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

REGIONAL BENCH- COURT NO.3

Excise Appeal No.11242 of 2018

(Arising out of OIA-CCESA-SRT-APPEALS-PS-42-2017-18 dated 29/09/2017 passed by Commissioner (Appeals) Commissioner of Central Excise, Customs and Service Tax-SURAT-I)

Metal Gems **........Appellant**
Plot No. 113 To 120 Panchal Udyog Nagar, Bhimpore,
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

APPEARANCE:
Ms. Dimple Gohil, 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/ 11195 /2022

DATE OF HEARING: 30.08.2022
DATE OF DECISION: 07.10.2022

RAMESH NAIR

The present appeal is filed by the appellant against the Order-in-Appeal No. CCESA-SRT (APPEALS) PS-42/2017-18 dated 29.09.2017 passed by the Commissioner (Appeals), GST & Central Excise, Surat.

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. During the course of search at the premises of said M/s Moongipa Roadways Pvt. Ltd., it was noticed that there was stock of copper tubes packed in cartoons/Boxes bearing name "Matrix Copper Tubes" and the boxes were having code words as "ASD". On being asked Shri Sharvan Choudhary of M/s. Moongipa Roadways Pvt. Ltd., Vapi stated that the " Matrix Copper tubes packed in 91 cartons were received from the M/s Mehta Tubes Pvt. Ltd., Kaparada without cover of any documents, Shri Rajendra Singh Deva, Authorized persons of M/s Mehta Tubes Pvt. Ltd. also confirmed that the said goods were cleared by M/s Mehta Tubes Pvt. Ltd. without issuing any invoices and therefore the said goods i.e. Copper tubes totally weighing 2672.04 Kgs valued at Rs. 14,69,622/ -were placed under seizure. Shri Rikhabchand V Mehta, Director of M/s Mehta Tubes Pvt. Ltd. in his statement dated 12.02.2013 stated that the said material belonged to M/s Metal Gems, daman cleared on 03.01.2013 without preparing Central Excise invoices and were routed through M/s Mehta Tubes Pvt. Ltd. Accordingly, the Show cause notice dated 19.06.2013 was issued which was culminated in the adjudication order No. DIV-I/AC/ADJ/0018/15-16 dated 17.12.2015 whereby the demand of Central Excise Duty amounting to Rs. 1,81,645/- along with interest and penalty was confirmed andalso ordered for confiscation of the excisable goods i.e. " Matrix Copper Tubes" totally weighing 2672.04 Kgs. in terms of the Rule 25 of Central Excise Rules, 2002 read with Rule 28(1) of Central Excise Rule, 2002 with an option to redeem the same on payment of fine of Rs. 2,00,000/-. He also imposed the penalty under Rule 26 of Central Excise Rules, 2002 on the Co-Noticees. Being aggrieved, Appellant filed appeal before the Commissioner (Appeals), who has dismissed the same vide impugned Order-In-Appeal No. CCESA-SRT(APPEALS)PS-42/2017-18 dated 29.09.2017. Hence, appellant filed this appeal before the Tribunal.

02. Ms. Dimple Gohil, Learned Counsel appearing on behalf of the appellants submits that in the interest of justice and fair play, it is necessary that all the relevant evidence collected in the course of investigation is transparently disclosed and brought on record that and provided to an assessee, to enable the assessee to effectively defend and represent his case before the original adjudicating authority, so that the matter can be decided after consideration of all relevant evidence. In the fact of the present case, despite repeated request, relied upon and non-relied upon documents were not provided to the Appellant and request of Appellant for cross-examination of witness also not considered by the lower adjudicating authority. Clearly impugned order is incomplete breach of the principles of natural justice.

2.1 She also submits that Shri Shravan Choudhary of M/s Moongipa Roadways in his statement dated 04.01.2013 has stated that the cartons of Matrix Copper tubes were received from M/s Mehta Tubes Pvt. Ltd., further, none of the other statements also corroborate the allegation raised by the department. Moreover the department chose to rely upon the statement of Mr. Rikhab chand Mehta and interpret the same to support their own concocted version. The department never made an effort to find out the correct facts of the matter and went on to retain the half-baked information that helped to level the allegations. This alone goes on to prove that grave injustice has been meted out to the Appellant and the impugned order which aids and approves such injustice ought to be quashed on this ground alone.

03. Shri Vinod Lukose, Superintendent (AR) appeared on behalf of the revenue reiterates the finding of the impugned order.

04. We have heard both sides and examined the case records. After considering the submissions of both the sides and perusal of the material on record, we find that both the authorities have completely failed to follow the principles of natural justice in passing the orders. It is on record that Appellant requesting the both the adjudicating authority to provide the copy of relied upon and non- relied upon documents, the same was not considered and impugned order was passed confiscating the goods,

confirming duty demand and imposition of penalty. The entire procedure followed by the both the authority appears to be in gross violation of the principle of natural justice.

4.1 We also find that in the present matter Shri Shravan Choudhary, employee of M/s Moongipa Roadways Pvt. Ltd. stated that "Matrix Copper Tubes packed in Cartoons/Boxes were received from M/s Mehta Tubes Pvt Ltd. Shri Ramniwas Sharam, Manager of M/s Moongipa Roadways Pvt. Ltd. in his statement dated 04.01.2013 also confirmed that the consignment of copper tube/ pipes were received from M/s Mehta Tubes. Shri Rajender Singh Devda, Authorised person of M/s Mehta Tubes Pvt. Ltd. also confirmed that the said goods were cleared by M/s Mehta Tubes Pvt. Ltd. However, Shri Rikabechand V Mehta, Director of M/s Mehta Tubes Pvt. Ltd. in his statement dated 12.02.2013 stated that the said material belonged to M/s Metal Gems. Despite the said facts on record, the learned Adjudicating authority has rejected the requested of appellant for cross-examination of witnesses. The lower adjudicating authority does not explain convincingly why the cross-examination sought by the appellants was denied. The lower Adjudicating Authority had failed to follow the requirement of Section 9D of the Act regarding examination in chief of witness. As per the provisions of section 9D it is clear that during 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. It is a settled principle of law that if the authority wants to rely upon the statement of any witness, the opportunity of cross-examination ought to have been given to enable the party to prove its case. Non-providing of the opportunity of cross-examination amounts to violation of the natural justice and in absence of denial of natural justice, such documents/statements cannot be relied upon. In the case of *Basudev Garg* v. *Commissioner of Customs*[2013 (294) E.L.T. 353 (Del.)], the Division Bench of the Delhi High Court has held that the statement against the assessee cannot be used without giving them opportunity of cross-examination. Cross-examination is valuable right of the accused/noticee in quasi-judicial proceeding which can have adverse consequences for them.

4.2 Further we are in agreement with the argument made by the Ld. Advocate that procedure as prescribed in Section 9D has not been followed by the Ld. Adjudicating Authority, and therefore, the impugned order is not sustainable in view of ratio laid down in case of *M/s. G-Tech Industries* v. *Union of India.* [2016 (339) E.L.T. 209 (P&H)].

4.3 We are also of the view that the charges of clandestine removal of the goods cannot be upheld merely on assumptions and presumptions, but has to be proved with positive evidence such as purchase of excess raw materials, consumption of excess electricity, seizure of cash, transportation of clandestinely removed goods etc. It has also been held that onus of proof of bringing clinching evidence is on the Revenue. It has been held that the clandestine manufacturing and removal of excisable goods is to be proved by tangible, direct affirmative and incontrovertible evidence relating to receipts of raw materials inside the factory premises, and non-accountal thereof in the statutory records, utilization of such raw materials for clandestinely manufacture of finished goods, manufactured of finished goods with reference to installed capacity, consumption of electricity, amount received by the consignees, statement of the consignees, receipts of sale proceeds by the consignor and its disposal. All these material evidences are missing in the present case and the evidences brought into the record by the department are incomplete, inconsistent and not a reliable piece of evidence to prove charges of clandestine removal.

05. On this account also we do not find force in the department's finding. Accordingly, we do not uphold the seizure/confiscation and set aside the redemption fine imposed on the appellant. Accordingly the impugned order is set aside and appeal is allowed with consequential reliefs, if any.

(Pronounced in the open court on 07.10.2022)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

Mehul