CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, WEST ZONAL BENCH : AHMEDABAD

REGIONAL BENCH - COURT NO. 3

EXCISE Appeal No. 12574 of 2019-DB

[Arising out of Order-in-Original/Appeal No DMN-EXCUS-000-COM-018-19-20 dated 16.07.2019 passed by Commissioner of Central Excise, Customs and Service Tax-DAMAN]

Commissioner of Central Excise & ST, Daman .... Appellant
3rd Floor...Adarsh Dham Building, Vapi-Daman Road,
Opp.Vapi Town Police Station, Vapi, Gujarat-396191

VERSUS

Taha Wires Pvt Limited .... Respondent
Plot No. 89, Panchal Udyog Nagar, Bhimpore
Daman, Gujarat.

APPEARANCE :

Shri G. Kirupanandan, Supdt (AR), for the Appellant-Revenue
Shri Willingdon Christian, Advocate for the Respondent

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

DATE OF HEARING : 11.10.2021
DATE OF DECISION : 11.02.2022

FINAL ORDER NO. A/10092 / 2022

RAMESH NAIR :

The brief facts of the case are that the appellant are engaged in the manufacture of copper wires by the process of drawing of continuous cast/rolled copper wire rods. The copper wire rods were either imported/ procured from the manufacturers thereof or got manufactured by M/s. Taha Wires Pvt. Limited on job work basis from raw materials through different job workers. An intelligence collected by the DGCEI, Vadodara indicated that Taha Wires Pvt. Limited using non-duty paid scrap for the manufacture of their final products. However, they were wrongly availing Cenvat credit on the strength of duty paid invoices of different inputs without actual receipt of the inputs against such documents. Therefore, the Cenvat credit so availed appeared not admissible to them. Accordingly, based on the intelligence, the factory premises of M/s. Taha Wires Pvt. Limited was searched by the officers of DGCEI on 10.02.2006 and again on 21.12.2006 and relevant documents/ records were resumed under respective Panchnamas. Further, during the course of investigations, several other documents/ records were also resumed under Section 14 of the Central Excise Act, 1944. As part of investigation, material as well as oral evidences were also collected from:-

(i) Various Road Transport Authorities to ascertain the names of the owners, nature of vehicles load carrying capacity etc. in respect of purported transportation of inputs to the factory of M/s. Taha Wires Pvt. Limited.

(ii) Custom House Agents, who cleared and transported imported consignments from ICD, Tughlakabad to Shahdara/ UP border.

(iii) The owner/ operator of the vehicles shown to have used for transportation of imported consignments from Delhi to M/s. Taha Wires Pvt. Limited, Daman

(iv) Transporters who had shown to have affected the transportation of goods from Delhi to M/s. Taha Wires Pvt. Limited, Daman

(v) The Director of M/s Taha, Shri Kamilbhai Zanubhai Vashi.

2. From the detailed investigations it revealed that M/s. Taha Wires Pvt. Limited, Daman had imported re-melted copper ingots/re-melted copper wire bar from Sri Lanka. Besides, M/s Taha Wires Pvt. Limited had also purchased on high-sea-sales basis of such re-melted copper ingots/ wire bars of Sri Lankan origin from other importers. Such consignments of re-melted copper ingots/wire bars were shipped from Sri Lanka to JNPT Nhava Sheva and then the same were transported to Delhi, for further customs clearance from ICD, Tughlaqabad, Delhi. Thereafter, these goods were

allegedly further transported in trucks to the factory of M/s Taha Wires Pvt. Limited at Daman through various transporters. On completion of investigation in respect of wrong availment of Cenvat credit by M/s. Taha Wires Pvt. Limited on copper ingots/ wire bars cleared from ICD Tughlakabad, show cause notice bearing No. DGCEI/AZU/36-35/2007-08 dated 03.10.2007 was issued to Taha Wires Pvt. Limited proposing demand of recovery of Cenvat credit amounting to Rs. 3,93,98,286/-, imposition of penalties on M/s. Taha Wires Pvt. Limited as well as personal penalty on various persons. The above show cause notice was adjudicated by the Commissioner of Central Excise & Customs, Vapi vide order-in-original No. 10/MP/Daman/2011 dated 20.04.2011 whereby demands raised in the show cause notice were confirmed for recovery along with applicable interest and also imposed penalty on the noticees.

3. Aggrieved by the above order-in-original, appeals were filed by Taha Wires Pvt. Limited and other co-noticees before this Tribunal mainly on the ground of cross-examination of the witness which was not allowed by the Adjudicating Authority. This Tribunal vide order No. A/10150-10154/2019 dated 08.01.2019 decided the appeals filed by the said noticees and set-aside the said order-in-original and remanded back the case for de-novo adjudication with directions that appellant shall be given sufficient opportunity of personal hearing and making their submission after allowing the cross-examination of the witness. Consequent upon this Tribunal's order dated 08.01.2019, fresh adjudication proceedings on remand, after going through the show cause notice dated 03.10.2007, the directions given by this Tribunal vide order dated 08.01.2019, the Adjudicating Authority passed the impugned order-in-original dated 16.07.2019 whereby he dropped the proceedings show cause notice dated 03.10.2007. Being

aggrieved by the impugned order-in-original dated 16.07.2019, the Revenue filed these appeals against M/s. Taha Wires Pvt. Limited, Daman, Shri Kamilbhai Z. Vashi, Director of M/s. Taha Wires Pvt. Limited, Shri Rajesh Sharma, Proprietor of M/s. Kamya Transport Company, Delhi, Shri Navrattan Lal Sharma, Transporter of M/s. Singal Road Carriers, Delhi and Shri Satish B. Agarwal, Partner of M/s. Time & Space Haulers, Mumbai.

4. Shri G. Kirupanandan, learned Superintendent (AR) appearing on behalf of the Revenue- Appellant reiterates the grounds of appeal.

5. On the other hand Shri Willingdon Christian, learned Counsel appearing on behalf of the Respondents filed a synopsis dated 15.10.2020 and argued the contents of the said synopsis which is taken on record.

7. We have heard both the sides and perused the record. The entire case of the Revenue is that the respondent have not transported the goods from ICD, Tughlakabad to Daman but the same was diverted somewhere else. Accordingly, the respondent are not eligible for Cenvat credit in respect of such alleged diverted goods.

8. We find that the Revenue in their appeal raised various grounds to contend that order-in-original is not legal and proper. As regards the ground that Adjudicating Authority without causing an enquiry accepted the submissions of the assessee/ respondent that taking the imported goods from Nhava Sheva to ICD Tughlakabad and bringing back same to the Daman is due to the reasons as commercial decision taken by Taha Wires Pvt. Limited. In this regard, we find that merely because there is distance between Nhava Sheva to Tughlakabad and then transportation to Daman, it

cannot be presumed that the goods might not have transported to Daman. Irrespective of distance there may be various other reasons and it is up to the assessee to take a commercial decision whether to transport the goods directly from Nhava Sheva to Daman or Nhava Sheva to Tughlakabad and then to Daman. At the most, this activity can create a suspicion but only on this basis, it cannot be concluded that goods have not been transported from ICD Tughlakabad to Daman. Therefore, the ground taken by the Revenue on this aspect is on assumption and presumption.

9. As regards the ground that the Adjudicating Authority has wrongly held that statements of transporters are not found to be reliable regarding unloading of the goods, we find that the Adjudicating Authority perused the statements/ explanation of the local transporters of Delhi revealed that they have not indicated any specific place or premises where the goods were unloaded by them except vaguely specifying the areas. The Adjudicating Authority also observed that it would be the drivers of the local transporters who would know the exact place of unloading of these consignments as held in the various decisions on the subject. The Adjudicating Authority also relied upon various decisions in this regard.

We find that in absence of clear statement of the transporters that goods were not unloaded to the respondent's destination only the vague statements cannot be used as conclusive evidence. We do not find any infirmity in these findings of the Adjudicating Authority inasmuch as the Adjudicating Authority has not found the statements of the transporters to be reliable.

10. We find that the Adjudicating Authority has given elaborate finding considering undisputed fact of recording of statements of Shri Rajesh

Sharma and Shri Sanjay Sharma and come to the conclusion. The said piece of statement cannot be used as evidence and on this basis it cannot be concluded that there is diversion of goods in or around Delhi. We find that in the grounds of appeal, it is nowhere disputed that statement of Shri Sanjay Sharma bears no signature, therefore on this basis learned Adjudicating Authority has not taken into consideration the statement of Shri Rajesh Sharma. Therefore, we do not find any infirmity in such finding.

11. As regards the grounds in the findings of the Adjudicating Authority in Para 30.3.3.4(b)(i), the same is reproduced below:-

> *"considering the statement of the local transporters at Delhi and CHA which has been relied upon it is found that the statements are stereo typed copies mostly disclosing only the vague places in Delhi, where the duty paid imported Copper was unloaded No statements of the local vehicle drivers are relied. As per the settled law, the vehicle drivers could identify the exact place where the allegedly diverted imported copper was unloaded & further movements de trucked This not being done & no recipients of such diverted Copper at Delhi identified corroborate, the theory of ICD Tughlakabad at Delhi being purposely selected to first clear the imported copper consignments at ICD and sell the Copper only in and around Delhi does not hold. This allegation is only on an assumption or presumption without corroboration and is thus rejected."*

The above finding was given by the Adjudicating Authority for the reason that statement of local transporters and CHAs, which have been relied upon are, firstly, stereotyped and the same was disclosing vague places but there is no confirmation of delivery of goods at Delhi to a particular person and place. Therefore, on the basis of such vague statement it cannot be concluded that the goods were unloaded in or around Delhi. Therefore, we do not find anything wrong in the aforesaid findings of the Adjudicating Authority.

12. The Revenue in the grounds of appeal referring to Para 30.3.3.4(b)(ii) submitted that though Shri Keshav Singh Tomar has stated about issuance

of transit pass for transportation of goods from Delhi to Gujarat /Daman but subsequently, on investigation with statutory bodies like Commercial Tax Check post authorities, Regional Transport authorities were found false therefore, should not have relied upon the statement of Shri Keshav Singh Tomar.

In this regard, it is the statement of respondent that except for relying on the third party statement like Commercial Check post, RTO authorities, there was no investigation nor any evidence was produced to substantiate that clandestine disposal of disputed items and substituted by locally purchased. We find that except of third party record, there is no positive evidence from the respondent to establish that goods were diverted in or around Delhi. Therefore, merely on reliance on third party evidence, the case against respondent cannot be established.

13. The Revenue objected the findings of the Adjudicating Authority given in Para 30.4.3.4(b)(iii) which is reproduced below:-

> *"The statement of the persons of M/S Singhal Road Carriers and the documents recovered from Ahmedabad Office cannot be accepted to prove non transportation of the goods from Delhi as they have retracted the statements in the cross examination and the delivery register at Ahmedabad office is for Railway Receipts and not related for door delivery and for delivery in and around Ahmedabad and not for Surat/ Daman, the destination in this case."*

From the above, we find that since the statement of the persons of M/s. Singal Road Carriers retracted in cross-examination, the statement cannot be used as an evidence. Therefore, we find it proper on the part of hhe Adjudicating Authority for not accepting the documents to prove non-transportation of goods from Delhi.

14. We find that the grounds of appeal is based on assumption and presumption and not on direct and cogent evidence. We find that the Adjudicating Authority has relied on CESTAT decision in the case of *Gujarat Victory Forging Pvt. Limited* wherein she recorded findings that the investigations made with M/s. Time & Space Haulers and M/s. Singal Road Carriers have not been upheld by the CESTAT and held that this binding decision will result in setting aside all charges in the show cause notice. The Revenue in the grounds of appeal stated that the said CESTAT decision in the case of *Gujarat Victory Forging Pvt. Limited* has not attained finality for the reason that the facts of *Gujarat Victory Forging Pvt. Limited* are different from the facts of the present case.

On going through the said judgment, we find that the Respondent's case is on better footing as compared to the case of *Gujarat Victory Forging Pvt. Limited.* In the present case, there is absolutely no evidence of delivery of goods in or around Delhi. However, there is ample evidences that goods have been transported to Daman to job workers of the Respondent for which records have been maintained.

15. From the overall grounds of appeal, we observed that the Revenue has strongly relied upon the investigation conducted with RTO, Commercial Tax authorities and certain documents and statements of transporters to establish that goods were not transported from Delhi to Daman but the same were supplied in and around Delhi.

We find that there is no investigation and no evidence to establish alleged clandestine disposal of disputed inputs in or around Delhi and not even a single alleged buyer out of 1670 MT is brought on record. Similarly, there is no details of transportation of goods or about financial transactions or about any blow back from the suppliers or from the alleged buyers.

Therefore, the alleged clandestine disposal of the disputed inputs remains unsubstantiated, despite some stray evidence relied upon in the show cause notice.

16. Similarly as regards the department's case about substitution of the disputed inputs by scrap procured from market, there is not even a semblance of evidence showing details as to any single supplier of the alleged substituted scrap or about transportation thereof or any financial transaction with the alleged supplier of the alleged substituted scrap. This shows that department's two pronged alleged case of clandestine disposal of disputed inputs and its substitution by procurement of scrap has no legs to stand on.

17. As regards the positive documentary evidence from CHAs, the CHAs have admitted that they had cleared the goods from the Customs, ICD Tughlakabad and arranged loading the disputed inputs in trucks of different transporters for dispatch to Surat/Daman. This fact cannot be brushed aside. Full value of the disputed inputs has been paid by cheque. Similarly full payments have been made to the concerned CHAs, transporters etc. The respondent have also paid service tax on GTA paid to the transporters for transporting the goods. The disputed inputs were delivered directly to the job workers for conversion of Copper Ingots/Bars/Scraps into wire rods, as the respondent did not have the facility of furnace, Rolling Mill etc. to convert Copper Ingots/Bars/Craps into wire rods.

18. There is absolutely full proof of record of every single consignment of total 124 consignments having been received by the job workers and returned the job worked goods to the respondent in terms of Rule 4(5)(a) of

Cenvat Credit Rules, 2004 read with Notification No. 214/86-CE. The crucial facts about receipt of disputed inputs and its utilization for the manufacture of final product stand corroborated and proved by the following statutory-cum-official documentary evidence:

a) RG23A Part-I & II maintained by the Respondent

b) Full payment through Bank to the various suppliers.

c) Payment to CHAs and transporters by cheque or by cash as per law.

d) Job work challans in Annexure-II, Registers maintained in Annexure-IV by the Appellant and Annexure-V by the job worker for processing of the disputed inputs in to intermediate product in terms of Rule 4(5)(a) read with Notification No.214/86-CE.

19. We find that Revenue has not questioned on the investigation of statutory and official documentary evidence of respondent. In the cross-examination of CHAs and one transporter, they deposed about actual handling and transportation of the disputed inputs. Except the statement of Shri Kamil Vashi, no statement was recorded from any of the employees or representatives of the respondent. Shri Kamil Vashi has categorically averred in the statement that they had received the inputs and used in the manufacture of final products.

20. The DGCEI officers raided the respondent's factory on 10.02.2006 and 21.12.2006 but no discrepancy was found either in the stock of inputs or stock of finished goods. The job worker M/s. Paramount Rolling was also summoned and enquired at their end. All the relevant documents for job work procedure were produced before the investigating agency under the cover of letter dated 17.02.2006 of M/s. Paramount Rolling but there was

no discrepancy found as regards stock of the disputed inputs or stock of job worked goods. We find that except for relying on third party evidence, i.e. transporter, RTO and Highway Check Post records, the investigating officers have not carried out any investigation, nor produced evidence to prove their two fold case of clandestine disposal of disputed inputs and its substitution by scrap locally purchased. The department's sole reliance is as under in their appeal:-

(a) Various Road Transport Authorities to ascertain the names of the owners, nature of vehicles load carrying capacity etc. in respect of purported transportation of inputs to the factory of M/s Taha Wires Pvt. Limited.

(b) Custom House Agents, who cleared and transported imported consignments from ICD, Tughlaquabad to Shahadra/UP border.

c) The owner/operator of the vehicles shown to have used for transportation of imported consignments from Delhi to M/s Taha Wires Pvt. Limited, Daman.

d) Transporters who had shown to have affected the transportation of goods from Delhi to M/s Taha Wires Pvt. Limited, Daman.

e) The Director of M/s Taha Wires Pvt. Limited, Shri Kamilbhai Zanubhai Vashi.

21. We find that there were in fact more than 12 transporters but the investigating officers have felt complacent by recording statements of only two transporters, namely M/s. Time & Space Haulers and M/s. Singal Road Carrier. Therefore the enquiry conducted with these two transporters who have transported only 10 consignments out of 124 consignments, that too the investigation is not conclusive against these transporters. It cannot be concluded that the goods have not been transported to Daman. It is further

seen that Shri Atul Navrattan Lal Sharma representative of M/s. SIngal Road Carrier was cross-examined, has categorically deposed that they had actually transported the disputed inputs as per LRs and received all payments from the Respondent for the transportation. Similarly, Shri Sanjay Sharma, CHA from M/s. R.U. Import Export Pvt. Limited has also categorically deposed that his statement was involuntary and that he had arranged for transport of the disputed inputs to Surat/Daman.

22. We also found that there is not a single statement of any supplier to the effect that the disputed inputs were not supplied to the Respondent and were supplied to some third parties. There is no evidence that some third party have made payments to the suppliers of the disputed inputs. The statements of transporters are not corroborated with any evidence. The entire case of the department is based on the record of the transporters and only on the basis of third party statements or record, the demand for denial of Cenvat credit cannot be sustained. It is also fact on record that there is no investigation made at the factory of the respondent and no statement of any production staff or excise/ stores staff is recorded. There is no allegation of flow back of money from the suppliers to the respondent. This fact is not under dispute that the respondent was preparing job work challans in Annexure –II and entries were also made in the Annexure-IV Register. The records maintained by the job worker were also produced before the investigating officers. But no discrepancy has been found at the job worker's premises. When the investigating offices visited the factory of the respondent as well as that of the job workers, they did not find any discrepancy about the inventory of inputs or final products. There is neither any investigation nor an iota of evidence that the respondent had procured the inputs from open market for substitution of the disputed inputs.

23. This is also fact on record that respondent have also entered the disputed inputs in their RG23A Part-I & II and have also shown the consumption of the same for manufacture of the final product. This plea does not stand rebutted by the Revenue. The disputed inputs have also been entered in the official stores ledgers and used in the manufacture of final products, which are cleared on payment of duty. Consequently, the denial of credit on the sole ground that the vehicles numbers were not found to be genuine cannot be made the basis for arriving at a conclusive finding against the respondent. The consideration for the disputed inputs was paid through cheques and freight payments were made through cheques or vouchers is the evidence in favour of the respondent.

23. The most important part is that there is absolutely no evidence brought on record to show as to how the huge quantity of the disputed inputs has been disposed off clandestinely and how and from which source the alleged substituted inputs were procured. This aspect of absence of evidence should suffice to cut the roots of the allegation, as there are ample and sufficient records and documentary evidence to prove that there was no shortage of the disputed inputs. The finished goods were manufactured and cleared on payment of duty and that there is not a single piece of evidence to prove source and manner of procurement of any substituted inputs.

24. We find that the case of the department is built up mainly on recorded statements of a few transporters of the disputed inputs. As the statements were retracted or contradicted during cross-examination, there has to be some other evidence sufficient to conclude that the disputed inputs was actually not received. The statements of co-accused necessarily need to be corroborated by some independent evidence. On the other hand, statutory

records, job work challans, job work registers, RG23A Part-I & II records etc., all stand in favour of the respondent. Since all these statutory records are not under dispute then the burden rests heavily upon the Revenue to establish with cogent evidence that the inputs were not actually received in the factory. Mere third party evidence like transporter's statements, RTO reports, Check Post records etc. which were not examined cannot suffice to prove the department's case.

25. The respondents rely on the following judgments:-

(a) 2014 (313) ELT 449 (Tri. Ahmd.)
Nissan Copper Pvt. Ltd. vs. CCE

(b) 2016 (337) ELT 129 (Tri. Hyd.) Akshay LPG Valves vs. CCE

(c) 2015 (325) ELT 910 (Tri. Ahmd.) STI Industries vs. CCE

26. In the above judgments also, the job work records constituted reliable and relevant evidence to disprove the department's case of non-receipt of inputs. We find that the above judgments support the respondent's case. The respondent also get support from the judgment of Hon'ble Gujarat High Court in the case of *Commissioner vs. Dhanlaxmi Tubes & Metal Industries – 2012 (282) ELT 206 (Guj.)* for the reason that in this case also the inputs were the same, i.e. Copper Ingts, secondly, the suppliers were also the same and thirdly, the inputs were also supplied by transshipment at Delhi and lastly, the transporter was also the same i.e. M/s. Singal Road Carrier. The most of the facts of the above judgment are same as in the present case also. Therefore, the ratio of aforesaid jurisdictional High Court judgment in the case of *Dhanlaxmi Tubes & Metal Industries (supra*) is applicable in the case.

27. As per our above discussion and findings, we find that the department could not establish beyond doubt that the alleged inputs were diverted in or around Delhi and not transported to Daman to the Respondent. Therefore, the Adjudicating Authority has rightly dropped the proceeding of the show cause notice. Accordingly, we uphold the impugned order and dismiss the Revenue's appeal.

(Pronounced in the open court on 11.02.2022)

(Ramesh Nair)
Member (Judicial)

(Raju)
Member (Technical)

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