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

REGIONAL BENCH- COURT NO. 3

Excise Appeal No. 11100 of 2014- DB

(Arising out of OIO-AHM-EXCUS-002-COMMR-053-13-14 dated 09.01.2014 passed by Commissioner of Central Excise-Ahmedabad-II)

M/s Excel Pump Industries **........Appellant**
Plot No. D-1/B, Diamond Park,
Opp : Gujarat Agro, Nh No. 8, Gidc, Naroda,
Ahmedabad-Gujarat

VERSUS

C.C.E. - Ahmedabad - II **......Respondent**
Custom House... First Floor,
Old High Court Road, Navrangpura,
Ahmedabad, Gujarat-380009

APPEARANCE:
Shri Devashish K. Trivedi, Advocate for the Appellant
Shri A.R. Kanani, Superintendent (Authorised Representative) for the Respondent

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

FINAL ORDER NO. 10756 /2024

DATE OF HEARING: 04.12.2023
DATE OF DECISION: 03.04.2024

RAMESH NAIR

The instant appeal has been filed by the assessee, M/s. Excel Pump Industries against the Order-in-Original No. AHM-EXCUS-002-COMMR-053-13-14 dtd. 09.01.2014 passed by the Learned Commissioner, Central Excise, Ahmedabad -II, whereby he has confirmed demand of Central Excise duty of Rs. 80,17,970/- along with interest and imposed equal amount of penalty.

1.1 Briefly stated, the facts of the case are that the appellant received the information from the Director General of Income –tax (Inv), Ahmedabad vide letter dtd. 22.02.10 indicated that Shri Bhikhabhai K Patel, proprietor of Appellant firm and Shri Dineshbhai S Patel, proprietor of M/s Umiya Pump both situated at D-1/B, Diamond Park, Opp. Gujarat Agro, Naroda GIDC, NH No. 8 Ahmedabad, engaged in the business of manufacturing, trading and jobwork of submersible pumps had made sales in cash and had not disclosed the same and had not maintained any books of accounts for the purpose of Income-Tax ; and that they had disclosed additional income to the tune of Rs. 1.28 Crore for FY08-09 and FY09-10 and had paid Tax of Rs. 37,74,500/-. From Panchanama, it appeared that both these persons were apprehended by the Income Tax authorities at Sardar Vallabhbhai Patel International Airport, Ahmedabad, on 14.01.2010. Certain documents viz. books of account and cash was seized from the aforesaid persons. With a view to carry out further investigation from Central Excise angle the officer of Central Excise Officer (Preventive), Ahmedabad-II, visited the premises of the appellant. Simultaneously, from the residence of Shri Bhikabhai Patel the officers recovered various documents/records for further investigation. Statements of various persons were recorded by the officers. On the basis of investigation carried out by the Department, the Show Cause Notice dated 02-04-2013 was issued wherein it was alleged that the Appellant had resorted to clandestine production and removal of finished goods without payment of Central Excise duty of Rs. 80,17,970/- during the period 2008-09 to 2010-11(upto November 2010). The Learned Commissioner adjudicated the Show Cause Notice *vide* impugned order dated 09-01-2014 and confirmed demand of Central Excise Duty alongwith interest and penalty. Being aggrieved, the Appellant has preferred the present Appeal before the Tribunal.

2. Shri D.K. Trivedi, Ld. Advocate appearing on behalf of appellant submits that appellant is small scale manufacturer of submersible pumps and they have capapcity to produce is about 175 to 190 pumps

per months. Even for higher estimation, the maximum value of clearance would be less than 1.5 crores which is well within the threshold limit of SSI exemption under Notification No. 8/2023-CE.

3. He also submits that the onus to prove that the appellant had manufactured goods and cleared clandestinely rests on department. Without having provide with cogent and tangible evidence that goods had been manufactured and cleared, not duty could be demanded. Since the adjudicating authority had failed miserably in putting on records about the manufacture of goods, the demand of duty is not sustainable. Copy of collection books recovered by the Income Tax Department is not conclusive evidence. The department has not made any inquiry about the veracity of such a document.

4. He further submits that department has relied upon the statement given before income tax authorities for demanding duty of central excise. The circumstances for giving such a statement the Income tax authorities were entirely different. Some cash was recovered from the possession of Shri Bikhabhai Patel at the airport by the Income Tax Officers and he was compelled to disclose some income before the Income tax officers. The statement was given to escape from punishment for carrying unaccounted cash under any other law which envisaged imprisonment also and the amount disclosed was out of compulsion. Thus the circumstance were entirely different at that time, but the central excise duty cannot be demanded on such a disclosure.

5. He also submits that the factory was closed after the Income tax raid in January 2010 and no manufacturing activity carried out thereafter by Appellant. However, the department demanded excise duty for the period after January 2010 and till October 2010. Shri

Bikhabhai has categorically stated that M/s Mexcel had been using the stationery of Excel Pump after January 2010. The department has not adduced any evidence to prove that the appellant had manufactured and cleared goods after January 2010.

6. He argued that none of the buyers, whose statements are recorded, had deposed that they received pumps from M/s Excel Pumps Industries after January 2010. However, without any documentary evidence, the adjudicating authority had confirmed the demand for the period January to October 2010. Even if the statements of the buyers are to be believed, most of the buyers were returning the pumps to the Appellant. The returned pumps were again cleared to some other dealers. Thus there is duplication of figures mentioned in the collection books.

7. He also argued that in order to manufacture the excisable goods it requires raw material like castings, copper rods, copper wires etc. The department has not adduced any evidence about the purchasing such raw materials. The department has demanded Central Excise Duty without going to the basics of manufacturing process and without support of any cogent and tangible evidence. Clandestine manufacture and clearances is serious offence and if the department alleges that the appellant had clandestinely manufactured and cleared excisable goods it should be supported by corroborative evidences. It is the prime burden on the department to prove whether the goods were manufactured and to whom they were cleared. In the present case there is no even a number about the manufacturing activity carried out by the appellant and the persons to whom the goods were cleared. Thus, it is clear that, the department has failed in all counts to prove that there had been manufacture and clearance of excisable goods from the factory.

However the adjudicating authority had not adduced any evidence in support of the allegation of clandestine removal in the impugned order. He had relied upon the statement given by the proprietor of the unit. But he failed to appreciate that the said statement had been retracted by Shri Bhikabhai Patel on the same by a letter addressed to the Superintendent (Preventive) who had recorded the statement. Therefore the adjudicating authority erred in relying upon a statement alone of the proprietor that too retracted by him the same day, in confirming a demand of clandestine removal. He placed reliance on the following decisions.

(i) Suntrek Aluminum Pvt. Ltd. 2013 (288)ELT 500 (Guj.)
(ii) Anil Agarwal – 2013(287)ELT 489 (Tri. Del.)
(iii) Eastern Bakeries Pvt. Ltd. -2013(293)ELT 593 (Tri. Kolkata)
(iv) Brims Products – 2011(271)ELT 184
(v) Gal Aluminum Extrusions Pvt. Ltd.–2011(274)ELT 582(T. Mum)
(vi) Patran Pipes (P) Ltd. -2010 (261)ELT 1173 (Tri. Del.)
(vii) RadhaMadhav Corporation -2012(284)ELT 369 (Tri.Ahmd.)
(viii) Shree Laxmi Steel Rolling Mills -2008(232)ELT 695(Tri. Ahmd.)

8. Shri A.R. Kanani, Learned Superintendent Authorized Representative appearing for Revenue on the other hand has supported the findings of the impugned order.

9. Heard both the sides. We have carefully gone through the case records, the written and as well as the oral submission of the appellant and the evidence placed on records. The Revenue’s case is primarily dependent upon the documents Collection Books (diary), forwarded by the Income Tax after seizure and a photocopy of seized by the Central Excise department during the course of panchnama at the factory on 12.01.2012, from which it was alleged that the appellant had cleared the goods clandestinely.

10. The entire case is based on various punchnamas and statements of various persons as listed below:

केन्द्रीय उत्पाद शुल्क, अहमदाबाद-II F.No.V.84/15-25/OA/2013

63

ANNEXURE-X

List of Relied upon documents in show cause notice F.No.V.84/15-25/OA/2013 dated 02.04.2013 issued against M/s Excel Pump Industries, D-1/B, Diamond Park, Opp. Gujarat Agro, Naroda GIDC, NH No.8, Ahmedabad, and others.

Sl No	Details of Records/ documents	Remarks
01	Panchnama dated 12.01.2012 drawn at the factory premises of M/s Excel Pump Industries, D-1/B, Diamond Park, Opp. Gujarat Agro, Naroda GIDC, NH No.8, Ahmedabad.	Copy supplied on the spot
02	Panchnama dated 12.01.2012 drawn at the residence of Shri Bikhabhai K. Patel situated at 71, Gangadhar Society, Near Bhadreshwar Colony, Hansol, Ahmadabad.	-do-
03	Records appearing in Annexure to the Panchnama dated 12.01.2012 drawn at the factory premises of M/s Excel Pump Industries, D-1/B, Diamond Park, Opp. Gujarat Agro, Naroda GIDC, NH No.8, Ahmedabad.	-do-
04	Records appearing in Annexure to the Panchnama dated 12.01.2012 drawn at the residence of Shri Bikhabhai K. Patel situated at 69, Gangadhar Society, Near Bhadreshwar Colony, Hansol, Ahmadabad.	-do-
05	Statement dated 14.01.2010 of Shri Bhikhabhai Keshavlal Patel recorded by the Income Tax department	Copy enclosed
06	Statements dated 3.2.2012 and 11.02.2013 of Shri Bikhabhai K. Patel, Proprietor of M/s. Excel Pump Industries	-do-
07	Statement dated 21.02.2013 of Shri H.C. Patel, Prop. of M/s. Mexcel Engineering.	-do-
08	Statement dated 12.01.12 of Shri Rameshbhai Mithalal Shah of M/s Mexcel Engineering, Ahmeddabad.	-do-
09	Statement dated 25.4.2012 of Shri Umesh Bapurrao Thanke Proprietor of M/s Shrinath Machinery Stores Market Yard, Kawwa Road Lathur	-do-
10	Statement dated 31.5.2012 of Shri Ghule Jalindar Lahanu Proprietor of M/s Sukhshanti Agency Near Bus Stand, Newasa, Dist Aurangabad	-do-
11	Statement dated 18.7.2012 of Shri Rakeshkumar Mali Son of Shri Durgaprasad Mali, proprietor of M/s Shivam Machinery & Electricals 29 Private Bus Stand, Nr Ambica Hotel, Neemuch (MP) .	-do-
12	Statement dated 10.12.2012 of Shri Seventilal Shah son of Shri Tribhovandas Shah proprietor of M/s Sevanilal & Co 1, JK Building, Hamidia Road Bhopal	-do-
13	Statement dated 05.02.2013 of Shri Durgesh C. Parmar, Manager & Authorised signatory of M/s Ratan India Traders, Hubli.	-do-

Though the adjudicating authority has confirmed the demand on the basis of the above evidences, Shri Bhikhabhai Patel has retracted his statement stating that no clandestine removal has taken place and also discarded the documents recovered. In this position particularly when the witnesses have objected their own statement, the examination in chief of witnesses and thereafter cross examination of the witnesses should be allowed in terms of Section 9D of Central Excise Rules, which is reproduced as under:

> **"SECTION 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 provisions 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."

From the plain reading of the above section 9D, it can be seen that it is not a discretion or choice of the adjudicating authority whether to allow or not to allow the examination in chief and or cross examination of witness. In the present case, since the witness have categorically denied the statement it become incumbent on the adjudicating authority to conduct the examination in chief and thereafter allow the cross examination of the witnesses to the appellant. Without carrying out the process as envisaged under Section 9D, the adjudication is not fair, therefore we are of the view that matter needs to be remanded to the adjudicating authority for passing a fresh order after conducting the examination in chief and thereafter allowing the appellant to cross examine the witnesses whose statements were relied upon. It is also made clear that despite all efforts of cross examination it the cross examination is not completed or partly completed, the adjudicating authority is not precluded to proceed with the adjudication on the basis of records. Accordingly, we set aside the impugned order and disposed of the appeal by way of remand to the adjudicating authority. Being very old matter, the denovo adjudication may be completed within two months from the date of this order.

(Order pronounced in the open court on 03.04.2024)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

Neha