

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
REGIONAL BENCH : ALLAHABAD**

E/70089/2018-EX[SM], E/70090/2018-EX[SM]

(Arising out of Order-in-Appeal No.296 & 297-CE/APPL/LKO/2017 dated 30.10.2017 passed by Commissioner(Appeals), GST, Customs & Central Excise, Lucknow.)

M/s. R.S.Packaging Pvt.Ltd.
Shri Rakesh Jhindal, Director

...APPELLANT(S)

VERSUS

Commissioner of Central Excise & Service Tax, Agra

RESPONDENT (S)

APPEARANCE

Shri Nishant Mishra (Advocate) for the Appellant (s)
Shri Pradeep Kumar Dubey (Supdt.) (A.R.) for the Revenue

CORAM:

SHRI ANIL G. SHAKKARWAR, HON'BLE MEMBER(TECHNICAL)

DATE OF HEARING/DATE OF DECISION : 24.12.2018

FINAL ORDER NO.72910-72911/2018

Per ANIL G. SHAKKARWAR :

The above-stated two appeals are taken together for decision since both of them are arising out of common impugned Order-in-Appeal dated 30.10.2017.

2. Brief facts of the case are that the appellant were engaged in the manufacture of corrugated boxes and laminated rolls. Revenue officers conducted investigations in the manufacturing unit of appellant. On 09.03.2010 statement of Shri Rakesh Jhindal, Director of the appellant was recorded and some note-books in which some information was

recorded were seized. Shri Rakesh Jhindal in his said statement has stated that there might be some entries in the said note-books against which no invoices were issued. The contents of the said note-books were tallied with the invoices issued and it appeared to Revenue that appellant manufactured and cleared clandestinely goods involving duty of Rs.11,91,473/-. Therefore a show cause notice was issued alleging that the appellant clandestinely removed the goods and evaded Central Excise duty to the said extent. The other appellant was also proposed to be imposed with penalty under Rule 26 of Central Excise Rules, 2002. The original authority confirmed the demand and imposed penalty on the other appellant. Aggrieved by the said order both the appellants preferred appeal before Commissioner(Appeals). Learned Commissioner(Appeals) upheld the said Order-in-Original bearing date 29.04.2016 by holding as follows:-

"Regarding further corroborated evidences like purchase of raw materials, consumption of electricity etc., it must be kept in mind that case of clandestine removal need not be proved to mathematical precision".

Further he has relied for said observation on ruling by Hon'ble Supreme Court in the case of CC v. D.Bhoormull reported in 1983 (13) ELT 1546 (SC). He has further observed "Shri Rakesh Jhindal in his statement has accepted the fact of clandestine removal which could not have taken place without his collusion." On the basis of said observations he has upheld the said Order-in-Original dated

29.04.2016. Aggrieved by the said order appellants are before this Tribunal.

3. Heard the learned Counsel for appellants. He has submitted that Hon'ble Delhi High Court in the case of Commissioner of Central Excise, Delhi-I v. Vishnu & Co.Pvt.Ltd. reported at 2016 (332) E.L.T. 793 (Del.) in para 36 has held that ruling in the case of D.Bhoormull (supra) was with respect to smuggled goods where onus was on the person in whose possession the contraband was found to establish that the goods were not of smuggled nature and that such provision is not available in Central Excise Act and that in Central Excise Act burden is on Revenue to prove clandestine removal. He has further submitted that in para 17.8 of Final Order No.71788-71790/2018 passed by this Tribunal in the case of Rimjhim Ispat Ltd. and Others v. Commissioner of Central Excise & Service Tax, Kanpur reported at 2018 SCC OnLine CESTAT 812 this Tribunal has held that statements cannot be adopted for arriving at a finding of clandestine removal in the absence of any other evidences to indicate clandestine removal. He therefore prayed to allow the appeal.

4. Learned A.R. for the Revenue has supported the impugned Order-in-Appeal.

5. Having considered the rival contentions and on perusal of record I find from the impugned Order-in-Appeal that Commissioner(Appeals) has admitted that there is no other corroborative evidence to establish clandestine removal except for the statement of Shri Rakesh Jhindal,

who was Managing Director of the Manufacturing unit. In view of ruling by Hon'ble Delhi High Court Revenue cannot take recourse to ruling of Hon'ble Supreme Court in the case of D.Bhoormull (supra) whenever they do not find any evidence to establish clandestine removal. I also follow the precedent decision of this Tribunal in the case of Rimjhim Ispat Ltd. and Others (supra) wherein we have held that only on the basis of statement clandestine removal cannot be established. I therefore set aside the impugned order and allow the appeal. The appellants shall be entitled for consequential relief as per law.

(Dictated and pronounced in the open Court.)

SD/
(ANIL G. SHAKKARWAR)
MEMBER(TECHNICAL)

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