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

REGIONAL BENCH-COURT NO. 3

EXCISE Appeal No. 10793 of 2015- DB

(Arising out of OIO-VAP-EXCUS-000-COM-017-14-15 dated 31/12/2014 passed by Commissioner of Central Excise, Customs and Service Tax-VAPI)

Shivani Metal ....**Appellant**

Gala No. B-2, Plot No. 40,
Standard House, Dan Udhyog Industrial Estate, Piperia,
Silvassa, U T Of Dadra & Nagar Haveli

VERSUS

Commissioner of C.E. & S.T.-Vapi ......**Respondent**

4th Floor...Adharsh Dham Building,
Opp. Town Police Station,
Vapi-Daman Road, Vapi
Vapi, Gujarat- 396191

WITH

(i) EXCISE Appeal No. 11072 of 2015- DB (Bhupender G Patel)
(ii) EXCISE Appeal No. 11073 of 2015- DB (Pankaj Aggarwal)
(iii) EXCISE Appeal No. 11074 of 2015- DB (Aashish Gupta)

APPEARANCE:

Shri Ankur Upadhyay, Advocate for the Appellant
Shri R K Agarwal, Superintendent (AR) for the Respondent

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

Final Order No. 12284-12287/2024

DATE OF HEARING: 21.06.2024
DATE OF DECISION: 01.10.2024

RAMESH NAIR

These appeals are filed by the Appellants against the impugned common Order-In-Original No. VAP-EXCUS-000-COM-017-14-15 dated 31.12.2014 passed by Commissioner, Central Excise, Customs & Service tax, Silvassa.

1.1 The brief facts of the case are that M/s Shivani Metal, main Appellant is engaged in manufacture of Copper Wire and bare Copper wire. Appellant was also getting such products manufactured on Job Work basis from other manufacturer. An intelligence was gathered that Appellant were involved in the clandestine clearances of their finished products viz. Copper wire/ bare Copper wire without payment of Central Excise Duty. Therefore, simultaneous searches were conducted on 10.11.2009 at the premises of appellants, transporters. Relevant documents/records were placed under seizure. During the search and on scrutiny of the records, statements of representatives of M/s Shivani and its associates are recorded. From the investigation, it appears that Appellant had cleared their finished goods illicitly without payment of duty of Rs. 1,46,85,771/- which were transported by several transporter. Further during the course of search at factory premises of Appellant, shortage of finished goods/ semi –finished goods of Rs. 2305.430 Kgs. were found. Shri Bhupendra Govind Patel, Factory Manager admitted the clearances of said goods. The duty liability on the said shortage goods of Rs. 60,789/- workout by the revenue.

1.2 After the detail investigation a show cause notice dated 24.12.2012 was issued to Appellants proposing the demand of Central Excise Duty of Rs. 1,46,85,771/- on account of clearances of finished goods without payment of duty and duty demand of Rs, 60,789/- on shortage found goods quantity 2305.430 Kgs. It was also proposed the redemption fine and imposition of penalties. The Ld. Commissioner, Vapi vide impugned order Adjudicated the show case notice wherein he confirmed the demand alongwith interest, penalty and fine. He also imposed the penalty on co-appellants under Rule 26 of the Central Excise Rules 2002. Hence, the Appellants filed these present appeals against the impugned order of the Learned Commissioner.

2. Shri Ankur Upadhyay Learned Counsel appearing on behalf of appellants submits that the allegation of the department regarding clandestine clearance of the finished goods is made on the basis of the statement of transporter and buyers. The Appellant vide their letter dt. 15.04.2014 requested the adjudicating authority to provide opportunity of cross-examination of total 13 persons whose statements have been relied upon by the department. However Ld. Commissioner only provided the opportunity of cross examination of 3 persons i.e. Shri Dwarkanath Khajuria, Shri Lal Bahadur Yadav and Shri Krishna Kumar (Transporters) on 08.07.2014, 12.09.2014 and 11.11.2014 but the witnesses did not appear on the said dates. Further cross-examination of the remaining 10 persons were not followed by the adjudicating authority. Therefore, Ld.

Commissioner in gross violation of principles of natural justice confirmed the demand solely on the basis of the statement of transporters and buyers without providing the opportunity of cross–examination and having disregard to the Section 9D of the Central Excise Act, 1944. Hence statements of 13 persons recorded by the department cannot be relied upon. He placed reliance on the following judgments:-

- Basudev Garg reported in 2013(294)ELT 353(del.)
- Kelvin Industries Vs. CCE, Rajkot – (2023) 3 Centax 252 (Tri. Ahm.)

2.1 He also submits that Shri Sushil Kumar Aggarwal proprietor of M/s. Shivani Metals and M/s. Somain Enterprises retracted the statement dated 11.01.2010 vide their letter dated 13.01.2010. Also Shri Pankaj Aggarwal, Power of Attorney Holder of M/s Shivani Metals and M/s. Somain Enterprises retracted his statement dated 31.03.2010 vide letter dated 01.04.2010 and statement dated 07.04.2010 vide letter dated 08.04.2010, therefore statements of the above person cannot be relied upon by the department for confirming the demand.

2.2 By relying the judgments of Motabhai Iron & Steel Industries Vs. CCE, Ahmedabad –II -2014(302)ELT 69 (Tri. Ahmd.) which was affirmed by Hon'ble Gujarat High Court – Commissioner Vs. Motabhi Iron & Steel Industries -2015(316)ELT 374 (Guj), he also argued that statements of the transporter not corroborated with any other evidences thus demand cannot be confirmed on the basis of the third party statements.

2.3 Without prejudice, he also submits that demand of central excise duty has been arrived by the department against M/s Shivani Metals by relying upon the documents pertaining to M/s. Somain Enterprises as the Ld. Commissioner, Vapi does not have the jurisdiction to make the demand against M/s. Somain Enterprises, therefore demand has been frivolously made against the Appellant which is liable to be set aside.

2.4 As regard the demand of central excise duty of Rs. 60,789/- he submits that revenue worked out the said duty liability on the goods 2305.430 Kg. found short during the search on the ground that Shri Bhupendra G Patel accepted the clearances of the said goods. However, in the present matter cross-examination of Shri Bhupendra Patel was not allowed by the Ld. Commissioner, hence by relying the statement of said person no demand is sustainable.

2.5 He further submits that demand is not maintainable against the main appellant, therefore penalty imposed under Rule 26 of the Central Excise Rules, 2002 on co-appellants are also not maintainable and liable to be set aside.

3. On other hand, Shri R. K. Agarwal Learned Superintendent (AR) for the Revenue has reiterated the findings recorded in the impugned order, to support the adjudged demands confirmed in the impugned order, against the appellants.

4. Heard both the sides and perused the records. We have carefully gone through the records, grounds of appeals and submissions of parties and finding of the impugned order and various case laws cited by both the parties. We find that the case of the department against the Appellant is that, appellant had received inputs without payment of duty and after processing it, sold their excisable goods without payment of duty clandestinely without preparation of Central Excise invoices and without accounting the same in daily stock account and without showing the same in their periodical returns from time to time. Revenue in support of above allegation relied upon the statements of Shri Sushil Kumar Agarwal proprietor of M/s. Shivani Metals and M/s. Somain Enterprises, Shri Pankaj Agarwal power of attorney Holder of M/s. Shivani Metals and Somian Enterprises, Shri Bupendra G. Patel factory manager of M/s Shivani Metal and various buyers and transporter. We find that the entire proceedings have been initiated on the basis of statements of above persons. The appellant in the course of adjudication have been consistently demanding cross-examination of the witnesses whose statements have been heavily relied upon by the Department. The appellants have pleaded that the only opportunity of cross-examination of 3 person i.e. Shri Dwarkanath Khajuria, Shri Lal Bahdur Yadav and Shri Krishna Kumar (Transporters) was provided but the said witness did not appear. It is the case of the appellant

that demand of duty has been confirmed by the Ld. adjudicating authority on the basis of the statements of transporters and other persons whose cross-examination have not been allowed. No other corroborative evidence is available on record but the statements which too have not been allowed to be examined.

4.1 On perusal of finding of the Learned Commissioner, we find that the request for cross-examination of the persons whose statements have been relied upon has been turned down on the ground that after recording the statements nobody retracted the statements thereafter, there is therefore a reason to believe that the statements have been given voluntarily, without any pressure. In this regard, we find that the reasons assigned by the authorities below to reject cross-examination is clearly unsustainable in legal parlance for the obvious reason that no adverse inference can be drawn against assessee whose statements are to be relied by the Revenue without ascertaining the veracity in the absence of cross-examination. Therefore the said statements cannot be relied upon as admissible evidence in terms of the provisions of Section 9D of the Act. The provisions of Section 9D which are reproduced as under: -

> ***"9D. Relevancy of statements under certain circumstances.*** *- (1) A statement made and signed by a person before any Central Excise Officer of a gazetted rank during the course of any inquiry or proceeding under this Act shall be relevant, for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which it contains, -*
> *(a) when the person who made the statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable; or*
> *(b) when the person who made the statement is examined as a witness in the case before the Court and the Court is of opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interests of justice.*
> *(2) The provision of sub-section (1) shall, so far as may be, apply in relation to any proceeding under this Act, other than a proceeding before a Court, as they apply in relation to a proceeding before a Court."*

The above Section deals expressly with the circumstances in which a statement recorded before a gazetted officer of Central Excise (under Section 14 of the Act) can be treated as relevant for the purposes of proving the truth of the contents thereof. Reliance is placed on the ruling of the Hon'ble Punjab & Haryana High Court in the case of *Jindal Drugs (Infra),* 2016 (340) E.L.T. 67 (P & H) wherein the Hon'ble High Court laid down the detailed procedure, *inter alia,* providing for cross-examination of the witness of the Revenue by the Adjudicating Authority and thereafter, if the Adjudicating Authority is satisfied that the statement of the witness is admissible in evidence than the Adjudicating Authority is obligated to offer such witnesses for cross-examination by the other side/assessee. Such view has also been affirmed by the Hon'ble Supreme Court in the case of *Andaman Timber (Infra)* - 2015 (324) E.L.T. 641 (S.C.) = 2017 (50) S.T.R. 93 (S.C.).

4.2 We further find that Hon'ble Punjab & Haryana High Court in the case of *Sukhwant Singh* - (1995) 3 SCC 367 has observed as under:-

> *"8. It will be pertinent at this stage to refer to Section 138 of the Evidence Act which provides :*
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> ***"138. Order of examinations.*** *- Witnesses shall be first examined-in-chief then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined. The examination and cross-examination must relate to relevant facts but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.*
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> ***Direction for re-examination.*** *- The re-examination shall be directed to the explanation of matters referred to in cross-examination; and if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter."*
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> *9. It would, thus be seen that Section 138 (supra) envisages that a witness would first be examined-in-chief and then subjected to cross-examination and for seeking any clarification, the witness may be re-examined by prosecution. There is, in our opinion, no meaning in tendering a witness for cross-examination only. Tendering of a witness for cross-examination, as a matter of fact, amounts to giving up of the witness by prosecution as it does not choose to examine him in chief. However, the practice of tendering witness for cross-examination in session trials had*

> *been frequently resorted to since the enactment of the Code of Criminal Procedure, 1898."*

In view of above it is clear that in adjudication, the adjudicating authority is required to first examine the witness in chief and also to form an opinion that having regard to the facts and circumstances of the case, the statements of the witness are admissible in evidence. Thereafter, the witness is offered to be cross-examined. We find that in the present matter Ld. Adjudicating Authority failed to do such exercise. We also note that Section 138 of the Indian Evidence Act, 1872, clearly sets out the sequence of evidence, in which examination-in-chief has to precede cross-examination, and cross-examination has to precede re-examination. We also note that it was held by Hon'ble Allahabad High Court in the case of *Commissioner of Central Excise* v. *Parmarth Iron Pvt. Ltd.* 2010 (260) E.L.T. 514 (All.) (supra) that if Revenue does not allow cross-examination of any prosecution witness then Revenue cannot rely on the statement given by such prosecution witness for confirmation of demand. In the present case cross-examination of none of the witnesses were allowed. Therefore, following the ruling by above judgments, we hold that none of the statements were admissible evidence in the present case and no duty demand is sustainable on the basis of statements of persons.

4.3 We also observed that in the present matter Shri Sushil Kumar Aggarwal proprietor of M/s Shivani Metals and M/s Somain Enterprises retracted the statement dated 11.01.2010 vide their letter dated 13.01.2010 and also Shri Pankaj Aggarwal power of attorney holder of M/s Shivani Metals and M/s Somain Enterprises retracted his statement dated 31.03.2010 vide letter dated 01.04.2010 and statement dated 07.04.2010 vide letter dated 08.04.2010. We find that Adjudicating Authority, instead of rebutting the said retraction has simply held that they have been given ample opportunities, by the investigating authorities to give their statements and to produce relevant records again in the matter but they failed to do so, hence their retraction became null and void. This approach of Ld. Commissioner indicates that the Adjudicating Authority did not find any answer to the retractions made by the said persons of the statements. In the case of Vinod Solanki, 2009 (233) E.L.T. 157 (S.C.) = 2009 (13) S.T.R. 337 (S.C.) the Hon'ble Supreme Court has inter alia held that the burden to prove that confession was voluntary is on the department. Court must bear in mind the time of retraction, nature and manner and other relevant factors to arrive at a finding. Further, in Agrawal Round Rolling Mills Ltd., 2015 (317) E.L.T. 145 (T), the Tribunal has held that the Adjudicating Authority, in accordance with the provisions of Section 9D(2) of the Central Excise Act, 1944 (pari materia to Section 138B of the Customs Act, 1962) must examine the witnesses whose statements have been relied upon by the Department. A finding of clandestine removal of goods on the basis of uncorroborated statements was not sustainable in the absence of positive evidence of purchase of unaccounted raw materials, use of excess electricity, admission of raw material supplier with corroborative evidences etc. In this case, no documents indicating suppression of purchase of raw material or of production of finished goods was recovered, no data related to excess electricity was found by the department, no seizure or recovery of any duplicate or fake purchase invoices or delivery challans was made and no physical movement of goods without proper invoices or without payment of duty was noticed for the period of dispute. The adjudicating authority found clandestine removal of goods merely on the basis of uncorroborated statements and, therefore, the finding was not sustainable.

4.4 We also find that the allegation against the appellant in present matter is that they have procured unaccounted raw materials and cleared illicitly the clandestine manufactured finished goods without payment of duty, however in the present matter no efforts were made by the Revenue to reveal the truth by examining the manufacturing process to ascertain the raw material consumed and resulted output. Further no raw material supplier was produced by the revenue in the present matter. Therefore, the charge of clandestine removal of goods is not sustainable against the appellant.

4.5 As regard the demand of central excise duty of Rs. 60,789/- on the goods 2305.430 Kg. found short during the search and admitted by the staff Shri Bhupendra G Patel we find that the admission of shortage by the staff does not conclusively establish the charges of clandestine removal of goods. We further find that there is no other corroborative evidence brought on record with respect to the allegation of clandestine removal of said goods, which is a serious charge and has to be proved beyond doubt as held by the Hon'ble High Court in the case of Continental Cement Company v. Union of India — 2014 (309) E.L.T. 411 (All.) (supra) and Commissioner v. Anand Founders & Engineers — 2016 (331) E.L.T. 340 (P & H).

4.6 As per our above discussions and findings, we are of the view that the charge of clandestine removal against the appellant could not be established by the revenue beyond doubt. Therefore the impugned order is not sustainable.

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

(Pronounced in the open court on 01.10.2024)

RAMESH NAIR
MEMBER (JUDICIAL)

RAJU
MEMBER (TECHNICAL)

Raksha