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

REGIONAL BENCH-COURT NO. 3

EXCISE Appeal No. 11213 of 2017- DB

(Arising out of OIO-RAJ-EXCUS-000-PR-COM-71-16-17 dated 28/02/2017 passed by Commissioner of Central Excise, Customs and Service Tax-RAJKOT)

Hari Om Steel Industries **.....Appellant**
V.b Sheth & Co.
Dharaj; Near Moti Tanki, Dr. Radhakrishna Road,
Rajkot, Gujarat

VERSUS

Commissioner of C.E. & S.T.-Rajkot **.....Respondent**
Central Excise Bhavan,
Race Course Ring Road...Income Tax Office,
Rajkot, Gujarat-360001

WITH

(i) EXCISE Appeal No. 11214 of 2017- DB (Vibhav Kumar Ramhinch Mishra)
(ii) EXCISE Appeal No. 11215 of 2017- DB (Priyal Manharlal Viradiya)
(iii) EXCISE Appeal No. 11216 of 2017- DB (Shri Manharlal H Viradia)

APPEARANCE:
Present for the Appellant :Shri Rahul Gajera, Advocate
Present for the Respondent: Shri G Nair, Additional Commissioner (AR)

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

Final Order No. 10930-10933/2024

DATE OF HEARING: 02.04.2024
DATE OF DECISION: 23.04.2024

RAMESH NAIR

Briefly the facts are that appellants, Shri Vibhavkumar Mishra and Shri Priyal Manharbhai Viradia, were engaged in the manufacturing of excisable goods viz. TMT/Round/Twisted Bars etc. of various sizes falling under chapter 72 of the First Schedule to the Central Excise Tariff Act, 1985 in the name of M/s. Hari Om Steel Industries ("appellant firm" herein after). Appellant Shri Manharbhai Viradia is the owner of the truck used in the

transportation of the excisable goods manufactured and sold by the appellants.

1.1 On 22-05-2014, the officers of anti-evasion section of central excise, Rajkot carried out search of the factory premises of appellants during which certain documents, registers etc were seized. The officers drew panchnama and brought on record several statements of partner of the appellant firm and buyers of the goods manufactured and sold by the appellants; based on statements of various persons, five dairies, weighment slips/details and two invoices, a show cause notice dated 16-3-2016 was issued to the appellants by which a demand of duty of Rs. 2,62,87,260/- was raised. After adjudication process, the said demand was confirmed by the Commissioner of Central Excise, Rajkot vide his Order dated 28.02.2017 by which he has further imposed penalty on the appellant firm as well as on partners of the appellant firm and on owner of the truck used in transportation of the goods manufactured by the appellant firm.

2. Shri Rahul Gajera, learned counsel appearing on behalf of appellants, submitted that the case of the department is mainly based upon dairies and statements of various persons; that it is the case of the department that in his statement dated 22-5-2014 and 12-6-2014 partner of the appellant firm shri Vibhav Mishra has confessed that pocket-size five diaries recovered from the factory relates to sale of finished goods manufactured at the factory of the appellant firm on which no duty has been paid; that 58 weighbridge slips so recovered from the factory pertains to TMT bars manufactured at the factory of Appellant firm and removed without cover of central excise invoices and that Invoice No. 3 dated 3-4-2014 and Invoice

No. 27 dated 11-5-2013, is in relation to finished excisable goods which when reached to the buyer's premise, the buyers have returned the same and they have again issued invoice with the same serial number to the new customer; that the said statements have been confirmed by another partner of the appellant firm, shri Priyal Manharbhai Viradia by his statement dated 02-06-2014. However, learned commissioner erred in not appreciating that the said statements have been retracted by shri Vibhav Mishra by affidavit dated 23.5.2014 and 12.6.2014 by which he has stated that officers of department carried out search at his residence and taken away dairies related to his personal business of brokerage and forcibly showed the same as relating to goods manufactured and sold by the appellant firm; and shri Priyal Viradia by affidavit dated 02-06-2014 stated that officers of department tortured and bullied him to sign the statements and by his voluntary statement dated 18.1.2016 shri Priyal Viradia has stated that he did not sale any excisable goods manufactured by his firm without invoice or without payment of duty to any of the buyers; and that as regards Invoice No. 27 dated 11.5.2013 and invoice no. 3 dated 3.4.2014, it has been clarified by shri Priyal Viradia that the same relates to finished goods returned or on account of cancellation of order by the buyers. In the circumstances, no reliance can be placed upon the statements dated 22.05.2014, 12.06.2014 and 02.06.2014 of the partners of the appellant firm as the same were not voluntary.

2.1 As regards the diaries, it is submitted that Shri Vibhav Mishra by his affidavit dated 23-5-2014 and 12-6-2014 while retracting his statements has explained that the same relates to shri Vibhav’s personal business of brokerage forcibly taken away from his residence by the officers and which was wrongly shown in the Annexure to panchnama dated 22.5.2014 as

having been recovered from the appellant firm's factory; the panchnama does not record the recovery of the said diaries and hence no reliance can be placed upon the dairies to demand the duty from the appellant firm.

2.2 It was further submitted that the most of statement of the alleged buyers appearing in the diaries, are almost similarly worded, computer typed pre-drafted, stating that they purchased finished goods from the appellant with as well as without invoice and payment was made in cash in respect of goods purchased without invoice and records of such purchase are destroyed and not available with them. It was submitted that the buyers who stated that they purchased goods without invoice from the appellants against cash payment have not beem made party to show cause, and their cross-examination has been denied to the appellants, in the circumstances, the same are not relevant and admissible as evidence and hence no reliance can be placed upon the said statements of the said persons. In this behalf they have relied upon the following decisions:

- Jindal Drugs Pvt Ltd V UOI – 2016 (340) ELT 67 (P&H)
- Basudev Garg V CC – 2013 (294) ELT 353 (Del.)
- CCE V Premier Alloys Ltd – 2019 (266) ELT 659 (All.)

2.3 It was further submitted that the dairies itself cannot be evidence of actual manufacture of the goods in absence of reliable corroborative evidence, that there is no evidence gathered as regards actual manufacture of goods viz. procurement of huge quantity of raw material, consumption of excess electricity and transportation of the goods allegedly covered under the said dairies. It was further submitted that during investigation electricity consumption records were also called for and submitted by the

appellant firm and that there was no excess consumption of electricity found. There is no evidence of transportation of such huge quantity of finished goods viz. any record/lorry receipts, further no statement of transporter/driver taken in this behalf in support of department's case. In absence of such clinching and corroborative evidence, demand of duty alleging clandestine removal of goods based on such rough diaries cannot be sustained. In this regard he relied upon the following decisions:

- Vishwa Traders P.Ltd v CCE – 2012 (278) ELT 362
  upheld by High Court in 2013 (287) ELT 243 (GUJ) and by Supreme Court in 2014 (303) ELT A24 (SC).
- Arya Fibres P. Ltd v CCE – 2014 (311) ELT 529.

2.4 As regard demand of duty based on 58 weighment slips allegedly recovered from the factory premises of the appellant firm, it was submitted that although the said weighment slips as reflected in sr. 6 in Annexure A to the Panchnama dated 22.5.2014 shown as recovered from the appellant's factory, the Panchnama does not record recovery of the said 58 weighment slips specifically. Further, partner of the appellant firm, Mr. Priyal Viradia denied in his statement dated 18.1.2016 the said weighment of goods related to manufactured goods in the factory of appellant firm; that there is no corroborative evidence to show that the said weighment slips related to manufactured goods in appellant's factory. There is no evidence of transportation of goods covered under the said weighment slips, nor any buyer of the said goods have been identified. It is the case of department that transportation of goods to the buyers of the appellant without payment of duty was carried out by Truck no. GJ3AX5325, however the said weighment slip mentioned this truck number only in 4 instances out of 58. As regards, the weighment slips/details produced by Shri

Dhirubhai Lavjibhai Vaghasiya of M/s. Shiv Shakti Oil Industries under his statement dated 29.7.2014 and Shri Mahendrabhai Vaghasiya of M/s. Patel Steel under his statement dated 22.8.2014 and rough records/accounts of buyers, it was submitted that partner of the appellant shri Priyal Viradia in this statement dated 18.1.2016 denied having sold goods without invoice and payment of duty to the said party. Further, the said third party records and statement cannot be relied upon having denied cross-examination of the said persons by the Commissioner. Further, the said person who has allegedly purchased goods from the appellant without invoice and payment of duty has not been made party to show cause, suggests that department has not treated the said party having purchased goods without invoice.

2.5 As regards the two invoices, it was submitted that partner of the appellant shri Priyal Viradia in his statement dated 18.1.2016 have explained the same relates to finished goods returned or on account of cancellation of order by the buyer and have specifically denied having cleared goods without payment of duty. Further, no corroborative evidence viz. buyers statement etc have been gathered to substantiate the allegation of removal of goods under earlier invoice without payment of duty.

3. Learned AR appearing for the revenue pointed out that demand is based on the statements of the persons by which offence has been confessed by the partners of the appellant firm as well as buyers of goods manufactured and sold by the appellant firm without payment of duty. He further submitted that apart from statements and diaries, during investigation shortages of raw material and discrepancies in maintenance of

daily stock account was also noticed. He reiterates the finding in the Order of the learned Commissioner.

4. We have carefully considered the submissions made by both the sides and perused the records. We find that show cause notice was issued demanding duties as shown in Annexures X to the SCN which has been confirmed by the Order of the Commissioner of Central Excise, Rajkot whereby the following duty has been worked out:

i. Demand of duty of Rs. 2,22,48,302/- based on five pocket sized dairies as worked out at Annexure X – VII

ii. Demand of duty based on weighment slips/details (Anx X- (I) – Rs. 15,07,271, sr. 3 – Rs. 1,01,942 (Anx X - (III) and sr. 4 Rs. 12,12,275 (Anx X - IV).

iii. Demand of duty based on rough accounts (Rojmel) of alleged buyers namely Ketan Tulsidas Sangani and Rajubhai Kacha (Anx – II & V, Rs. 5,06,439 and Rs. Rs. 6,12,223)

iv. Demand of duty of Rs. 93,808 based on the duplicate invoices recovered from the factory of appellant firm as per Anx. X (VI)

4.1 The demand of duty at (i) above is based on the five-pocket sized dairies which has been shown as recovered during search of factory premises and listed at sr. 7 to 11 of Annexure A of the Panchnama dated 22.5.2014. Learned Commissioner has held that since the said diaries are mentioned at sr. 7 to 11 of Annexure A, the same are to be considered as part of panchnama drawn in presence of panch witnesses and admission of the partner present during panchnama.

4.2 It can be seen that although in Annexure A to the panchnama, the said dairies are listed at sr. No. 7 to 11, the panchnama itself does not record the recovery of the said dairies. The Commissioner does not dispute the said fact. Further, it is observed that Annexure A does not contain the signature of the Inspector who signed the panchnama nor does it contain running page number in continuance of panchnama. Thus, seizure of the said diaries from the appellant's factory as sought to be shown by the investigation is not established; and, having wrongly shown as seized from the factory premises by the investigation; weakens evidentiary value of the said diaries.

4.3 It is further observed that the statements dated 22.5.2014 and 12.6.2014 and 2.6.2014 of the partners of the appellant firm have been retracted; the partner of the appellant firm, Mr. Vibhav Mishra has stated while retracting his statements dated 22.5.2014 and 12.6.2014 vide affidavit dated 23.5.2014 and 12.6.2014 that the said pocket-sized diaries have been forcibly taken away from his residence by the officers of department and the same pertained to his personal business of brokerage, unrelated to the factory of the appellant firm and that his statement dated 22.5.2014 and 12.6.2014 in which it is stated that the said dairies were recovered from the factory premises during search, was not voluntary. Further, another partner of the appellant firm Mr. Priyal M Viradia by his affidavit dated 2.6.2014 has also stated that the details of the dairies are not related to the appellant firm and further in his last statement dated 18.1.2016, while no question as regards the said dairies was asked to Mr. Priyal Viradia, he has denied having removed clandestinely any goods manufactured by appellant firm. Learned Commissioner clearly erred in

holding that only statement dated 12.6.2014 of partner, shri Vibhav Mishra have been retracted; the said finding is contrary to the records of the case.

4.4 We further find that the said dairies contain certain names and figures which are taken as weight of the finished goods and duty demand has been worked out on that basis. Some of the buyers of the finished goods, whose names are shown in the diaries, have stated in their statement that they have purchased the goods from the appellant firm with as well as without invoice and that in respect of goods purchased without invoice, payment was made in cash, however cross-examination of the said buyers has been denied by the Learned Commissioner without giving any justifiable reason; the said statements are therefore not relevant and admissible as evidence in view of section 9D of the Act as held by the Hon'ble high court judgements in the case of Jindal Drugs Pvt Ltd and Basudev Garg referred supra.

4.5 It is further observed there is otherwise no other evidence of actual manufacture of goods such as raw material procurement transporter's statement or records, cash flow, and excess consumption of electricity. On the contrary, during investigation, electricity consumption details were called for and submitted by the appellants, and the same has been verified by the department, and have not found any excess consumption of electricity pointing to any clandestine manufacture and removal of goods by the appellant firm.

4.6 Learned Commissioner has erred in relying upon one of the supplier of raw materials shri Asgar Ali Bahadur Ali Bhimani of M/s Reza Enterprise,

Sihor holding that he has admitted to have sold raw material to the appellant firm without invoice and payment of duty, however, it is observed that the said person is also the buyer of the goods manufactured by the appellant and has tendered the statement similar to the other buyers, and has in his statement admitted to have sold goods, the weight of which is appearing in the dairies; as discussed herein above, the dairies themselves are not tangible and reliable evidence particularly in absence of cross-examination of said person whose statement has been relied upon; further, said person having not made party to show cause, no reliance on such statement and records of such party can be made as that may indicate that the statements might have been obtained from the parties by way of inducement.

4.7 It can been seen that once such untested statements and rough records/diaries are discarded, there is no tangible evidence, absent which case of clandestine removal cannot be sustained as held in the decision of this tribunal in the case of Vishwa Traders Pvt Ltd V. Commissioner of Central Excise - 2012 (278) ELT 362, the relevant para is extracted herein after:

> ***"10.3*** *The adjudicating authority, in his findings in Para 9.2.5, had not granted cross examination of the above said people only on the ground that they are co-accused and they have in one way or other has helped M/s. VTPL to evade payment of duty. It is also seen that the adjudicating authority had dismissed the request for cross examination only on the ground that M/s. VTPL has not given any reason and justification for cross examination of these persons. We find that this approach of the adjudicating authority is inconsistent with the settled law of evidence. It is undisputed that the persons who had given inculpatory statements (as indicated herein above) were 3rd party and were only employees of the assessee. There could be an element of doubt that these persons jointly or severally were*

> *working against appellant M/s. VTPL or otherwise. This could be ascertained only during the cross examination, by confronting the persons with the documents recovered from their possession. Be that it may be, documentary evidences recovered from the residential premises of the employees, the veracity of the same needs to be always checked and cross checked before relying upon such evidences. M/s. VTPL were well within their rights to ask for cross examination of these employees to bring on record that documents which were recovered and on which reliance has been placed by adjudicating authority for confirmation of demand of duty, could have been maintained by other persons or 3rd party for their own personal reasons or for the reasons best known to them. In our considered opinion, due to non-granting of the cross examination of above said persons, no reliance can be placed upon the evidences collected from residential or other premises and inculpatory statement of these persons cannot stand test of the law and said evidences needs to be discarded. We are fortified in our view by the judgment of Hon'ble Apex Court in the case of Shalimar Rubber Industries v. Collr. of C.E., Cochin - 2002 (246) E.L.T. 248 (S.C.), wherein their Lordship held "no reliance can be placed on the oral statement of the raw material suppliers as he is not subjected to any examination and cross examination during adjudication." On discarding of the evidences from the above persons, we find that there is paucity of tangible evidence which would indicate that there was clandestine manufacture and clearance of the goods."*

The above decision of this Tribunal has been upheld by Hon'ble High Court - 2013 (287) ELT 243 (GUJ) and by Supreme Court in 2014 (303) ELT A24 (SC). Reliance in this behalf is also placed in the case of Arya Fibres P. Ltd v CCE – 2014 (311) ELT 529, in para 40 it has been observed by this Tribunal as follows:

> *"40. After having very carefully considered the law laid down by this Tribunal in the matter of clandestine manufacture and clearance, and the submissions made before us, it is clear that the law is well-settled that, in cases of clandestine manufacture and clearances, certain fundamental criteria have to be established by Revenue which mainly are the following :*

(i) There should be tangible evidence of clandestine manufacture and clearance and not merely inferences or unwarranted assumptions;

(ii) Evidence in support thereof should be of :

(a) raw materials, in excess of that contained as per the statutory records;

(b) instances of actual removal of unaccounted finished goods (not inferential or assumed) from the factory without payment of duty;

(c) discovery of such finished goods outside the factory;

(d) instances of sale of such goods to identified parties;

(e) receipt of sale proceeds, whether by cheque or by cash, of such goods by the manufacturers or persons authorized by him;

(f) use of electricity far in excess of what is necessary for manufacture of goods otherwise manufactured and validly cleared on payment of duty;

(g) statements of buyers with some details of illicit manufacture and clearance;

(h) proof of actual transportation of goods, cleared without payment of duty;

(i) links between the documents recovered during the search and activities being carried on in the factory of production; etc.

Needless to say, a precise enumeration of all situations in which one could hold with activity that there have been clandestine manufacture and clearances, would not be possible. As held by this Tribunal and Superior Courts, it would depend on the facts of each case. What one could, however, say with some certainty is that inferences cannot be drawn about such clearances merely on the basis of note books or diaries privately maintained or on mere statements of some persons, may even be responsible officials of the manufacturer or even of its Directors/partners who are not even permitted to be cross-examined, as in the present case, without one or more of the evidences referred to above being present. In fact, this Bench has considered some of the case-law on the subject in Centurian Laboratories v. CCE, Vadodara [2013 (293) E.L.T. 689]. It would appear that the decision, though rendered on 3-5-2013, was reported in the issue of the E.L.T., dated 29-7-2013, when the present case was being argued before us, perhaps, not available to the parties. However, we have, in that decision, applied the law, as laid down in the earlier cases, some of which now have been placed before us. The crux of the decision is that reliance on private/internal records maintained for internal control cannot be the sole basis for demand. There should be corroborative evidence by way of statements of purchasers, distributors or dealers, record of unaccounted raw material purchased or consumed and not merely the recording of confessional statements. A co-ordinate Bench of this Tribunal has, in another decision, reported in the E.L.T. issue of 5-8-2013 (after hearings in the present appeals were concluded), once again reiterated the same principles, after considering the entire case-law on the subject [Hindustan Machines v. CCE [2013 (294) E.L.T. 43]. Members of

> *Bench having hearing initially differed, the matter was referred to a third Member, who held that clandestine manufacture and clearances were not established by the Revenue. We are not going into it in detail, since the learned Counsels on either side may not have had the opportunity of examining the decision in the light of the facts of the present case. Suffice it to say that the said decision has also tabulated the entire case-law, including most of the decisions cited before us now, considered them, and come to the above conclusion. In yet another decision of a co-ordinate Bench of the Tribunal [Pan Parag India v. CCE, 2013 (291) E.L.T. 81], it has been held that the theory of preponderance of probability would be applicable only when there are strong evidences heading only to one and only one conclusion of clandestine activities. The said theory, cannot be adopted in cases of weak evidences of a doubtful nature. Where to manufacture huge quantities of final products the assessee require all the raw materials, there should be some evidence of huge quantities of raw materials being purchased. The demand was set aside in that case by this Tribunal."*

In view of above discussions and decisions, demand of duty of Rs. 2,22,48,302 based on said dairies as worked out at Annexure X – VII is not tenable and is liable to be set aside.

4.8 As regards demand of duty based on 58 weighment slips (ii) above, it is the case of department that transportation of goods under the said weighment slips was carried out to the buyers of the appellant without payment of duty by Truck no. GJ3AX5325, however the said weighment slip mentioned the truck number only in 4 instances out of 58. Further, the weighment slips at best show goods having been weighed at the factory premises of appellant, as discussed herein above, in absence of any tangible and corroborative evidence of actual manufacture of goods, duty demand only on the basis of the weighment slips cannot be sustained. As regard, demand of duty as per Annexure X(II, III, IV & V) of the SCN, the duty demand is worked out based upon the weighment slips produced by Shri Dhirubhai Lavjibhai Vaghasiya of M/s. Shiv Shakti Oil Industries under his statement dated 29.7.2014, weighment details produced by Shri Mahendrabhai Vaghasiya of M/s. Patel Steel under his statement dated

22.8.2014 and rough records of the buyers. In this regard, it is observed that the partner of the appellant firm in this statement dated 18.1.2016 has denied having sold goods without invoice to the said party. Further, as discussed herein above, the said third party records under the statements of buyers and weighment bridge operators cannot be straightway relied upon having denied cross-examination of the said person to the appellants. Further, the said party who has allegedly purchased goods from the appellant without invoice has not been made party to show cause, may indicate that the statements might have been obtained from the parties by way of inducement; the said statements and records produced thereunder therefore cannot relied upon to impose duty upon the appellant firm in absence of concrete and corroborative evidence in this behalf. In view of above discussion, duty demand raised by Annexure (II, III, IV & V) cannot be sustained.

4.9 As regards, duty demand worked out as per (Anx X-VI), it is observed that the partner of the appellant shri Priyal Viradia in his statement dated 18.1.2016 have stated the same relates to finished goods returned or on account of cancellation of order by the buyer and have specifically denied having cleared goods without payment of duty. Further, no tangible and corroborative evidence viz. buyers statement, transportation etc have been gathered to substantiate the allegation of removal of goods under earlier invoice number without payment of duty. Even, shortages of raw material and discrepancies in maintenance of daily stock account as pointed out by the department, needs to be corroborated with tangible and sufficient evidence to bring home the serious charges of clandestine removal, which are clearly absent; case of department cannot

be sustained on account of weak and insufficient evidence. It has been consistently held in several judicial pronouncements of the Hon'ble High Court and Apex Court that in case of clandestine manufacture and removal of goods, revenue has to prove it beyond doubt. Reliance in this behalf is placed on the Hon'ble High Court judgment in the case of Commissioner of Central Excise V. Brims Products – 2011(271) ELT 184 (Pat.) wherein it was held that:-

> *"8. Facts emanating from the records, disclose that the Central Excise authority itself has held with regard to two consignments out of four, that the investigation is incomplete and has been carried out only at the transporters end, thus, does not reveal actual purchase by the buyers. The authorities with regard to the aforesaid two consignments have also extended benefit of doubt to the respondent. We are of the opinion that there could not have any reason for arriving at different conclusion with regard to the remaining two consignments.*
>
> *9. In our opinion, since the charge was for clandestine manufacture and surreptitious removal of finished final product, the same is required to be proved beyond doubt by the Revenue. One has to keep in mind that, though being the main ingredient, betel-nut is not the only raw material which is used in manufacture of Pan Masala. That apart, since the investigation has been carried only at the transporters end, no presumption could be drawn with regard to manufacture and removal of the final product. Presumptions and assumptions cannot take place of positive legal evidence, which are required for proving the charge. Even if, it is assumed that some raw materials were received at the factory of the respondent during the said period, the same cannot become conclusive proof of production and clandestine sale to different parties. Due to lack of positive evidence, benefit of doubt will always go in favour of the assessee.*
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> *10. Accordingly, we answer the reference against the Revenue and in favour of the assessee and it is held that the receipt of one of the raw materials, does not conclusively prove clandestine manufacture and surreptitious removal of finished final product. Further, since the charge is regarding clandestine manufacturer and removal of finished product for evading excise duty, the same cannot be held to be proved on the basis of principle of preponderance of probabilities and the Revenue has to prove the same beyond doubt. The reference is answered accordingly."*

In view of foregoing discussion and finding, allegation of clandestine removal of goods as made out against the appellant firm is not substantiated with tangible and sufficient evidence; consequentially duty

demand cannot be sustained and hence penalties upon all other appellants are also liable to be set aside.

5. Accordingly, the impugned order is set aside. Appeals are allowed with consequential relief, if any, in accordance with law.

(Pronounced in the open court on 23.04.2024 *)*

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

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