

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

REGIONAL BENCH- COURT NO.3

Excise Appeal No. 10824 of 2020

(Arising out of OIO-SUR-EXCUS-000-COM-032-17-18 dated 13/03/2018 passed by Commissioner of Central Excise, Customs and Service Tax-SURAT-I)

H K IMPEX PRIVATE LIMITED

.....Appellant

459/ A-2 Shah And Nahar Industrial Estate, Lower Parel West
Mumbai, Maharashtra

VERSUS

C.C.E. & S.T.-SURAT-I

.....Respondent

New Building...Opp. Gandhi Baug,
Chowk Bazar, Surat, Gujarat - 395001

WITH

Excise Appeal No. 10823 of 2020

(Arising out of OIO-SUR-EXCUS-000-COM-019-20-21 dated 30/09/2020 passed by Commissioner of Central Excise, Customs and Service Tax-SURAT-I)

SHRI DEEPAK AGRAWAL

.....Appellant

459/ A-2 Shah And Nahar Industrial Estate, Lower Parel West
Mumbai, Maharashtra

VERSUS

C.C.E. & S.T.-SURAT-I

.....Respondent

New Building...Opp. Gandhi Baug,
Chowk Bazar, Surat, Gujarat - 395001

AND

Excise Appeal No. 10825 of 2020

(Arising out of OIO-SUR-EXCUS-000-COM-019-20-21 dated 30/09/2020 passed by Commissioner of Central Excise, Customs and Service Tax-SURAT-I)

SHRI SHARAD GUPTA

.....Appellant

18, Dda Sfs Flat, Hauz Khas
New Delhi

VERSUS

C.C.E. & S.T.-SURAT-I

.....Respondent

New Building...Opp. Gandhi Baug,
Chowk Bazar, Surat, Gujarat - 395001

APPEARANCE:

Shri J.C Patel, Shri Rahul Gajera & Ms. Shamita Patel, Advocates appeared for the Appellant

Shri G. Kirupanandan, Superintendent (Authorized Representative) for the Respondent

CORAM:

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

Final Order No . A/ 10205-10207 /2022

DATE OF HEARING: 27.10.2021
DATE OF DECISION: 25.02.2022

RAMESH NAIR

The brief fact of the case is that vide his impugned Order-In-Original No. SUR-EXCUS-000-COM-019-20-21 dated 30.09.2020 Commissioner has confirmed demand of recovery of rebate claim of Rs. 1,22,82,044/-, which was earlier granted as rebate to the appellant. He has also rejected rebate claim amounting to Rs.2,20,91.410/- and imposed penalty of Rs. 3,43,73,454/- along with imposition of penalty of Rs. One Crore on Shri Deepal Agarwal, Director of M/s. H.K. Impex and of Rs. 50 Lakhs on Shri Sharad Gupta, agent in terms of Rule 26 of the Central Excise Rules, 2002. The appellants are before us for the third time and the present appeals is a consequence of *de novo* proceedings following remand of the matter back to the adjudicating authority.

1.2 As the facts of these appeals are common, these are being taken up together for disposal through this common order. The main Appellant is engaged in the export of stainless steel utensils under claim of rebate of duty paid on Inputs used in the manufacture and export of Stainless Steel utensil in its factory and its Job workers. Investigation conducted by the officers of the DGCEI revealed that the raw material shown purchased were never brought to the factory of the appellant or to the premises of the Job Workers, declared with the department and the stainless steel utensils, which were exported, were procured from other manufacturers. The show cause notice was issued for recovery of demand. The Adjudicating Authority confirmed the demands. On further appeal, Tribunal vide Final Order No. A/11128-11130/2014 dated 25.06.2014 remanded the matter for *denovo* proceedings. Resulting in, Commissioner confirmed the demand vide OIO dated 13-3-2018. Aggrieved, Appellant again filed Appeal before the Tribunal. Vide Final Order A/ 10341-10343/2019 dtd. 21.02.2019 the tribunal again remanded the matter to adjudicating authority, which upheld

the original order and dismissed appeal of appellant. Aggrieved appellant has once again approached this Tribunal.

2. Shri J.C Patel, Learned Counsel along with Shri Rahul Gajera and Ms. Shamita Patel, Learned Advocates appeared for the Appellant. Shri J.C Patel submits that impugned order-in-original traverse beyond the scope of remand orders by this Hon'ble Tribunal by order dated 21.02.2019 read with order dated 06.08.2019 and is liable to be set aside on this ground alone. The Commissioner seriously erred in disregarding and ignoring the categorical direction of this Hon'ble Tribunal. He placed reliance on the following Judgments

- Kushalchand & Co, Vs CCE- 2011(265)ELT109 Upheld by Apex Court in CCE Vs Kushalchand & Co. 2015(325)ELT813(SC)
- Honeycomb International Vs. CCE 2014(311)ELT823
- Dimension India Vs CCE – 2003(158) ELT 325.

2.1 He submits that in present matter SCN dated 26.11.2007 issued by the Additional Director General, DGCEI under Section 11A of the Central Excise Act, 1944, demanding the refund amount which was granted under various OIO passed by the Jurisdictional Deputy Commissioner of Central Excise is without Jurisdiction and not maintainable in law. Said OIO passed by the Deputy Commissioner, Central Excise had not been appealed against and had attained finality.

2.2 He further submits that in earlier order-in-original dated. 13.03.2018, categorical findings had been given in the Appellant's favour that duty paid inputs were in facts procured, transported and delivered to the Appellant and sent to Job Worker and manufactured goods were received back. The matter was being remanded for the limited purpose of rectifying the error in the order dated 13.03.2018 of confirmation the demand on a ground not

contained in the show cause notice. The Commissioner had no jurisdiction to re-examine the evidence on the said issue fresh and to arrive at a fresh finding contrary to the finding in the Appellant's favour on that issue in the earlier order dated 13.03.2018. The impugned order dated 30.09.2020 of the Commissioner is therefore without Jurisdiction and liable to be set aside. It is settled law as laid down in CCE Vs National Steel Agro Industries Ltd. – 2015 (322) ELT 690 (BOM), that in re-adjudication upon remand, the adjudicating authority cannot re-open a concluded issue.

2.3 On merit he submits that the department case is primarily based on the statements of some of the Suppliers and of the Transporters, the department has not recorded any statement of Mr. Deepak Agarwal, Director of Appellant's company. Prior to investigation by DGCEI, the Range Officers visited the factory for verification of the extent of wastage in the manufacturing process, etc in connection with the rebate claims. During such verification the officers took stock of the duty paid inputs, goods in process and finished goods. The inspection report of department gives the details of raw materials, invoices, LR nos. and date under which the same were received, the name of supplier, the qty. received, the qty issued for cutting, the qty. of circles made out of cutting and the qty. of scrap. The said Inspection report signed by the departmental officers, whose statement has not been recorded by the DGCEI. The said inspection report contains the details of the duty paid inputs received from the suppliers. The Commissioner has completely disregarded the said Inspection Reports of the Superintendent and Inspector. The Statement of Shri Navneet Chhabra that no goods were sent for Job Work to Vasai is on the face of it false in view of the fact that when the officers went for search to the premises of Job Worker on 29.03.2006, Shri Navneet Chhabra was found to be present there and he

introduced himself as Production Supervisor of Appellant. Moreover, the said person have not been produced for cross-examination and therefore no reliance can be placed on their Statements as laid down in various decisions of courts/ tribunals. The Panchnama dated 27.03.2006 relied upon by the Commissioner is totally unreliable since it does not record the presence of goods found by DGCEI as noted in the File Noting of DGCEI (obtained under RTI). Transporter's statements recorded by Maharashtra Sales Tax Authorities contradict their statements recorded by DGCEI and those transporters who appeared for cross-examination have stood by their statements before Maharashtra Sales Tax Authorities and confirmed delivery of the inputs to the Appellant. He placed reliance on the following Judgement in which it is held that where witness whose statements are recorded by the department, have in their Cross-examination resiled from such statement, such statement cannot be relied upon to confirm the demand.

- Shri Jamin Uday Thakore & Ors Vs CCE -2018 (1) TMI 49 CESTAT-MUMBAI
- GTC Industries Ltd. Vs CCE -2006(198)ELT 121 upheld by Supreme Court in CCE Vs GTC Industries Ltd. – 2015(324)ELT236(SC)

2.4 He submits that Commissioner in impugned OIO seriously erred in relying on statements of persons who did not appear for cross-examination. As laid down in following Judgment, the statements of person who have not appeared for cross examination cannot be relied upon.

- Commissioner Vs Motabhai Iron & Steel Industries – 2015(316)ELT374(Guj)
- Shalimar Rubber Industries Vs CCE – 2002(146)ELT 248(SC)
- Adhunik Alloys Ltd., Vs CCE – 2016(344)ELT 426
- Shri Jamin Uday Thakore & Ors Vs CCE 2018(1)TMI 49CESTAT - Mumbai
- Chandan Tubes & Metals Pvt. Ltd. Vs CCE- 2006(193)ELT48

- Krishna Steel Industries Vs CCE -2010(254)ELT 292

2.5 He further submits that Suppliers Statement recorded by Maharashtra Sales Tax Authorities contradict their statements recorded by DGCEI and those supplier who appeared for cross -examination have stood by their statements before Maharashtra Sales Tax Authorities and confirmed delivery of the inputs to the Appellant. In the present matter no location nor any buyer where/to whom the inputs were allegedly diverted in Vasai, Bhayender or anywhere else have been identified or indicated or shown/ established by any evidence. Goods exported by the Appellant not been disputed by department in the present matter. The allegation of department that goods exported by Appellant under claim of rebate were those purchased from Delhi suppliers through Shri Sharad Gupta is totally baseless. The Report/review in DGCEI file obtained under RTI, clearly states that verification was done with Container Corporation of India Ltd. (CONCOR) to ascertain whether the numbers of vehicle under which export goods were received at Nhava Sheva matched with Vehicle numbers in ARE-2/ Central Excise Invoice. The CONCOR by letter dated 12.10.2006 confirmed the details of vehicles. The allegation of lack of machinery and absence of manufacturing activity at Job Workers premises at Vasai totally incorrect and unsustainable there is no expert evidence of any Chartered Engineer or otherwise to establish that the machinery found in factory was insufficient for manufacture was undertaken. Verification of manufacturing process in the factory was carried out by the Superintendent and Inspector of Central Excise in their inspection reports.

3. Shri G. Kirupanandan, Learned Superintendent (AR) appearing on behalf of the revenue reiterates the findings of the impugned order and relies upon the following Judgments :

- Bhavin Impex Pvt. Ltd Vs Union of India 2010(256)ELT 20 (Guj)
- Umiya Chem Intermediate Vs CCE 2009(239)ELT 429(Guj)
- RA Shaikh Paper Mills Pvt. Ltd. Vs Union of India 2010(258)ELT198(Guj)
- H R Siddique Vs Director of ED 2015(318)ELT182 (Del)
- Pooja Tex Prints Pvt. Ltd. Vs Additional Commissioner 2019(367)ELTA322(SC)
- Pooja Tex Prints Pvt. Ltd. Vs CCE Surat -I 2019(365)ELT42(Guj)
- Power Control Corporation Vs CCE Jaipur-I 2019(369)ELT471(Raj)

4. On careful consideration of the submissions made by both sides and perusal of the records, we find that the department's case is that the appellants have not received the inputs in their factory or at the premises of job worker in respect of which they have claimed the rebate of duty paid on such inputs. The entire case was made out of on the basis of investigation done by DGCEI. In the Show cause notice the department's case was based on following points:

- a) That intelligence was gathered by DGCEI that H.K Impex had only arranged invoices for the inputs and that duty paid inputs were neither brought to the factory of H.K Impex nor sent to their job workers
- b) That H.K Impex has shown that they have got the export goods manufactured on job work from Balaji Steel Works and Adikanksha Impex; intelligence however revealed that the said job workers were not manufacturing any goods for H.K Impex.
- c) Consumption of electricity was not sufficient to run the machines of the said job workers in order to manufacture the quantum of finished goods as claimed to have been got manufactured from them by HK Impex.

- d) Machinery with job workers was sufficient only for manufacturing trays and that the job workers could not have manufactured other export goods such as basins, bowls, spoons, tea pots, etc .
- e) That the export goods were neither manufactured in the factory of H.K.Impex nor in the premises of job workers.
- f) That H.K.Impex had shown 81.75% of the purchased material as sent to job workers, but the same was never received by the job workers.
- g) That rebate of duty paid on the materials used in the manufacture or processing of excisable goods which are exported, can be availed subject to the condition that the raw materials must be brought in the claimant's manufacturing unit or in the manufacturing unit of the job worker and used in the manufacture of exported goods. That the duty paid materials were not used by H.K.Impex or their job workers for manufacture of export goods and were sold by them.

4.1 In the first round of adjudication the adjudicating authority vide order in original dated 31.03.2009 confirmed the charges made in the show cause notice. On appeal filed by the appellant before the Tribunal against the said order the Tribunal's vide order dated 25.06.2014 remanded the matter to the Commissioner for fresh adjudication on certain observations and directions. The Tribunal in its order observed that the transporters and suppliers of inputs had given statements in their own language to the MVAT Authorities which showed that the duty paid inputs were supplied and transported to and received by the appellant and their job workers and these statements contradicted their statements recorded in English by DGCEI. The Tribunal further held that the report of the MVAT authorities revealed that the job workers had large manufacturing capacity and huge input machinery and had incurred huge electricity expenditure and that the commissioner had not properly appreciated this report. The Tribunal further directed that it was obligatory to grant cross examination of the person whose statements were

relied upon. The relevant Para 6 of tribunal order dated 25.6.2014 is reproduced below:

"Heard both sides and perused the case records. It is observed that Government of India has issued notification No. 21/2004-C.E.(N.T.) dated 06.09.2004 for grant of rebate of central excise duty paid on materials used in the manufacture of export goods. The essential requirements of the notification for claiming rebate are that the duty paid materials, purchased directly from the material manufacturers or from registered dealers, are actually received by the manufacturer of export goods; that the same are actually used in the manufacture of export goods; and that the export goods so manufactured are actually exported. If any of these essential requirements is not met with, the claim of rebate under the notification cannot be sanctioned/ paid. We find that after the Revenue started its investigations regarding alleged fraudulent rebate claims by the main appellant, the Maharashtra Value Added Tax authorities obtained copies of various documents from the Central Excise Department on the issue and commenced Independent Investigations from VAT angle. During this investigation the statements of the transporters were recorded by Maharashtra Sales Tax Authorities in their own language "Hindi", which indicate that the inputs in fact have been transported and delivered to the factory of main appellant or to its two job workers at Vasai, which contradict the statements recorded by DGCEI in English. These transporters have confirmed transportation of inputs from the factory premises of the main appellant to its two job workers in vassai. The input suppliers of Rajasthan namely Kartik Ramesh Shah, Director of Shah Foils Limited and Shri Suresh Chandra Mohnot of Mohnot Metals have also deposed before the Maharashtra Value Added Tax (MVAT) authorities that the inputs were delivered at the premises of the main appellant or at the premises of the two job workers at Vasai. Thus, the two set of statements of the same persons on the same issue of transportation of inputs by two investigating authorities are contradictory to each other. The report of MVAT authorities also revealed that the two job workers of the main appellant have very large Manufacturing capacity & have huge machinery for manufacture, and had incurred huge electricity expenditure. We note that the copy of the said MVAT report was not properly appreciated by the adjudicating authority. We also find that the adjudicating authority has nowhere tried to verify from the records of the Deputy/Assistant Commissioner having jurisdiction over the factory of the main appellant to know whether any additional

intimations have been filed mentioning the names and addresses of more job workers. The main appellant has placed on record that such additional intimations were actually filed with jurisdictional DC/AC, which may have bearing on the appellant's rebate claims. Due to the above factual contradiction the cross-examination of those persons whose statements are relied upon was obligatory as per the settled position of law indicated in Para 3(g) above."

4.2 After the aforesaid remand by the Tribunal some of the witnesses were made available for cross examination and their cross examinations were conducted. In the de-novo adjudication the Commissioner passed order in original dated 13.03.2018 wherein the Learned Commissioner based on the cross examination and other evidences on record accepted that the duty paid inputs were received by the appellant and sent to the job workers and job workers did carry out the manufacturing activity in respect of the goods exported as is evident from the following finding :

- a) The noticee has set up elaborate defence to demonstrate that goods were procured from excise registered manufacturers under cover of valid excise invoices
- b) HKIPL has presented elaborate documentary evidence to demonstrate transport and delivery of declared inputs.
- c) In the case in hand, the arguments and material adduced by HKIPL clearly demonstrate inputs were sent to job worker and manufactured goods were received back.

4.3 We find that from the aforesaid finding of the Learned Commissioner that the duty paid inputs were in fact procured, transported and delivered to the appellant and sent to the job workers and manufactured goods were received back is established. Since the entire allegation in the Show cause notice, that the appellant has not received the input, does not survive after the above finding of the Learned Commissioner. In our view on the basis of aforesaid order which attained finality as the revenue has not challenged the aforesaid

finding, the learned Commissioner had no option except to discharge the show cause notice however, the learned commissioner proceeded to hold against the appellant on an entirely new ground which was not only not contained in the show cause notice but which in fact runs counter to the Show cause notice. The Commissioner came up with a new ground which is not there in the Show cause notice namely that para 4 of the rebate Notification 21/2004 permits sending the goods to job worker only for the limited purpose of tests, repairs, refining, reconditioning or manufacture of intermediates product and not for manufacturing of final product. He held that H.K Impex could not have sent the inputs to the job worker for the manufacture of Final product by the Job workers. The appellant challenged the said order in original dated 13.03.2018 before this Tribunal who vide order dated 21.02.2019 held that the commissioner had by order dated 13.03.2018 confirmed the Show cause notice on the basis of his own fabricated allegation which was not contained in the Show cause notice and that therefore the said order dated 13.03.2018 cannot stand. The Tribunal accordingly remanded the matter to the commissioner. We find that the Commissioner has a limited scope to pass the de-novo order only on the points that whether he was right in deciding the entire matter on a new ground which was not contained in the Show Cause Notice. Meanwhile, the appellant moved an application before the tribunal wherein the tribunal vide order dated 06.08.2019 clarified that the categorical finding of the Commissioner in order dated 13.03.2018 that the inputs had been duly received by the appellant and sent to the job workers and manufactured final product had been duly received by the appellant from the job workers has not been disturbed by the Tribunal vide its order dated 21.02.2019. In this fact it is further established that the materials were sent to the Job

worker and the manufactured goods received by the appellant are not under dispute. The Tribunal further held that the matter was remanded to the Commissioner for him to rectify the error committed by him of conforming the Show cause notice on a new ground not contained in the Show cause notice. Despite the aforesaid categorical direction of this tribunal in its order dated 06.08.2019 that the fact of sending raw material to the job workers and receipt of the manufacturing products from them by the appellant is not under dispute. The Commissioner has passed the present impugned order in original dated 30.09.2020 in which he has proceeded to hold the contrary and confirmed the Show cause notice by confirming the demand for rebate with interest and rejected the pending rebate claim. As per the above development we find that the main allegation which is the foundation of the case is that the appellant have not received the inputs and the same was not used in the export goods, therefore, the appellant is not entitled for rebate claim does not exist in terms of Commissioner's earlier order dated 13.08.2018 read with Tribunal's Miscellaneous order dated 06.08.2019. By this order settled that the appellant have received the inputs and used in the manufacture of export goods. On this undisputed conclusion the entire case of the department gets demolished.

4.4 We find that the impugned order in original traversed beyond the scope of the remand order by this tribunal vide order dated 21.02.2019 read with order dated 06.08.2019 therefore, the same was liable to be set aside on this ground alone. It is a settled law laid down in CC vs. National Steel & Agro Industries Ltd- 2015 (322) ELT 690 (Bom.) that in re-adjudication upon remand, the Adjudicating Authority cannot reopen the concluded issue. In the present case the issue

of receipt of inputs, their transport to the job workers and manufacture of the final products to the job-worker and receipt of the same by the appellant stood concluded in the Appellant's favour by the earlier order in original dated 13.03.2018 which was upheld by the Tribunal in its order dated 06.08.2019 was not disturbed. Therefore, the learned Commissioner (Appeals) could not have therefore re-opened the said concluded issue and decided it against the appellant. In the following judgment it was held that in proceedings upon remand the Adjudicating Authority cannot travel beyond the scope of remand.

- Kushalchand & Co v CC- 2011(265) ELT 109
- Upheld in CC v Kushalchand &Co- 2015 (325) ELT 813 (SC)
- Honeycomb International v CC – 2014 (311) ELT 823
- Dimensions India v CC- 2003 (158) ELT 32

4.5 The appellant also argued vehemently on the entire evidence relied upon by the department in the Show cause notice. However, since after consideration of all the evidences and remand direction when the learned Commissioner in order in original dated 13.03.2018 read with Tribunal order dated 06.08.2019 concluded that the receipt of inputs by the appellant, use thereof at the job workers premises, manufacture of final product and export thereof. Since neither side challenged the finding of the commissioner's order dated 13.03.2018 and this tribunal's order dated 06.08.2019, the finding on the facts has discussed above attained finality. The appellant also raised the issue of jurisdiction of DGCEI whether they are empowered to issue the SCN or otherwise. Since we have decided the matter on merit we are not addressing the issue of jurisdiction.

4.6 However, in the interest of the justice, since the appellant have made a detailed alternative submission dealing with evidences and allegations related thereto in their argument, We, without prejudice to our

above independent finding, are now dealing with the submission of the appellant on evidence adduced in the Show cause notice. The investigating agency viz. DGCEI during investigation gathered evidences such as recording of statements of various persons including transporters, Panchnama drawn in the factory, statements of suppliers of inputs, allegation of lack of sufficient machinery at the appellant's factory as well as job workers' factory etc. On this basis the SCN alleged that the appellant as well as their job workers have not received the inputs in their factory. Accordingly, it was proposed to deny the rebate claim of duty paid on such inputs which was allegedly not received.

4.7 We find that the allegation in the SCN is that the appellant have not received the inputs on which they have claimed the rebate. Prior to the commencement of investigation by DGCEI on 27.03.2006 in the normal course, the range officers visited the factory of the H.K Impex for verification of the extent of wastage in the Manufacturing process etc. in connection with the rebate claims. During such verification the officer took stock of the duty paid inputs, goods in process and finished goods for such verification. The officer has prepared their inspection report dated 10.03.2006 and 22.03.2006. In said inspection reports the range officer has recorded all the details such as description of raw-material, Invoices and LR Nos. and dated under which the same were received, the name of the supplier, the quantity received, the quantity issued for cutting, the quantity of circles made out of cutting and the quantity of scrap. The Range officer after physical verification of the entire process and goods available in their factory given the report. On the basis of this verification and report thereof it cannot be alleged that the appellant has not receiving the inputs. The learned Commissioner has not given any heed to the departmental officer's inspection report and went on solely relying

on the statements of representatives of the suppliers M/s Salwas Metals Pvt Ltd and Shah foils Pvt Ltd namely Shri Navneet Chhabra and Shri Pawan Dhasriwal respectively. On the basis of the inspection report carried out by the range officers, the reliance cannot be placed on the statements of the aforesaid persons particularly when the statements were retracted. Moreover, the aforesaid persons have not been produced for cross-examination. We further find that despite the fact of the inspection report on record no question was raised from the Superintendent and the Inspector who did the verification about the veracity of the inspection report. Therefore, the inspection report given by the officers which clearly established that the goods were received by the appellant cannot be brushed aside.

4.8 It is further observed that the Panchnama dated 27.03.2006 does not record the presence of goods found by DGCEI noted in the File Noting of DGCEI (the details obtained under RTI by the appellant). The said File Noting in the file of DGCEI clearly shows that apart from 16 M Tone of SS Patta/Patti there were other goods lying in the factory viz. 12 Tons of Plates , 19 tons of Plates, 360 kgs of Stock Pots, 360 Kgs of Covers/Small Plates, 190 kgs of Glasses, 6 Tons of unfinished goods , unspecified quantity of SS Coils, 60 Tonnes of finished/unfinished goods and scrap. This very fact was not recorded in the Panchnama therefore, the panchnama relied upon by the Learned Commissioner gets demolished the evidential value of the Panchnama. Therefore, the appellant's dispute on the Panchnama dated 27.03.2006 by their letter dated 30.03.2006 has strong force.

4.9 As regard transporters statements recorded by DGCEI which were heavily relied upon in the SCN, in the Cross-examination of the transporters they stood by their statements given before the Maharashtra Sales Tax

Authority and confirmed delivery of inputs to the appellant. In this position the transporters statements given before DGCEI have lost its evidential value and could not have been relied upon. The MVAT Authority had investigated the same case wherein there was an allegation that the goods supplied to the appellant diverted. The statements of the same transporters were recorded wherein they have categorically stated that the goods have been supplied to the appellant and their job workers. In the remand proceedings as per the direction of the Tribunal some of the transporters were cross examined as stated above. However some of the transporters could not be produced for cross examination. We find that some of the transporters were cross examined and they have clearly stated that the goods have been supplied to the appellant and their job workers. In case of some of the transporters, though their inculpatory statements were recorded by DGCEI but since they were not examined their statements cannot be relied upon as per the provision of Section 9D of Central Excise Act, 1944. In this regard the law is clearly settled in the following judgments wherein it was held that the witnesses whose statements are recorded by the department have in their Cross Examination resiled from such statements, such statements cannot be relied upon to confirm the demand.

- (a) Shri Jamin Uday Thakore & ors v CCE- 2018 (1) TMI 49 CESTAT-MUMBAI
- (b) GTC Industries Ltd v CCE- 2006 (198) ELT 121 upheld by Supreme Court in CCE v GTC Industries Ltd- 2015 (324) ELT 236 (SC)

4.10 It is also a settled law that the persons whose statements have been relied upon in the SCN if they are not produced for cross examination no reliance can be placed on their statements as laid down in the following judgments :

- Commissioner V Motabhai Iron & Steel Industries- 2015 (316) ELT 374 (Guj.)
- Shalimar Rubber Industries v CCE- 2002 (146) ELT 248 (SC)
- Adhunik Alloys Ltd v CCE- 2016 (344) ELT 426
- Shri Jamin Uday Thakore & ors v CCE- 2018 (1) TMI 49 CESTAT-MUMBAI
- Chandan Tubes & Metals P. Ltd. v CCE- 2006 (193) ELT 48
- Krishna Steel Industries v CCE- 2010 (254) ELT 292.

In view of the above settled position and the facts of the present case the witnesses whose statements were relied upon, since could not be produced for cross examination, their statements have no evidential value and in respect of the transporters whose statements were retracted during cross examination as they have stated that the goods have been received by the appellant and by the Job workers, the entire basis in the SCN which is the statements of the transporters gets demolished.

4.11 The Learned Commissioner also proceeded on the basis that retraction of statements before DGCEI by one of Shri Pawan Kumar Agarwal of Gaurav roadways is after much delay and he has discarded the same as an after-thought. We find that only due to delay it cannot be said there is after thought as laid down in the case of GTC Industries – 2006 (198) ELT 121. Once the witness has resiled from his statement in cross-examination, the credibility thereof is eroded and the mere fact that such retraction was after lapse of years does not make the statement reliable.

4.12 The Commissioner also relied upon the Lorry receipts of Jodhpur based transporters wherein the place of delivery is mentioned as either Valsad or Vasai and not Umbergaon. In this regard the appellant have submitted that the observation of the commissioner is factually incorrect, in as much as in

all the lorry receipts of Gaurav Roadways it mentioned the address of the appellant's factory at Umbergaon. Most of the Lorry receipts of other Jodhpur based Transporters mentioned Umbergaon. In few cases the lorry receipts mentioned either "Umbergaon, Valsad" or "Valsad, Vasai". It is the submission of the appellant that Umbergaon is in Valsad District only and the Appellant's job workers were at Vasai only. On this fact we are of the view that merely because on lorry receipt either "Umbergaon, Valsad" or "Valsad, Vasai" is mentioned this alone cannot be reason that the goods were not transported to the appellant's factory or to their job workers.

4.13 It is also pertinent to note that two suppliers viz. Kushal Industries, Jodhpur and Devendra Udyog, Jodhpur in their statements have maintained that the inputs were supplied to H.K Impex. This however strengthen the claim of the appellant that the goods have been supplied to the appellants and their job workers. Even the suppliers statements were also recorded by the MVAT Authority and during their cross- examination they have stood by their statements before the MVAT Authorities confirming delivery of the inputs to the Appellant. In view of the above, it is clear that the entire basis of the department in the SCN stands demolished.

4.14 We further find that the investigating agency could not bring on record any evidence such as location of any buyers to whom the inputs were allegedly diverted in Vasai, Bhayender or anywhere else. In the Show Cause Notice it is also the case of the department that as per the statement of Shri Mangalram Sonaram Vishnoi, Manager of Jai Shree Raodlines and proprietor of Jai Shree Freight Carriers in his statement stated that some of the consignments dispatched to H K Impex were delivered to Saurabh Metals, Bhayender. However, it is observed that Shri Mangalram Vishnoi in his statement dated 29.12.2008 & 30.12.2008 recorded before MVAT Authority, stated that he does not understand English

well. He also stated that he has delivered the goods only as per addresses given by the supplier's sales invoices and he has not delivered goods at any other place on directions of H K Impex. He also stated that he does not know Saurabh Metals. As regard the statement recorded by the DGCEI, he stated that he was not allowed to read the statement nor was that statement read out to him and only signature was taken. He had signed the statement by trusting the government officer. In the cross examination also, he has retracted the statement given to DGCEI. As per this version of Shri Mangalram Vishnoi statement recorded by DGCEI cannot be taken as evidence to use against the appellant. As regard the reliance on the statement of Shri Rajeshbhai A Muni, Manager of Saurabh Metal Works, we find that the said statement was retracted in cross-examination therefore, no reliance on his statement can be made.

4.15 It is also observed that there is no dispute about entry of goods in question into Gujarat which were supplied by suppliers of Jodhpur which is established by evidence on record. It is also not under dispute that the Central Excise Invoice under which the export goods were removed from the Appellant's factory at Gujarat bears the transport vehicle number. The appellant used packing material which was purchased and received by them in their factory for manufacture of export goods.

4.16 In the show cause notice, there is also an allegation that in the Appellant's factory there is no sufficient machinery to manufacture the goods. In this regard the Panchnama dated 27.03.2006 clearly shows that the sufficient machinery were installed in the Appellant's factory at Umbergaon viz:

- Heavy Duty Shearing Machine-1;
- Handrolling Machines- 1;

- Pressing Machines- 4;
- Beeding Machinery -3 nos; Grinding Machinery- 1;
- Powered Lathe Machinery- 1;
- Heavy Duty Mechanical Power Presses- 1;
- Heavy Duty Cutting Machinery Big- 1;
- Cutting Machinery Small -1;
- Drilling Machinery -1;
- Embossing/Engraving Machines (Manual)- 1;
- Buffing Machinery- 4 Nos.

In view of the above fact, it cannot be said that the appellant did not have sufficient machinery for manufacturing. It is also noticed that the DGCEI also obtained a Chartered Engineering Certificate regarding installed capacity of production of H K Impex at Umbergaon and their two job workers. However, no certificate of Chartered Engineering is produced to show that the machinery and power consumption were insufficient. As regard the allegation of lack of machinery and absence of manufacturing activity at job worker's premises at Vasai, it was found totally incorrect and unsustainable for the reason that the appellant have given address of the job workers, the DGCEI chose to carry out verification only at one unit of job worker whereas, the second unit located adjacently of which intimation had been given, was not verified by DGCEI. The Panchnama dated 27.03.2006 drawn at unit of job worker clearly records the presence of certain machinery and presence of inputs under process and finished goods. Moreover, immediately after the Panchnama was drawn, one unit of the job worker, H K Impex and job worker by letter dated 30.03.2006 pointed out to the DGCEI that verification may be also carried out at the second unit of the job worker however, DGCEI did not carry out any verification at the 2nd Unit of Job Worker

therefore, the allegation of lack of machinery at job worker premises is not sustainable.

4.17 We also find that this tribunal while remanding the matter vide Order dated 25.06.2014 had categorically upheld that the report of MVAT Authority revealed that the two job workers of H K Impex had very large manufacturing capacity and had a huge machinery for manufacture and had incurred huge electricity expenditure and that MVAT Authority report was not properly appreciated by the Adjudicating Authority.

4.18 As regard the doubt raised about the job worker we note that one Shri Arun Mishra, the Production Manager of Job Workers before the adjudicating authority on 2.7.2015 established that the input sent by H K Impex to the job workers were received by them and used in the manufacture of export product. The same deposition was made by Shri Arun Mishra during his cross examination during the adjudication proceeding.

4.19 The appellant also relied upon the fact that raw material, semi finished goods and finished goods at the appellant's factory premises as well as the job workers premises were hypothecated to the Bank and insured from time to time. We find that this fact also establish that the manufacturing activities were going on in the appellant's factory as well as job worker's factory.

4.20 We also note that it is a surprising fact that DGCEI did not record any statement of the appellant's Managing Director Shri Deepak Agarwal despite giving him various summons and his visit to DGCEI Office.

4.21 The department's case is also on the allegation that the goods exported by H K Impex under claim for rebate were those purchased from Delhi suppliers through Shri Sharad Gupta. The report which was available in DGCEI file obtained under RTI by the appellant states that verification was done with Container Corporation of India Ltd. to ascertain whether the

vehicle number under which export goods were received at Nhava Sheva port matched with the Vehicle Number in ARE-2/ Central Excise Invoices. The report from CONCOR by letter dated 12.10.2006 shows that the vehicle numbers tally with the list of trucks carrying goods under claim for rebate which left from appellant's factory at Nhava Sheva port for export. The report also stated that the goods procured by Shri Sharad Gupta and supplied through Delhi transporters do not match with exported goods. On the basis of above facts the charge of the department that some different goods were exported does not sustain.

4.22 The doubt raised in the show cause notice about the manufacturing activity on the basis of doubtful sales of scrap generated in the appellant's manufacturing, the same could not be established as the report obtained under RTI itself establish the manufacture activity was being undertaken and scrap as generated in the course of such manufacture . Even the report in the DGCEI file clearly states that scrap generated is found correct.

4.23 As per the above undisputed factual position, we find that the department's case of non-receipt of inputs by the appellant and the job worker and non-manufacturing of export goods is baseless and without any tangible evidence. On the contrary, the appellant have established that the appellant have received the inputs in their factory and at job workers premises and the goods manufactured there from have been exported.

5. As per our above discussion, our conclusive finding is that the appellant M/s HK IMPEX have received the inputs, used in the manufacture of final product and such final product has been exported. Therefore, the appellant are entitled for the rebate as claimed by them.

5.1 As regard the appeals filed by Shri Deepak Agarwal and Shri Sharad Gupta , since the penalty upon them imposed is consequential to allegation

of wrong availment of rebate claim by M/s H.K Impex and such allegation does not survive . The personal penalties being consequential shall also not survive.

6. Accordingly, the impugned order is set aside. Appeals are allowed with consequential relief.

(Pronounced in the open court on 25.02.2022)

RAMESH NAIR
MEMBER (JUDICIAL)

RAJU
MEMBER (TECHNICAL)

Geeta