apparent on record that the Cenvat Credit availed by the Appellant was post such receipt from the job worker. We find that there is no material on record to show that the goods were not utilized as inputs therefore we are of the considered view that there is no wrongful availment of Cenvat Credit when the records of the Appellant reflect due compliance towards all requirements as prescribed under the Cenvat Credit Rules, 2004 for availing such Credit.

05. In the light of foregoing findings and discussions we find that under the present facts and circumstances there is no merit in the claim of the Department towards clandestine removal of goods and wrongful availment of Cenvat Credit. Therefore the impugned order is set aside. Appeals are allowed with consequential relief, if any.

(Pronounced in the open court on 06.03.2024)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

Raksha