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

REGIONAL BENCH- COURT NO. 3

Excise Appeal No. 10329 of 2016- DB

(Arising out of Order No. AND-EXCUS-000-COM-001-004-15-16 dated 18.11.2015 passed by Principal Commissioner - Anand)

Anupam Industries Limited ....**Appellant**
Unit-III, Plot No. 199-200 and 201a,
GIDC, VithalUdyog Nagar,
Anand, Gujarat

VERSUS

C.C.E. &C. –Anand ......**Respondent**
Office of the Commr. Central Excise,
Customs & Service Tax, Central Excise Build.
NrJunaDadar, Behind Old Bus Depot,
Anand, Gujarat-388001

WITH

Excise Appeal No. 10330 of 2016- DB

(Arising out of Order No. AND-EXCUS-000-COM-001-004-15-16 dated 18.11.2015 passed by Principal Commissioner - Anand)

Anupam Industries Limited ....**Appellant**
Unit-III, Plot No. 199-200 and 201a,
GIDC, VithalUdyog Nagar,
Anand, Gujarat

VERSUS

C.C.E. & C. – Anand ......**Respondent**
Office of the Commr. Central Excise,
Customs & Service Tax, Central Excise Build.
NrJunaDadar, Behind Old Bus Depot,
Anand, Gujarat-388001

APPEARANCE:
Shri Saurabh Dixit, 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. 12919-12920 /2024

DATE OF HEARING: 27.11.2024
DATE OF DECISION: 02.12.2024

RAMESH NAIR

The brief facts of the case are that the appellants are in appeal against the impugned common Order-in-Original No. AND-EXCUS-000/COM-001-004-15-16 dated 18.11.2015 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.

1.2 Against the said common impugned order, the order in the matter of two show cause notices No. DGCEI/AZU/36-112/14-15 dated 23.07.2015 and DGCEI/AZU/36-113/14-15 dated 23.07.2015, the present appeals are filed. As regard other matter related to other two show cause notices, this Tribunal in appeal No. 10331of 2016 and 10332 of 2016 with other co-noticees, allowed the appeals vide Final order No. 11370-11377/2024 dated 18.06.2024.

2. Shri Saurabh Dixit, learned counsel appearing on behalf of the appellant submits that all the four show cause notices which were decided by the common impugned order are on the identical issue and the same set of facts. Mistakenly, the present two appeals were left out to be taken up with other appealNos. 10331 of 2016 and 10332 of 2016

wherein this Tribunal has passed the order dated 18.06.2024. He request that the present two appeals may also be disposed of on the same line of this Tribunal's order dated 18.06.2024.

3. Shri R.K. Agarwal, learned (Superintendent) Authorised Representative appearing for the revenue reiterates the findings of the impugned order.

4. We have carefully considered the submissions made by both the sides and perused the records.

5. We find that the impugned order was passed on the same issue in the matter of four show cause notices. In the matter of two show cause notices bearing Nos. DGCEI/AZU/36-105/2014-15 dated 15.07.2015 and DGCEI/AZU/36-106/2014-15 dated 15.07.2015, this Tribunal in appeal No. E/10331/2016-DB and E/10332/2016-DB vide Final Order No. 11370-11377/2024 dated 18.06.2024 allowed the appeals by setting aside the impugned order. Since the present appeals are out of the same impugned order involving same issue and identical facts, the issue in the present case is no longer res-integra. The relevant order of this Tribunal dated 18.06.2024 is reproduced below:

> *"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.*
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> *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 Hasmukhbhaipatel 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 crossexamination 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 TulsyanNec 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."*
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> *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.*
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> *5. We, therefore, set aside the impugned order and allow all the appeals with consequential relief, as per law."*

In view of above order dated 18.06.2024, it can be seen that issues in the present appeal as well as in the appeals disposed of by the above order are identical in all respect, therefore, following the ratio of the above decision, in the present case also, the demand is not sustainable. Hence, the same is set aside and appeals are allowed.

(Order pronounced in the open court on 02.12.2024)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

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