

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

REGIONAL BENCH-COURT NO. 3

EXCISE Appeal No. 10054 of 2017- DB

(Arising out of OIO-RAJ-EXCUS-000-PR-COM-33-16-17 dated 14/10/2016 passed by Principle Commissioner Customs, Excise and Service Tax-RAJKOT)

Nishtha Automation

.....Appellant

17-balaji Industrial Park,
Gondal Road, Near Octroi Naka,
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. 10053 of 2017- DB (Shri Rasikbhai G Khokhariya)

(ii) EXCISE Appeal No. 10055 of 2017- DB (Shri Bankim G Vyas)

(iii) EXCISE Appeal No. 10056 of 2017- DB (Shri Sanjay G Khokhariya)

APPEARANCE:

Shri P V Sheth Advocate for the Appellant

Shri Rajesh R Kurup, Superintendent (AR) for the Respondent

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

Final Order No. 11177-11180/2024

DATE OF HEARING: 16.05.2024

DATE OF DECISION: 06.06.2024

RAMESH NAIR

Appellants have filed these appeals against the impugned order-in-original No. RAJ-EXCUS-000-PR.COM-33-16-17 dated 14.10.2016 passed by the Principal Commissioner of Central Excise, Customs and Service tax, Rajkot.

1.1 Briefly stated the facts of the case are the appellant, M/s. Nishtha Automation is engaged in the manufacture of Diamond Polishing machines. On the basis of intelligence that the appellant has been indulging in clandestine removal of excisable goods and wrongly availing the benefit of Notification No. 8/2003-CE dated 01.03.2003, a search was conducted on

09-08-2011 in the factory premises of the appellant. In the course of search, certain documents were resumed. Statements of partners, employees and others persons were recorded, which have been relied upon in the show cause notice. On the basis of scrutiny of the documents resumed *vide* panchnama and the statements of various persons, it appeared to Revenue that the appellant had manufactured and cleared the excisable goods i.e. Diamond Cutting and polishing/faceting machines clandestinely without preparing proper invoices/bills and all such machines were bearing brand name of "AT" belonging to other person/ party. After the detail investigation, show cause notice was issued to the appellant. The value of goods and the duty liability have been worked out as per Annexure IV to the show cause notice. Accordingly, duty was worked out at Rs. 1,08,82,465/-, invoking the extended period of limitation with proposal to appropriate Rs. 25 lakhs deposited during investigation stage. Further penalty was also proposed under Section 11AC and on co-noticee under Rule 26 of Central Excise Rules, 2002. In Adjudication Ld. Commissioner *vide* impugned order confirmed the duty demand alongwith interest and penalty. The Learned Commissioner has concluded that the computer print-outs taken from laptop, the Chit -Books and diaries recovered from M/s Nishtha Automation, contain details of their sale of finished goods without payment of duty. Being aggrieved, the Appellants have preferred the present Appeals before the Tribunal.

2. Shri P.V. Sheth Learned Advocate appeared on behalf of Appellants and submits that in the present matter duty is demanded on the bases of the details in Annexure-IV of the Notice. On perusal to Annexure -IV it appears that the duty on so called clandestine removal has been worked out as per entries and records available in diary seized as per Sr. No. 13 of Annexure-A to the panchanama. As clarified by Shri Triloki in his statement dated 04.09.2012 in reply to question No.9 and 10 details in book No. 13 also includes the details of the order received for respective machines and mentioned in book at serial No. 8,9,12 and 14. He had also clarified that the other entries were made as directed by Shri Sureshbhai. But the department has not recorded any statement of said Shri Sureshbhai. Therefore, the basis for the demand on book No. 13 is bad in law and cannot be sustained. Further, in reply to the show cause notice request was

made to allow the cross examination of the witnesses. The Adjudicating authority has not allowed the cross-examination of the witnesses.

2.1 He also submits that the department while demanding the duty has worked out the value of the respective machines on the basis of some statements of the witnesses and reflected in the printouts obtained from laptop seized from the appellant. The value determined for raising the demand is only a presumption and assumption. It is the settled law that the printout of the laptop cannot be relied on unless and until the criteria laid down under Section 36B of Central Excise Act is fulfilled. Admittedly, the criteria laid down has not been complied with or the duty has not been demanded by relying on the printouts obtained from the laptop. Therefore, the basis of valuation is also not proper and justified.

2.2 He further submits that the Learned Adjudicating Authority observed that since the appellant is using brand name of 'AT' which owned by the other person the exemption under Notification No. 8/2003-CE dated 01.03.2003 as amended was not available. However, he failed to consider the fact that the duty is not demanded on such ground and therefore, said observation is beyond the scope of the show cause notice and is accordingly liable to be set aside.

2.3 He placed reliance on the following decisions in support of his arguments and submission:-

- Bharmal Hardware Product and others- Final Order No. FO/A/10770-10771/2024
- M/s Mansa Cigarettes Pvt. Ltd. – Final Order No. A/11434-11439/2019
- Patidar Products 2023-9-Centax-231(Tri. Ahd)
- M/s Mahendra Metal Industries – Final Order No. A/10067-10068/2019
- Oudh Sugar Mills Ltd. – 1978(2)ELT (J172)SC
- Shri Krishna Industries – 2020(372)ELT 121 (Tri. Ahd)
- Vishwa Traders Pvt. Ltd. -2013(287)ELT 243 (Guj)
- Gupta Synthetics Ltd. – 2014(312)ELT 225
- Shree Sidhbali Ispat Ltd. – 2017(357)ELT 724 (Tri. Mum)
- Chhajusingh S. Kanwal – 2011(272)ELT 202 (Guj)

- Flevel International -2016(332)ELT 416
- Hingora Industries Pvt. Ltd. – 2015(325)ELT 116 (Tri. Ahd)
- Pravin N. Shah -2014(305)ELT 480 (Guj)
- Narendrabhai Naginbhai Bhut 2014(306)ELT 451

3. On the contrary, Shri R.R. Kurup, the Learned Superintendent (AR) for the Revenue justified the findings of the Learned Commissioner and submitted that the demand has rightly been made and that the appeals be rejected being devoid of any merit.

4. Heard both sides and perused the appeal records. Having considered the rival contentions and on appreciation of evidence, it is evident on the face of the record that duty demand was confirmed by the Learned Commissioner on the basis of entries and records available in diary seized as per Sr. No. 13 of Annexure-A to Panchanama which is admittedly not written by any of the partners but by Shri Triloki, ex-employee of Appellant. On plain reading of the statement of Shri Triloki dated 04.09.2012 we find that in reply to question No. 10 he stated that the data mentioned in Book No. 8,9,12 & 14 are of the orders received from the customers and the details of Book No. 13 are the details which were dictated by Shri Sureshbhai. We find that the said Rough record/ dairies on the basis of which the quantum of clandestine removal has been estimated, is not reliable, as the author of the same nowhere admitted that the said details are related to the clandestine removal of the goods. Further, department failed to record the statement of Shri Sureshbhai and not interrogated him about the entry of the said records. We also find that the details recorded in the dairies were only showing type of machines and number of machines. The said dairies nowhere shown the details of transaction value, rate, details of buyers, details of transporter etc.. The entries made in the said dairies may create a doubt but it cannot take place of evidence. Merely on the basis of said dairies, or on mere statements of some persons, may even be responsible officials of the manufacturer or even of its Directors/partners who were not even permitted to be cross-examined, demand of clandestine removal of the goods is not sustainable. The clandestine manufacture and removal of excisable goods is to be proved by tangible, direct, affirmative and incontrovertible evidences relating to (i) Receipt of raw material inside the factory premises, and non-

accountal thereof in the statutory records; (ii) Utilization of such raw material for clandestine manufacture of finished goods; (iii) Manufacture of finished goods with reference to installed capacity, consumption of electricity, labour employed and payment made to them, packing material used, records of security officers, discrepancy in the stock of raw materials and final products; (iv) Clandestine removal of goods with reference to entry of vehicle/truck in the factory premises, loading of goods therein, security gate records, transporters' documents, such as L.Rs., statements of lorry drivers, entries at different check posts, forms of the Commercial Tax Department and the receipt by the consignees; (v) Amount received from the consignees, statement of the consignees, receipts of sale proceeds by the consignor and its disposal. Whereas, in the instant case, no such clinching or corroborative evidences to the above effect have been brought on record. In the absence of corroborative evidence, on the fact in the present case "the charge of clandestine clearance" cannot be leveled against the assessee.

4.1 We also find that the investigating authority has recorded statements of various persons which were relied upon in the SCN. The appellant strongly made request before adjudicating authority for cross examination of persons, however request for cross-examination was refused on the ground that persons are also co-noticee and Learned Adjudicating authority also observed that the ample of evidence is available, therefore, no cross examination is required. We completely disagree with the adjudicating authority as in terms of Section 9D of the Central Excise Act, it is incumbent on the adjudicating authority to cross examine the persons whose statements were recorded by the investigating agency, only thereafter such statements can be used for adjudication of the SCN. Since admittedly the adjudicating authority has refused cross examination of persons, there is clear violation of principles of natural justice. In this case, the statements cannot be used as evidence against the assessee.

4.2 We also find that the allegation of clandestine removal is also based on the computer printouts seized at Serial No. 1 of the Annexure-A to Panchnama dated 09.08.2011 containing certain details of sale transaction, outstanding amount etc. We find that the computer printouts also did not satisfy the conditions prescribed under Section 36B of the Central Excise

Act, 1944. As per the Section 36B of the Act one of the conditions for the computer printout to be an admissible evidence is that the said printout should have been produced by the computer during the period over which the computer was used regularly to store or process information for the purposes of any activities regularly over that period by the person having lawful control over the use of the computer. We find that the Learned Commissioner has not examined these aspects. Therefore, such computer printouts are not eligible to be used as evidence.

4.3 In view of the discussions in above paragraphs, we find that the evidences produced by the Revenue for sustaining the duty demand has not been corroborated by detailed investigation. The allegation of clandestine manufacture and clearance cannot be sustained on the basis of such flimsy evidences.

5. Accordingly, the impugned order is set aside and the appeals are allowed with consequential relief, as per law.

(Pronounced in the open court on 06.06.2024)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

Raksha