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

REGIONAL BENCH- COURT NO.3

Excise Appeal No.11241 of 2018

(Arising out of OIA-CCESA-SRT-APPEALS-PS-43-2017-18 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/ 11196 /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-43/2017-18 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. On the basis of the investigation carried out at the transporter's 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. Search at M/s Rakesh Industries, Shop No. 66, Pandav Nagar, Commercial Market, Near Naraina Bus Depot, New Delhi -8 was carried out by the DGCEI officer, during the course of search, it was observed that there were lying Copper Coils totally weighing 750 Kgs valued at Rs. 4,05,000/- in the premises. On being asked about the bills of those Copper coils Shri Harash Kumar Rajput, Proprietor showed his inability to produce the bills of the same and therefore the same were detained under the detention order dated 29.03.2013. Shri Harash Kumar in his statement denied to be knowing any person of M/s Metal Gems and M/s Moongipa Roadways. The documents produced by M/s Rakesh Industries showing the receipts of the said goods from M/s Satyam Metals, Ajmeri Gate, Delhi and the inquiries conducted with M/s Satyam Metals, Delhi shows that the description of goods nowhere matches with goods seized at the premises of M/s Rakesh Industries. It was alleged that the person of M/s Rakesh Industries were admittedly in constant touch with the persons of M/s Moongipa Roadways Pvt. Ltd. The excisable goods seized at the premises of M/s Rakesh Industries, Delhi, have been cleared by M/s Metal Gems, Daman without payment of Central Excise duty due thereon through M/s Moongipa Roadways Pvt. Ltd. Accordingly, the Show cause notice dated 25.09.2013 was issued which was culminated in the adjudication order No. DIV-I/AC/ADJ/0019/15-16 dated 30.11.2015 whereby the demand of Central Excise Duty amounting to Rs. 50,058/- along with interest and penalty was confirmed and also ordered for confiscation of the excisable goods i.e. " Copper Coils" totally weighing 750 Kgs. in terms of the Rule 25 of Central Excise Rules, 2002 read with Rule 28(1) of Central Excise Rules, 2002 with an option to redeem the same on payment of fine of Rs. 1,00,000/-. He also imposed the penalty under Rule 26 of Central Excise Rules, 2002 on the Co-Noticees. Being aggrieved, Appellants filed appeals before the Commissioner (Appeals), who has dismissed the same vide impugned Order-In-Appeal No. CCESA-SRT(APPEALS)PS-43/2017-18 dated 29.09.2017. Hence, appellants filed these appeals before the Tribunal.

02. Ms. Dimple Gohil, Learned Counsel appearing on behalf of the appellant 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 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 principle of natural justice.

2.1 She also submits that as per the statements recorded on 29.03.2013 of Mr. Harash Kumar, Proprietor of M/s Rakesh Industries, he has unambiguously denied knowing anyone from the Appellant Company and he further stated in his statement dated 26.08.2013 that the goods were purchased from M/s Satyam Metals and Laxmi Trading Co. ,Delhi. In the absence of any corroboration, the department had come to the conclusion that goods detained belonged to the Appellant company simply because Mr. Sangram Singh Chauhan has in his statement said that the goods were cleared from the Appellant company. The department has blatantly overlooked the statements in favour of the Appellant.

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

04. We have heard both sides and perused 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 have been requesting 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 authorities appears to be in gross violation of the principle of natural justice.

4.1 We also find that in the present matter only on the basis of statements of persons no demand is sustainable without corroborating the same. 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 also hold 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, manufacture 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 hold 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