

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

REGIONAL BENCH- COURT NO.3

Excise Appeal No.12432 of 2019

(Arising out of OIO-DMN-EXCUS-000-COM-045-18-19 dated 30/03/2019 passed by Commissioner of Central Excise, Customs and Service Tax-DAMAN)

Metal Gems

.....Appellant

Plot No. 113-120, Panchal Industrial Zone, Bhompore
Daman, Gujarat

VERSUS

C.C.E. & S.T.-Daman

.....Respondent

3rd Floor...Adarsh Dham Building, Vapi-Daman Road, Vapi
Opp.Vapi Town Police Station,
Vapi, Gujarat-396191

WITH

- i. Excise Appeal No. 10032 of 2020 (Mr Rikhabchand V Mehta)**
- ii. Excise Appeal No. 10033 of 2020 (Mr Ganpat V Mehta)**
- iii. Excise Appeal No. 10034 of 2020 (Harsh Kumar)**
- iv. Excise Appeal No. 10035 of 2020 (Mr Sanjay Agarwal)**
- v. Excise Appeal No. 10036 of 2020 (MR LALITBABLANI)**
- vi. Excise Appeal No. 10074 of 2020 (Naval Basudev Agarwal)**

(Arising out of OIO-DMN-EXCUS-000-COM-045-18-19 dated 30/03/2019 passed by Commissioner of Central Excise, Customs and Service Tax-DAMAN)

APPEARANCE:

Shri Ankur Upadhyay, Advocate for the Appellant
Shri Vinod Lukose, Superintendent (AR) for the Respondent

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

Final Order No. A/ 11197-11203 /2022

DATE OF HEARING: 30.08.2022
DATE OF DECISION: 07.10.2022

RAMESH NAIR

All the present appeals are filed by the appellants against the Order-in-Original No. DMN-EXCUS-000-COM-45-18-19 dated 30.03.2019 passed by the Principal Commissioner, GST & Central Excise, Daman. These appeals arise from common order and investigations, hence we take up these appeals together for disposal.

1.1 The relevant facts of the case, in brief, as per records are that M/s Metal Gems are engaged in the manufacture of Copper and Copper Alloy articles. On the basis of an intelligence that M/s Metal Gems are clearing the goods i.e. Copper wire/ Rod/ Pipe/tube without cover of the Central Excise invoices, without payment of Central Excise Duty and without accounting for the same, in their books of account, searches were conducted by the officers of DGCEI at the premises of M/s Metal Gems and M/s Moongipa Roadways Pvt. Ltd. and also seized several records and documents. The officers recorded the statements of various persons including employees and partners of the Appellant and also the transporters, amongst others.

1.2 The documents recovered from M/s Moongipa Roadways Pvt. Ltd. were scrutinized and it appeared that they are engaged in the transportation of the consignment of Copper Pipes/ tubes/ coils from M/s Metal Gems, Daman. They have been showing the name of /details of the consignor and consignee when the goods are covered under proper central excise invoices and whenever the goods are not covered under proper invoices, they have been showing the consignment to have been booked in abbreviated form such as NKD, RKD, SMD, MKD, Lalitbhai, PD, KK, AE, etc. they have admitted that the consignment which have been transported by them under the abbreviated names have been received by them, for transportation, without the cover of any proper duty paying documents. They also admitted that persons of M/s Metal Gems have also been in continuous touch with the persons of the transporter for the purpose of transportation of their goods. On the basis of the investigation carried out at the transporters end and as per the statements of the persons/ directors of M/s Moongipa Roadways Pvt. Ltd., the investigation was extended to buyers of the goods, which were transported by M/s Moongipa Roadways Pvt. Ltd. by showing the names of the consignors/ consignees in abbreviated form and as self. The revenue calculated the duty demand on the basis of records/ register of transporter. After completing the investigation, accordingly, the Show cause notice dtd. 31.03.2016 was issued which was culminated in the impugned adjudication order whereby the demand of Central Excise Duty along with interest and penalty was confirmed and a penalty under Rule 26 of Central Excise Rules, 2002 was also imposed on the Co-Noticees. Being aggrieved, Appellants filed these present appeals before the Tribunal.

02. Shri Ankur Upadhyay, Learned Counsel appearing on behalf of the appellants submits that in the present matter it has been alleged that Appellant during the period April 2011 to November 2012 have clandestinely cleared 1126.193 MT. of finished goods without payment of duty to various buyers through M/s Moongipa Roadways (Transporter). The department arrived at the demand of Central Excise Duty against the Appellant solely on the basis of loading register maintained by the transporter. During the investigation carried out by the department at the factory and office premises of the Appellant nothing incriminating was found. Also not a single piece of evidence regarding unaccounted purchase of inputs in cash, suppression of production or clearances of manufactured goods was found at the premises of the Appellant. Further no excess electricity consumption was found and during the physical verification neither any excess or shortage of goods was found, hence all the charges of clandestine clearance of finished goods made against the Appellant without any corroborative evidence are baseless and are made on assumption & presumption basis, thus liable to be set aside.

2.1 He also submits that as per the loading register, details of parties to whom goods have been supplied is mentioned in abbreviated form under 63 code names, in respect of such code names no investigation has been done by the department apart from three parties, from whom nothing incriminating regarding the clandestine clearance of goods was found, therefore, in such circumstances demand of duty in respect of entire consignments allegedly cleared under 63 code names cannot be made against the Appellant. Shri Ramnivas Sharma, Manager in M/s Moongipa Roadways in his cross -examination in answer to question 14 stated that 'code name' mentioned by them was as per the instruction of Shri J.K. Yadav from their Mumbai office and in answer to question 15 he stated that they used to transport copper pipe for other parties as well as M/s R.R. Cables, M/s Salasar Copper, M/s Mandev Metals, M/s Parasmani, M/s Jalan etc., Most importantly in his answer to question 16 he mentioned that they used to transport goods for above parties in 'code name' only. Thus it is unambiguously clear that when details of various parties are mentioned in the loading register in code names than solely on the basis of loading register demand of clandestine clearance of goods cannot be made against Appellant. Hence demand is not sustainable on this ground alone.

2.2 He further submits that all the details related to third party which without any corroborated evidence are not reliable in the eyes of law. Therefore demand of duty is liable to be set aside. It is also evident that duty has also been calculated on the items which is not even manufactured by the Appellant such as Copper wires, rubber tubes, bath tubes, copper utensils, plastics goods thus duty cannot be demanded from the Appellant.

2.3 He also submits that impugned order has been passed in grave violation of principles of natural justice as the department has relied upon statement of 18 witnesses in the show cause notice in respect of which Appellant made various correspondences to the adjudicating authority for the cross examination of the said witnesses, however except four witnesses, cross examination of 14 witnesses was not allowed by the adjudicating authority. Therefore it is a settled law that statement of these 14 witnesses cannot be relied upon.

2.4 In support of above submission, heavy reliance has been placed by learned counsel for the appellant upon the judgments delivered in the following cases: -

- ARYA FIBERS PVT. LTD. VS. CCE, AHMEDABAD -II- 2014(311)ELT 529 (TRI. AHMD.)
- SAKEEN ALLOYS PVT. LTD. VS. CCE, AHMEDABAD- 2013(296)ELT 392 (TRI. AHMD.) UPHELD BY HON'BLE GUJRAT HIGH COURT 2014(308) ELT 655 (GUJ.)
- VISHWA TRADERS PVT. LTD. VS. CC, VADODARA -2012(278) ELT 362 (TRI. AHMD.) UPHELD BY HON'BLE GUJRAT HIGH COURT 2013 (287) ELT 243 (GUJ.)

03. Shri Vinod Lukose, learned Superintendent (AR) appearing on behalf of the revenue reiterates the finding of the impugned order. He placed reliance on the following judgments:-

- 2011 (270) ELT 643 (SC) -CCE, MUMBAI VS. KALVERT FOOD INDIA PVT. LTD.
- 2015 (316) ELT 534 (GUJ)- KRISHNA SCREEN ART VS. CCE.
- 2014 (306) ELT 533 (GUJ)- SANJAY VIMALABHAIDEORA VS. CESTAT
- 2022 (2) TMT 264 – GUJ-HC-CC, KANDLA VS. RAJKAMAL INDUSTRIES P. LTD.

04. We have heard both sides and perused the case records. We find that in present matter, the case of clandestine removal has been made out against the appellant M/s. Metal Gems on the basis of booking register /loading register recovered from the business premises of M/s. Moongipa Roadways Pvt. Ltd and statements of persons of said transporter. It is settled law that documents recovered from a third party can be used against the manufacturer to prove clandestine removal only when these are supported with corroborative evidences. The Revenue has alleged that huge quantity of finished products have been manufactured and cleared clandestinely without payment of Central Excise duty. The booking register/loading register recovered from the business premises of transporter, no doubt, gives rise to suspicion that these are details relating to clandestine clearance of the goods. However, clandestine manufacture and clearance alleged against the appellant is a very serious charge which needs to be proved by Revenue by producing tangible and reliable evidences. For clandestine clearance of such huge quantities of finished products, corresponding quantity of raw materials ought to have been procured by the appellant. The finished products allegedly have been cleared to various customers. In fact, in the said transporter records it revealed that clearances under abbreviated name have been effected under 63 code names, the investigation has been conducted only in respect of 3 codes, no investigations were conducted in respect of remaining 60 codes. However, we note that Revenue has failed to bring any material evidence on record even for the procurement of raw materials without entering in their books, nor carried out any proper investigation on the buyers who are alleged to have purchased these finished goods, in cash without payment of duty. From the records recovered from the Appellant's premises, there is no evidence of any physical receipt of raw materials used in production of such a huge quantity of finished goods. In fact on the date of search, no discrepancy was recorded in respect of stock of raw materials and finished goods vis-a-vis that recorded in statutory records. No single payment detail of clandestine sale has been brought on record. Nor there is any evidence of any excessive power consumption which is one of the vital factor otherwise required for the alleged large scale production. No document in the form of receipts of any cash or kind on account of clandestine clearance and sale of goods has been seized from the parties. No evidences of removal of excisable goods or procurement of raw materials and its consumption are on record. Clearly, there is also no evidence in the form of unaccounted procurement of raw materials, fuel, labour, receipts of unaccounted cash, etc. which are some of

the basic parameters which have been laid down by Courts and Tribunals over a period of time for determining whether or not the allegation for clandestine removal is established. It may be worthwhile to quote the tests that have been laid down in the case of in *M/s. Nova Pharmaceuticals Pvt. Ltd. v. CCE* - 2014 (311) E.L.T. 529 (Tribunal) which approved of by the Hon'ble Delhi High Court in *Flevel International v. CCE* - 2016 (332) E.L.T. 416 (Del.). The said tests are extracted hereinbelow :

- "(i) *There should be tangible evidence of clandestine manufacture and clearance and not merely inferences or unwarranted assumptions;*
- (ii) *Evidence in support thereof should be of :*
 - (a) *raw materials, in excess of that contained as per the statutory records;*
 - (b) *instances of actual removal of unaccounted finished goods (not inferential or assumed) from the factory without payment of duty;*
 - (c) *discovery of such finished goods outside the factory;*
 - (d) *instances of sale of such goods to identified parties;*
 - (e) *receipt of sale proceeds, whether by cheque or by cash, of such goods by the manufacturers or persons authorized by him;*
 - (f) *use of electricity for in excess of what is necessary for manufacture of goods otherwise manufactured and validly cleared on payment of duty;*
 - (g) *statements of buyers with some details of illicit manufacture and clearance;*
 - (h) *proof of actual transportation of goods, cleared without payment of duty;*
 - (i) *links between the documents recovered during the search and activities being carried on in the factory of production; etc."*

The aforesaid ratio also finds support in the following judgments :

- VISHWA TRADERS PVT. LTD. V. CCE, 2012 (278) E.L.T. 362 (T), AS AFFIRMED BY THE HON'BLE GUJARAT HIGH COURT IN CCE V. VISHWA TRADERS, 2013 (287) E.L.T. 243 (GUJ.),
- SAKEEN ALLOYS PVT. LTD. V. CCE, 2013 (296) E.L.T. 392 (T), WHICH HAS BEEN AFFIRMED BY THE HON'BLE GUJARAT HIGH COURT IN CCE V. SAKEEN ALLOYS, 2014 (308) E.L.T. 655 (GUJ.),
- MAHESH SILK MILLS V. CCE, 2014 (304) E.L.T. 703 (T), AS AFFIRMED BY THE HON'BLE GUJARAT HIGH COURT IN CCE V. MAHESH SILK MILLS, 2015 (319) E.L.T. A52 (GUJ.)
- CCE V. AIR CARRYING CORPORATION, 2009 (248) E.L.T. 175 (BOM.).

4.1 We also noticed that the reliance of third party documents/ records placed by the learned Commissioner while conforming demand against present appellant is also observed to be unjustified and unreasonable. It has been consistently held by the court and tribunal that demands of whatever nature cannot be confirmed solely on the basis of third party's evidence/records. The relevant case law in the case of *Bajrangbali Ingots & Steel Pvt. Ltd. & Suresh Agarwal v. CCE, Raipur* in Appeal Nos. E/52062 & 52066/2018 which is held as follows :-

"9. The law i.e. as to whether the third party records can be adopted as an evidence for arriving at the findings of clandestine removal, in the absence of any corroborative evidence, is well established. Reference can be made to Hon'ble Allahabad High Court decision in the cases of Continental Cement Company v. Union of India - 2014 (309) E.L.T. 411 (All.) as also Tribunal's decision in the case of Raipur Forging Pvt. Ltd. v. CCE, Raipur-I - 2016 (335) E.L.T. 297 (Tri. - Del.), CCE & ST, Raipur v. P.D. Industries Pvt. Ltd. - 2016 (340) E.L.T. 249 (Tri. - Del.) and CCE & ST, Ludhiana v. Anand Founders & Engineers - 2016 (331) E.L.T. 340 (P & H). It stand held in all these judgments that the findings of clandestine removal cannot be upheld based upon the third party documents, unless there is clinching evidence of clandestine manufacture and removal of the goods."

Similarly, the Tribunal in various cases, as cited below, has held that charges of clandestine removal cannot be levelled or confirmed on the basis of private records, the authenticity of which was doubted by the manufacturer without any corroborative evidence and the private records/registers of third party cannot be the sole basis for arriving at the clandestine removal.

- *DALMIA VINYL P. LTD.* - 2005 (192) E.L.T. 606 (TRI.-BANG.)
- *CHEMCO STEELS P. LTD.* - 2005 (191) E.L.T. 856 (TRI.-BANG.)
- *C.M. RE-ROLLERS & FABRICATORS* - 2004 (168) E.L.T. 506 (TRI.-DEL.)
- *TGL POSHAKCORPN.* - 2002 (140) E.L.T. 187 (TRI.-CHE.)
- *MINAKSHI STEELS* - 2005 (190) E.L.T. 395 (TRI.-KOL.)
- *SRI JAYAJOTHI& CO. LTD.* - 2002 (141) E.L.T. 676 (TRI.-CHE.)
- *SHARMA CHEMICALS* - 2001 (130) E.L.T. 271 (TRI.-KOL.)
- *OPEL ALLOYS P. LTD.* - 2005 (182) E.L.T. 64 (TRI.-DEL.)

4.2 We also find that in present matter Appellant had sought cross-examination of 18 deponents out of which department could only produce 4 deponents for cross-examination. It is well settled law that though the statements carry good persuasive value but such untested statements cannot be made stand-alone basis for arriving at an adverse conclusion against the assessee. Though an admission or a statement is one of the important piece of evidence but the same has to bear the test of veracity through the tool of cross examination. Further, as per various decisions, it is well settled law that no reliance can be placed on the deponents' statements unless he is allowed to be cross examined for testing the correctness of his statement. Reference in this regard can be made to the Hon'ble Supreme Court's decision in the case of *Godrej Pacific Tech Ltd. v. Computer Joint India Ltd.* - 2008 (228) E.L.T. 507 (S.C.); *Shalimar Rubber Industries v. Collector of Central Excise, Kochin* - 2002 (146) E.L.T. 248 (S.C.); *Arya Abushan Bhandar v. UOI* - 2002 (143) E.L.T. 25 and *Laxman Export Ltd. v. Collector of Central Excise* - 2002 (143) E.L.T. 21 (S.C.). In all these decisions, it stands specifically observed by the Hon'ble Apex Court that the oral statements of third party implicating the assessee for clandestine purchase of raw material, with the subsequent written denial, cannot be relied upon for establishing the charge of clandestine manufacture unless such person is either examined or cross examined. In fact, the Hon'ble Supreme Court in the case of *Arya Abhushan Bhandar* has held that non-production of the witness for cross-examination results in breach of natural justice and cannot be accepted on the ground that no prejudice would be caused to the appellant for reason of non-production. In the case of *Laxman Exports Ltd.*, the Hon'ble Supreme Court observed that denial of cross-examination of raw material supplier results in denial of the appellant's right to contest the veracity of the statement made by the other person and accordingly the Hon'ble Supreme Court set aside the majority order of the Tribunal vide which the denial of cross examination was held to be not suffering from any infirmity. It is settled law that if the persons are not offered for cross-examination, their statements cannot be relied upon. since in the present matter other persons did not turn up for cross-examination, hence their statement cannot be relied upon for confirmation of duty demand against the Appellant.

4.3 It is well settled law that clandestine removals cannot be arrived at based upon the confessional statement of other persons or the documents recovered from the third party premises, without corroboration of the said

documents. The statements itself are not sufficient for holding so. No presumptions are available in respect of such documents unless they come from the proper custody and such documents raise serious doubts about their genuineness. For the above proposition reference can be made to Bombay High Court decision in the case of *Commissioner of Customs, Mumbai v. Foto Centre Trading Co.* - 2008 (225) E.L.T. 193 (Bom.); *Radhey Shyam Kanoria* - 2006 (197) E.L.T. 130 (Tri. - Mum.); *Pioneer Industries* - 2006 (193) E.L.T. 506 (Tri. - Mum.) & *Rutvi Steel & Alloys* - 2009 (243) E.L.T. 154 (Tri. - Ahmd.). Similarly there is catena of judgments laying down that the inculpatory statements alone cannot be made the basis for arriving at a finding of clandestine removal. In a nutshell, it has been the constant stand of quasi-judicial and judicial appellate forums that for establishing the fact of clandestine removal, there need to be sufficient evidence on record leading to conclusive proof of production of goods, their removal from the factory by any mode of transportation and clandestine clearance to the buyers. Mere doubts, howsoever strong cannot take the place of evidence required to be produced by the Revenue. The onus to establish such clandestine activities, resulting in confirmation of demand is placed heavily on the Revenue and is required to be discharged by production of sufficient evidences. Again, it is to be proved by the Revenue that the raw materials required for production of huge quantity of final product were obtained by the assessee in a manner which is not in its regular course of its business. It stands held by the Tribunal in the case of *Mohan Steels Ltd.* reported in [2004 \(177\) E.L.T. 668](#) (Tri.), that duty demand cannot be confirmed unless it is shown that the manufacturer had procured all the raw materials required to manufacture the goods

05. In view of the discussions made herein above, we find that Department has failed to prove the allegations against the appellant. The confirmation of duty demand along with interest and penalty against the appellant is, therefore, held to have been confirmed without any cogent basis. Order under challenge is, accordingly, hereby set aside. As a consequent thereto, the appeals are allowed.

06. As regard the other Appeals filed by the co-appellants, we find that these appeals have challenged the imposing of personal penalty under Rule 26 of the Central Excise Rules 2002. Since the demand of duty is itself not sustainable, question of penalties on other appellants does not arise.

Accordingly, the appeals filed by the co-appellants against the common impugned orders are also allowed.

(Pronounced in the open court on 07.10.2022)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

Mehul