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

REGIONAL BENCH-COURT NO. 3

Excise Appeal No. 10331 of 2016- DB

(Arising out of OIO-AND-EXCUS-000-COM-001-004-15-16 dated 04/11/2015 passed by Commissioner of Central Excise, Customs and Service Tax-ANAND)

Anupam Industries Limited ....**Appellant**
Unit-iv, Village-salun,
Taluka-nadiad,
Kheda, Gujarat

VERSUS

Commissioner of C.E. & Customs-Anand ......**Respondent**
Office of the Commissioner,
Central Excise, Customs & Service Tax,
Central Excise Building, Nr. Juna Dadar,
Behind Old Bus Depot Anand
Gujarat, 388001

WITH

(i) Excise Appeal No. 10332 of 2016- DB (Anupam Industries Limited)
(ii) Excise Appeal No. 10594 of 2016- DB (Dharampaul Associates)
(iii) Excise Appeal No. 10596 of 2016- DB (Keshav Steel)
(iv) Excise Appeal No. 10599 of 2016- DB (Mehul Patel)
(v) Excise Appeal No. 10600 of 2016- DB (Mehul Patel)
(vi) Excise Appeal No. 10601 of 2016- DB (Mehul Patel)
(vii) Excise Appeal No. 10602 of 2016- DB (Mehul Patel)

APPEARANCE:
Shri Saurabh Dixit Advocate for the Appellant
Shri Tara Praksah, Deputy Commissioner (AR), for the Respondent

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

Final Order No. 11370-11377/2024

DATE OF HEARING: 17.04.2024
DATE OF DECISION: 18.06.2024

RAMESH NAIR

The appellants are in appeal against the impugned common Order-In-Original No. AND-EXCUS-000/COM-001-004-15-16 dated 04.11.2015 denying the Cenvat credit to the appellant M/s Anupam Industries Ltd. and imposing penalties on the all appellants.

1.1 The facts of the case are that an intelligence was gathered by the officers of the DGCEI, Vadodara that the raw materials/inputs viz., MS Plates, MS Angel, MS Channels, Rails, castings, electrical and mechanical goods etc. required to be used in or in relation to manufacture of the finished goods they were being stolen from the premises of the assessee since long back. One of the event of theft of raw materials viz. MS plates and Angels from the Godown/Stock yard which occurred on 02.10.2011 had been detected by local police and hence the management of the assesee had taken decision to conduct the physical stock taking of all raw materials to know the factual position of their raw material stock. During the physical stock taking, they had found physical shortage of huge quantity of the said raw materials than the actual quantity of recorded stocks. However, the assessee had not reversed the cenvat credit involved in the materials found physically short. Acting on said intelligence the DGCEI officers, searched the various manufacturing premises of the assessee, resumed records/ documents under the Panchanama proceedings, recorded statements of various personnel of the assessee, including the Managing Director. The investigation reached to a conclusion that there was huge physical shortage of raw materials, than the recorded stock. Accordingly, four show cause notices dtd. 15.07.2014 and 23.07.2014 were issued to the M/s Anupam Industries Ltd., Unit –V, Unit –IV, Unit-II & unit –III for recovery of Cenvat Credit alongwith interest and penalty and to impose penalties on the other co-appellants. The matter was adjudicated vide common impugned order and cenvat credit demand as proposed in the show cause notice was confirmed and penalties were imposed on all the appellants. Against the said order, the appellants are before us.

2. Shri Saurabh Dixit, the Learned Counsel appearing on behalf of the appellants submits that appellant has introduced SAR ERP system somewhere in May 2012 in their premises. As is common knowledge, implementing SAP ERP system is a time –consuming and confusing job. It was felt that whenever production process was undertaken on concurrent basis prior to as well as after SAP implementation during its initial phase, the consumption of raw materials was not properly recorded as issued for production as it should be. This necessitated taking actual stock of the goods available and update the SAP data so as to reflect the correct position for effective use of the SAP ERP system. Appellant has been in the business of the production of cranes and material handling equipment for the last past 50 years. When the material is procured and stores, the same can have minor variations in weight and quantity. So much so, when it is

issued for production, again it is done so on approximate basis. At times there are minor variations that take place in such estimates as well as actual consumption. This can lead to the stock being shown as consumed in production and the balance on hand (as per books) to be at variance compared to the actual physical stock consumed and so available on hand physically. That it is logical that when the appellant has been in business for over 40 years and during this course of business, handled lakhs of tonnes of MS Steel inputs and used it in production, minor variation in stock are common and expected to take place. As a result, once the SAP ERP system implemented, the appellant, based on stock taking exercise to arrive at reasonably accurate factual position, reconciled the RM/WIP stock and made necessary adjustment in SAP system, so as to show all such consumption of stock, that was actually made for production process over the past period in time, but the same was not properly captured in books due to various reasons such as error in estimation/missed out in showing stock consumption etc.

2.1 He also submits that as against this, the impugned order purely presumes that since there was one theft identified in October 2011 (which was of a very minuscule quantity), even in the past such theft must have taken place, which amounts to 'raw materials not used in production' and hence, the entire demand as such stand raised on such presumption basis.

2.2 He further submits that entire demand in the present matter of revenue is based on consumption entry made in SAP system. It is an irony that while the presumption is that raw material was not used for production, its quantification is made on basis of SAP ERP entry passed for 'material consumed for production' which on the fact of it renders the entire proceedings liable to dropped at the outset. The very fact that the above reconciliation done by the appellant was towards RM as well as WIP itself shows that it was not a case of RM not used in production at all. Further, it is not at all the case of the revenue that the difference in the weight as adjusted in SAP ERP was not within the prescribed IS-1852:1985 tolerance limit of +5% when one considers the quantum of steel handled by the Appellant till the date of such adjustment. He placed reliance on the following judgments:-

- Welspun Corp Ltd. – 2018(12)TMI 173-CESTAT AHMEDABAD
- Asion Solvochem P. Ltd. -2023(7)TMI 217-CESTAT AHMEDABAD.
- Welspun Corp Ltd. – 2023(7)TMI 1069- CESTAT AHMEDABAD.
- Jain Garni Marno Pvt. Ltd.- 2024(2)TMI -318 CESTAT AHMEDABAD.

2.3 He also argued that in any case, onus to first prove that the appellant had in fact availed Cenvat Credit on inputs, is upon revenue to discharge, which is not done so at all in the present case. In absence of first proving that the goods were cenvatted, even if they are converted into scrap (or assumed to be stolen in the present case), not demand on this count can be raised since revenue failed to prove that it was cenvatted. He placed reliance on the following decisions:-

- L&T Ltd. 2008(228)ELT 294 (Tri-Mumbai)
- Banswara Textile Mills Ltd. 2005(183)ELT 318 (Tri-Del)
- GSFC Ltd. 2019(9)TMI 669 –CESTAT AHMEDABAD

2.4 He further submits that the onus to prove that there was actually shortage of inputs before they were put to use, and the same were removed from the factory in clandestine manner, is upon revenue. He placed reliance on the following decisions:-

- Indian Polypipes and others Vs. Commissioner, Central Excise, Kolkata –I- 2003(157)ELT 652 (Tri. –Kolkata)
- Rishi Polymach Pvt. Ltd. -2010(261)ELT 349(Tri. Bang,)
- Panchmahal Steel Ltd. – 2023(12)TMI 434-CESTAT AHMEDABAD
- Krupalu Metals Pvt. Ltd. – 2024(2)TMI 13-CESTAT AHMEDABAD

2.5 He also submits that entire case is made out on basis of alleged SAP entries, under the presumption that stock of RM was stolen from the Appellant 's premises without being put to use. The distance between 'may be true' and 'must be true' is long and is required to be covered by legal and unimpeachable evidence, which the subject matter grossly fails to prove. He placed reliance on the following judgments:-

- IOC Ltd. Vs. CCE 2003(158)ELT 49 (Tri. –Kolkata)

- IPCL Vs. CCE, Vadodara 2005(181)ELT 99 (Tri,- Mumbai)
- Kwality Tube Industries 2008(232)ETL 813(Tri. Ahmd)
- CCE Vs. Kwality Tube Industries 2009(240)ELT 20(Guj)
- Good Kare Medico P. Ltd. 2019(366)ELT 133 (Tri. All)
- Mahavir Metal Industries 2014(313)ELT 581 (Tri. –Ahmd)

2.6 He also submits that it is equally important to note that there is no proof that the quantity shown to be consumed in production in SAP System (which is the subject matter of dispute) is at variance with the consumption norms production made by the appellant or in excess of reasonable variation in stock quantum at all. The appellant simply got the SAP system in sync with the actual stock position, by making missing entries towards consumption of material in production process. No demand thereon as such can be confirmed.

2.7 He further submits that the various statements recorded during the course of investigation did not show how, when and how much stock were stolen at all. It only refers to making entry in ERP system to bring it in sync with physical stock (which too was taken on estimate basis). The Managing Director merely agreed with the contents of statements of various persons shown to him, to the limited extent of whether the employee's statement actually stated it contents or not. This does not amount to admission of any sort by anyway at all.

2.8 As regard the allegation regarding the availing cenvat credit only on the basis of invoices without receiving any accompanying goods (M/s. San Enterprise and M/s. Evershine Sales), it appears that this objection is raised for the sake of raising, and to justify the presumptive nature of the demand. The Appellant had never received any fake credit without accompanying goods at all. In the present matter not a single invoice has been identified by the revenue authorities to show that credit was wrongly availed on such invoices, including quantifying the demand involved on this count as well. The very fact that entire demand is quantified only on basis of SAP reconciliatory entries, and no demand is raised in Annexures to SCN on 'non receipt of input ' related issue at all ipso facto means that this issue anyway is academic as such.

2.9 He also submits that the impugned order at para 8 (vi) had refused to grant cross-examination of witnesses stating that paper credit was based of statements and hence, there is no need to cross –examine any witness. That such statements which are not put to the test of cross-examination loose their evidentiary value in toto. The demand on this count therefore must be dropped.

2.10 He also submits that the statements of co-accused per se is not a solid evidence, but merely an assurance to the court, if anything. The same is not sufficient to bring home serious charge of clandestine clearance. He placed reliance on the following decisions:-

- Shakil Ahmed Khan 2019(266)ELT 634 (All)
- Gobinda Das -2023(385)ELT 722(Tri. –Kolkata)
- Shri Krishna Industries -2020(372)ELT 121 (Tri. Ahmd)

3. On other hand, Shri Tara Prakash, Ld. Deputy Commissioner (AR) appearing for Revenue has supported the impugned order by reiterating the finding of the Ld. Adjudicating authority. He placed reliance on the following decisions:-

- Commr. Of C.EX & Cus., Aurangabad Vs. Greaves Cotton Ltd. – 2008(225)ELT 198(Bom.)
- Golden Hills Estates Vs. Collector of Central Excise, Madras - 1997(90)ELT 301(Mad.)
- Commissioner of C.Ex. & Cus., BBSR-I Vs. Pentagon Steel (P)Ltd.
- Gupta Metal Sheets Vs. Commissioner of Central Excise, Gurgaon - 2008(232)ELT 796(Tri. LB)

4. We have heard both the sides and perused the records. Considering the fact of the present matter we find that during the course of investigation itself, the reasons for shortage has been explained by the appellant but no verification was conducted by the department to find out the actual true. We noticed that only one theft event has been detected by the appellant on 02.10.2011 and the same was reported to the local police. They internally conducted the physical stock of their raw material and some shortage was found but this did not mean that all the disputed goods had

been stolen and not used in the manufactured goods. We find that the whole inquiry has revolved around the basic presumption that huge raw material has been removed from their premises during the disputed period but it was noticed that there is absolutely no evidence with the department in this regard as to where and when the said raw material moved out of their factory premises. In the present matter department merely assumed that the said shortage was due to theft. Further we also find that there is no other corroborative evidence to establish that the shortage was on account of short-receipt of raw material. In that circumstances, we hold that the investigation was conducted by the Revenue is deficient and incomplete. In that circumstances, the charge of shortage of inputs stands disproved.

4.1 We also find that the recovery of Cenvat credit has been ordered under the impugned order on the basis that the cost centre entries vide 201 to 202 on SAP accounting package adopted by the them has been used to accommodate shortage in raw materials. In this regard the appellant claimed that when the materials are issued physically but not recorded in SAP, excess materials are found. And when the material are not issued but recorded in SAP then there will be shortage of materials in SAP system. Excess or shortage of materials are adjusted by making entry 201, materials are not issued physically, however quantity and amount of such raw materials are recorded by entry 201 in SAP system to adjust the shortage or excess of raw materials. As far as SAP software program in concerned, 221 & 221Q is entry related to goods issued to project WBS (Work Break down Structure). 261 is entry where material is issued to production order and 261Q is entry related to goods issued to project production order. The meaning of abbreviation mentioned in the report of entry Nos. 221Q, 261 and 261Q are as same as given against the entry 201 & 202. The Ld. Commissioner has arrived at a conclusion that the raw material entry in said SAP system is all the raw material which is clandestinely removed by the appellant under the guise of cost centre. However but we noticed that the said SAP entry is done just to avoid the mal-functioning of SAP programme on actual basis as the shortage caused due to mis-handling of accounts cannot be entered into the SAP accounting at any later stage. It has to be accommodated in some other head which does not have a previous mention of the same entry. Further during the

SAP ERP System was implemented, the appellant based on stock taking exercise to arrive at reasonably accurate factual position, reconciled Raw materials/WIP stocks and made necessary adjustment entry in SAP System, to show all such consumption of stock, that was actually made for production process over the period of time but the same was not properly captured/ recorded in books of account due to various reasons such as error in estimation/missed out in showing stock consumption etc. Therefore on the basis of said SAP entry only it cannot be assumed that the appellant has not used the disputed raw material qty. in production during impugned period.

4.2 We find that the Cenvat Credit rules allows recovery of the credits incorrectly or improperly taken. In the present case, there is no allegation that original credit taken was incorrect or improper. The allegation is that, in view of the shortages noticed, the appellant has not used the inputs on which credit had been taken. In the present case, the demand is on account of the fact that there are some shortages which are not reconciled. The appellant clearly explained the reasons for the such shortage which were reconciled at the time of implementation of SAP system. We also find that as regards the shortages in stock detected during physical verification by the appellant itself, department nowhere produced any positive evidence that the disputed inputs found so short were disposed of in any manner other than in the manufacture of final products. The charge of clandestine removal has to be proved by the Revenue by bringing positive evidence on record and not by presumptions and assumptions. The Supreme Court has held in the judgment in the case of *Oudh Sugar Mills Ltd*. v. *U.O.I.*, 1978 (2) E.L.T. (J 172) that no show cause notice or an order can be based on assumptions and presumptions. "The findings based on such presumptions and assumptions without any tangible evidence will be vitiated by an error of law."

4.3 We find that the evidence on record does not indicate any diversion of inputs in contravention of rules relating to utilisation of inputs. There is no evidence, that the shortage of inputs are due to diversion of inputs or theft of the inputs or clandestine clearances of inputs. When there is no finding that the inputs on which credit has been taken were clandestinely removed/ diverted what remains is improper accounting of the inputs. For improper accounting the cenvat credit cannot be demanded. In these circumstances, we are of the view that there is no evidence to sustain a finding that this is a case of irregular or incorrect taking or utilisation of credit. In such a situation, no cenvat demand is sustainable under Rule 14 of Cenvat Credit Rules, 2004.

4.4 We also find that the in the present matter it is also alleged by the department that Shri Hasmukbhai Patel, Proprietor of M/s. Kushal Steel and Karta of HUF namely Hasmuk C. Patel was making arrangement of Cenvatable invoices for the appellant without physical/actual sending the materials to the appellant. In his statement, Shri Hasmukhbhai patel admitted the said facts. He admitted that he had arranged 18 invoices of M/s San Enterprises and M/s Evershine Steel for about 235 MT. of MS Angle, Plate, Flats etc. We find that in support of their statements Shri Hasmukhbhai Patel nowhere produced any documentary evidences. Further he was not given the details of invoices to which period they belong. We also notice that appellant requested the Ld. Adjudicating authority for cross-examination of witnesses which are relied upon by the department. However the said request of the appellant was rejected. Since no cross-examination of any of the persons had been granted, the alleged statements cannot at all be the basis for confirming cenvat demand. We find support form the judgments in the case of *Shalimar Rubber Industries* v. *C.C.E., Cochin*, 2002 (146) E.L.T. 248 (S.C.) wherein the Supreme Court has held that no reliance can be placed on the oral statement of a person who has not been subjected to cross-examination during adjudication. Further, in the case of *Tulsyan Nec Ltd*. v. *C.C.E.,* 2003 (157) E.L.T. 627 (Mad.) the Madras High Court has held that "any material, even if it be expert evidence, it is to be relied upon by the respondents, then such statements shall be made available for cross-examination....... it is but proper that expert evidence shall be made available for cross-examination by the petitioners in the interest of compliance of principles of natural justice .... Any material to be used against the party has to be put to the aggrieved persons and the aggrieved persons should also have the freedom to cross-examine the witnesses who have given their expert opinion."

4.5 Statements recorded during investigation in the present matter, whose makers are not examination-in-chief before the adjudicating authority, would have to be eschewed from evidence, and it will not be permissible for Ld. Adjudicating Authority to rely on the said evidences. Therefore, we hold that none of the said statements were admissible evidence in the present case. We, therefore, do not find the impugned order to be sustainable.

5. We, therefore, set aside the impugned order and allow all the appeals with consequential relief, as per law.

(Pronounced in the open court on 18.06.2024)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

Raksha