CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH - COURT No. I

Excise Appeal Nos.71118, 71175-71178, 71192 & 71203 of 2018–EX[DB]

[In Excise Appeal No. 71178 of 2018]

(Arising out of Order-in-Original No.02/Commissioner/GZB/2018-19 dated 25/05/2018 passed by Commissioner of Central Goods & Service Tax, Ghaziabad)

M/s Sandeep Manufacturing Strips, ...Appellant

(C-23, Sector-A-5/6, Tronica City, Ghaziabad)

VERSUS

Commissioner of Central Excise, ...Respondent

(Ghaziabad)

WITH

(i) Excise Appeal No.71118 of 2018 (M/s Subodh Gupta Vs Commissioner of Central Excise, Ghaziabad)

(ii) Excise Appeal No.71176 of 2018 (Shri Mukesh Chauhan Vs Commissioner of Central Goods & Service Tax, Ghaziabad)

(Arising out of Order-in-Original No.02/Commissioner/CX/GZB/2018-19 dated 25/05/2018 passed by Commissioner of Central Goods & Service Tax, Ghaziabad)

(iii) Excise Appeal No.71175 of 2018 (M/s Mayank Metals Vs Commissioner of Central Excise, Ghaziabad)

(iv) Excise Appeal No.71177 of 2018 (Shri Sandeep Gupta Vs Commissioner of Central Goods & Service Tax, Ghaziabad)

(v) Excise Appeal No.71192 of 2018 (M/s Vasudev Udyog Vs Commissioner of CGST, Ghaziabad)

(vi) Excise Appeal No.71203 of 2018 (M/s Shivam Metals Vs Commissioner of Central GST, Ghaziabad)

(Arising out of Order-in-Original No.03/Commissioner/GZB/2018-19 dated 25/05/2018 passed by Commissioner of Central Goods & Service Tax, Ghzaibad)

APPEARANCE:

Shri Rupesh Kumar, Advocate Shri Jitin Singhal, Advocate & Shri Pravesh Gahuguna, Advocate **(in Appeal Nos.71177 & 71178 of 2018)**,

Shri Rajesh Chhibber, Advocate
(in Excise Appeal Nos.71192 & 71203 of 2018)

Shri Tarun Chawla, Advocate **(in Excise Appeal Nos.71176 of 2018)**

Shri R.P. Singh, Advocate **(in Excise Appeal Nos.71175 of 2018)**

Absent on call, **(in Excise Appeal Nos.71118 of 2018)** for the Appellants

Shri Rajeev Ranjan, Addition Commissioner,
Shri Sandeep Kumar Singh, Deputy Commissioner,
Shri Shiv Pratap Singh, Deputy Commissioner
Authorised Representatives for the Respondents

CORAM: **HON'BLE SMT. ARCHANA WADHWA, MEMBER (JUDICIAL)**
HON'BLE MR. ANIL G. SHAKKARWAR, MEMBER (TECHNICAL)

FINAL ORDER NOS71483-71489 / 2019

DATE OF HEARING : 04 July, 2019
DATE OF PRONOUNCEMENT : 30 July, 2019

PER: ANIL G. SHAKKARWAR

Above stated seven appeals are taken together for decision since they are arising out of common investigation.

2. Brief facts of the case are that M/s Sandeep Manufacturing Strips (hereinafter referred as SMS), located at Ghaziabad were engaged in the manufacture of Copper Wires and Copper Strips. Shri Sandeep Gupta was Proprietor of the said manufacture unit. Shri Subhodh Gupta was employee of SMS. M/s Mayank Metal, M/s Shivam Metals and M/s Vasudev Udyog were units manufacturing Copper Ingots and all of them were located in Mandoli Industrial Area, Delhi. Copper Ingots was raw material for manufacture of Copper Wires and Strips. On 27.07.2010 officers of DGCEI conducted searches at following premises:-

i) Factory premises of SMS.

ii) Residential Premises of Shri Sandeep Gupta, Proprietor.

iii) Residential Premises of Shri Shubodh Gupta.

iv) Shop Premises of M/s Sandeep Metal Supply at Chawri Bazar, Delhi.

v) Factory premises of M/s Mayank Metals.

vi) Factory premises of M/s Shivam Metal.

vii) Factory premises of M/s Vasudev Udyog.

At the factory premises of SMS, officers found two parallel invoices and few hand written 'Kacha Slips'. At the residential premises of Shri Sandeep Gupta Officers did not find any incriminating material. At the residential premises of Shri Shubodh Gupta Officers found 31 Small Spiral Pads which were maintained for the period from 02.09.2008 to 26.07.2010, 09 small files containing loose papers and copies of 195 parallel invoices. At the factory premises of M/s Mayank Metal Officers found one small diary maintained for the period from 17.07.2010 to 27.07.2010. Officers seized Tata 407 vehicle allegedly under the control of M/s Mayank Metals and the same were loaded with Copper Ingots. At the factory premises of M/s Shivam Metal, officers found one small note book. Officers also seized one Tata 407 Truck under the control of M/s Shivam Metal and the said truck was loaded with 45 pieces of copper Ingots. At factory premises of M/s Vasudev Udyog Officers did not find any incriminating material. Officers resumed purchased invoices issued by 12 traders at the shop premises of M/s Sandeep Mettal Supply Chawri Bazar, New Delhi. Further, officers found excess stock of finished goods at the said premises of M/s Sandeep Metal Supply, Chawri Bazar. On the basis of said searches offices recorded various statements. During his statement Shri Shubodh

Gupta employee of SMS stated that he used to look after production and dispatch on behalf of SMS. On behalf of M/s Mayank Metal their Proprietor Shri Pawan Kumar Agarwal stated that they supplied copper ingots on cash basis to SMS, without invoices. On behalf of M/s Shivam Metal, Proprietor Shri Sanjeev Agarwal stated that they had supplied Copper Ingots without invoices on cash basis to SMS. On behalf of M/s Vasudev Udyog Shri Jai Bhagwan Authorized Signatory stated that they supplied Copper Ingots without invoices on cash basis to SMS. Shri Anil Kumar, Driver stated that they used to transport Copper Ingots without bills and invoices from various manufacturers to SMS. Shri Muhammad Ishrar, employee of SMS stated that he used to pilot vehicles while carrying Copper Ingots from various manufacturers to SMS at the said premises of M/s Sandeep Metal Supply. Invoices issued by 12 traders were resumed. Some of the traders stated that they had issued invoices and the same were bogus whereas some other stated that they have opened the firm at the behest of Shri Sandeep Gupta. On the basis of aforesaid investigations, it appeared to revenue that SMS was involved in clandestine manufacturing and clearance of Copper Wires and Strips and for the said purpose they were procuring non duty paid Copper Ingots from M/s Mayank Metals, M/s Shivam Metal and M/s Vasudev Udyog and that to make up for the source of material they were using fake invoices issued by various traders. Therefore, all the appellants were issued with a show cause notice dated 18.04.2012, through the said show cause notice Central Excise duty demand of Rs.6,71,05,300/-

was raised against SMS with proposals for recovery of interest & imposition of penalties. Further, all the other appellants were proposed for imposition of penalties. It was alleged in the said show cause notice that SMS had indulged into clandestine manufacture and removal of Copper Strips and Wires, out of clandestinely procured copper ingots raw material by adopting following modus-aprandi. Shri Sandeep Gupta, Proprietor of SMS connived with Shri Subodh Gupta and arranged for some Copper Ingots manufactures such as M/s Mayank Metals, M/s Shivam Metals and M/s Vasudev Udyog to supply Copper Ingots to SMS on cash basis without invoices and without payment of Central Excise duty. The ingots manufacturers were located in Delhi. Therefore, to transport Ingots from Delhi to Ghaziabad a trading firm in the name of Shri Balaji Udyog, Ghaziabad was created in which Shri Subodh Gupta was Proprietor and Shri Sandeep Gupta was Authorised Signatory. Bills of Shri Balaji Udyog were used to transport the goods from Delhi to Ghaziabad. Shri Balaji Udyog purchased Bills for raw materials from various firms. The finished goods such as Copper Wires and Sprits were clandestinely manufactured and clandestinely removed to shop of M/s Sandeep Metal Supply at Chawari Bazar on the strength of parallel invoices of SMS. When goods were received safely at M/s Sandeep Metal Supply at Chawari Bazar then parallel invoices were destroyed. M/s Sandeep Metal Supply Chawari Bazar used to purchase fake bills from around 12 traders located in Delhi. Making said allegations of said modus-aprendi, Central

Excise duty on the basis of aforesaid was demanded for the period from 20.09.2008 to 13.07.2010.

3. Appellants filed interim reply dated 20.11.2013 to the above stated show cause notice and prayed for cross examination of various persons. The cross examination of representative of M/s Mayank Metals, M/s Shivam Metals and M/s Vasudev Udyog was permitted. During the cross examination all of them stated that they had never transacted with SMS and they did not know Shri Sandeep Gupta (accepted Shri Jai Bhagwan representative of M/s Vasudev Udyog) and that they were coerced to implicate Shri Sandeep Gupta with the threat of arrest. Without allowing any further cross examination, Order-in-Original dated 30.05.2014 was passed, confirming the demand and imposing penalties. The said order was challenged before this Tribunal and the said appeals were decided through Final Order Nos.70198-70204/2017 dated 30th January, 2017. In para no.6 of the said Final Order this Tribunal has made following observations and issued directions:-

> *"In this view of the matter, we are satisfied that there has been violation of the principles of Natural Justice and the provisions of Section 9D of Central Excise Act, 1944. Accordingly, we allow these appeals by way of remand and set aside the impugned order. We, further, direct the learned Commissioner to convey the reasons to the appellant for refusal of cross-examination of the persons, if any, whose cross examination he have denied and/or he intends to deny for the reasons to be recorded, complete*

the process of cross-examination, thereafter grant opportunity for personal hearing in accordance with law".

Accordingly, the appeal filed before this Tribunal challenging earlier Order-in-Original dated 30.05.2014 was allowed by way of remand.

4. According to the above stated directions, Original Authority has allowed cross examination and allowed cross examination of seven traders and Shri Muhammad Ishrar employee of SMS. In respect of Shri Subodh Gupta, Shri Anil Kumar, Driver, Shri Shyam Singh, Shri Ajay Kumar Dev and Shri Suresh Chandra Sharma, Commissioner observed that said persons could not be contacted inspite of repeated efforts and therefore could not be produced for cross examination and proceedings for cross examination were concluded on 01.06.2017 and appellants were directed to file final reply. On 24.05.2018 learned Original Adjudicating Authority had passed the impugned order, confirming the demand and imposing penalties on all the appellants. Aggrieved by the said order all the above stated appellants are in appeal before this Tribunal.

5. Another show cause notice dated 18.04.2012 was issued to M/s Mayank Metals, M/s Shivam Metal, M/s Vasudev Udyog and Shri Sandeep Gupta. Through the said show cause notice Central Excise duty of around Rs.2.32 crores was demanded from M/s Mayank Metals, that of around Rs.2.9 crores was demanded from M/s Vasudev Metal and that of around Rs.41 lakhs was demanded from M/s Vasudev Udyog. Further, there was proposal for imposition of personal penalty on Shri Sandeep

Gupta. It was stated in the said show cause notice that 31 Small Spiral pads and 9 small files found at the residential premises of Shri Sandeep Gupta were further decoded which revealed that the said small files contained information that SMS received around 7.1 lakhs Kg of Copper Ingots from M/s Mayank Metal during the period from 17.08.2009 to 23.07.2010. Further, as per the said show cause notice decoding of the said information revealed that SMS received around 11.5 lakhs Kg of Copper Ingots from M/s Shivam Metal during the period from 20.09.2008 to 13.07.2010 and also received 1.41 lakhs Kg of Copper Ingots from M/s Vasudev Udyog during the period from 19.06.2009 to 26.07.2010. On the basis of said information Central Excise duty demand was raised against M/s Mayank Metals, M/s Shivam Metal and M/s Vasudev Udyog. The said show cause notice was adjudicated through another Order-in-Original bearing No.03/Commissioner/GZB/2018-19 dated 25/05/2018 through which the demands raised were confirmed and penalties were imposed and a personal penalty was imposed on Shri Sandeep Gupta. The said Order-in-Original is also impugned in the present appeals.

6. Heard Shri Rupesh Kumar learned Advocate along with Shri Jatin Singhal and Shri Pravesh Bahuguna learned Advocates on behalf of M/s Sandeep Manufacturing Strips (SMS). They made following submissions:-

i) The entire demand is based on 31 Small Spiral Pads recovered from the residential premises of Shri Subodh Gupta who was the employee of SMS. Further, in addition to the said 31 Small Spiral pads the allegations of revenue were also on the basis of statements of Shri Subodh Gupta recorded before the Central Excise Officers. The appellants requested for cross examination of Shri Subodh Gupta which was allowed initially. However, latter on, learned Original Authority denied the cross examination of Shri Subodh Gupta on the ground that despite repeated efforts of the Department Shri Subodh Gupta could not be produced for cross examination.

ii) SMS registered criminal complaint against Shri Subodh Gupta making allegations of fraud against SMS and the trial in the said case is presently going on.

iii) Learned Commissioner in para no.40 stated that Shri Subodh Gupta appeared for personal hearing before him on 01.02.2018.

iv) Inspite of Shri Subodh Gupta appearing before learned Original Adjudicating Authority the said authority did not allow cross examination of Shri Subodh Gupta. It was held by Hon'ble Allahabad High Court in the case of Commissioner of Central Excise, Meerut-I Vs M/s Parmarth Iron Pvt. Ltd. reported as 2010 (260) ELT 514 (All.) that revenue cannot rely upon statement, if the person could not be produced for cross examination. It was held by Hon'ble Allahabad High Court that if revenue seeks to rely upon various statements the same to have made available for cross examination to establish whether such statements were Voluntarily given and/or are relevant for the issue and that the findings cannot be arrived at against the assessee on the basis of uncontested material. The Hon’ble Court has further observed that if revenue chooses not to examine any witnesses in adjudication then their statements are not considerable as evidence.

v) By relying on the said ruling by Hon’ble Allahabad High Court if all the statements of Shri Subodh Gupta are removed from the proceedings then there are no grounds to confirm the demand against the appellant.

vi) Uncorroborated private reports and records from the premises of the third party, is the whole basis of demand and the same cannot be relied upon in the present case.

vii) During the cross examination of representative of M/s Mayank Metals, M/s Shivam Metals and M/s Vasudev Udyog, SMS had established that SMS had never received raw materials clandestinely from the said three parties. In the remand proceedings the said three parties were not produced for cross examination. Therefore, their earlier cross examination record is sufficient to establish that the allegations of clandestine receipt of Copper Ingots from M/s Mayank Metals, M/s Shivam Metals and M/s Vasudev Udyog are not sustainable.

viii) There were no investigations as to whether the alleged clandestinely removed Copper Ingots were at all manufactured by M/s Mayank Metals, M/s Shivam Metals and M/s Vasudev Udyog and/or the said three Ingots manufacturers received raw materials at all and how the goods got manufactured clandestinely and removed clandestinely.

ix) In para no.45.4 of the impugned Order-in-Original No.02 learned Original Adjudicating Authority has given his finding that the charge of abatement in clandestine manufacture and removal by SMS in the present show cause notice does not substantiate with the offences specified under Rule 26 (1) of the Rules.

x) Regarding excess quantity of raw material and finished goods allegedly found in the factory premises of the appellant, proceedings were initiated and finally this Tribunal has held in separate proceedings that the said goods were not liable for confiscation. The department had accepted that order and refunded the amount paid by the appellant in the said proceedings.

xi) Allegations of clandestine removal cannot be decided merely on the basis of uncorroborated entries in the records of third party as held in the case of M/s Kashmir Vanaspati Pvt. Ltd. Vs Commissioner of Central Excise reported at 1989 (39) ELT 655 (Tri.) & in the case of M/s Kuber Tobacco Products Ltd. Vs Commissioner of Central Excise, Delhi reported at 2013 (290) ELT 137 (Tri.-Del.)

xii) Duty demand along with interest and penalty is not sustainable on the appellant since there is no evidence of clandestine manufacture and clearances. It is because documents were resumed from third party and the persons from whose possession the documents were recovered is not allowed to be cross-examined. Therefore, in the absence of evidence of statements of said person the documents recovered from him are not admissible evidence. Further, the said documents were also not corroborated.

xiii) Revenue did not bring any evidence to support transportation of such excess quantity of finished goods. The raw materials and finished goods as alleged would have required transportation of raw material and finished goods between Delhi and Ghaziabad for which transport vehicle needs to cross border check post. No evidence from Authorities regarding such interception of any vehicle coming to or coming from the appellant's factory.

xiv) It is settled law that the charge of clandestine removal of excisable goods is to be established by revenue and onus is on revenue to establish the same. Hon'ble Allahabad High Court in the case of Continental Cement Vs Union of India reported at 2014 (309) ELT 411 (All.) has held that the allegation of clandestine removal is a serious charge which is required to be proved by revenue by production of sufficient documentary evidences. The Hon'ble High Court has observed that following factors need to be investigated by the Department to establish the charge of clandestine removal:-

- To find out excess production details,
- To find out whether the excess raw materials have been purchased,

- To find out dispatch and transport of the same,
- To find out realization of sale proceeds and
- To find out excess power consumption.

In the present case no such investigations has been carried out and there is no evidence regarding excess procurement of raw material or excess manufacture or excess transportation of the manufactured goods and realization of sale proceeds etc. even though the allegation is that the appellant had sold Copper Strips and wires to the worth of around Rs.71 crores. No unaccounted cash was recovered during the course of search from any of the premises. Since the clandestine manufacture is not establish impugned order is not sustainable.

6. Learned Advocates Shri Rupesh Kumar and Shri Jatin Singhal along with Shri Pravesh Bahuguna on behalf of Shri Sandeep Gupta have submitted that their submissions in respect of SMS will hold good against Shri Sandeep Gupta because Shri Sandeep Gupta is proprietor of SMS and that the proprietor and the business organization are not two separate persons.

7. Nobody appeared on behalf of Shri Subodh Gupta. In the grounds of appeal filed by Shri Subodh Gupta, it is interalia stated as follows:-

"The statements recorded by the Department are all recorded under pressure and were all dictated by the Department. Noticee (Shri Subodh Gupta) denies all the submissions so recorded by the Department. The statements recorded by the Department are not at all voluntary statements and were recorded under threat. Under these facts and circumstances the said statement cannot be relied upon. The noticee (Shri Subodh Gupta) was not at all knowing any of the code language used as stated in the statement. The Department forcefully made the noticee (Shri Subodh Gupta) to write such statement giving code language so used in the statement."

Further, it is prayed that Shri Subodh Gupta was only the employee of SMS, therefore, he cannot be imposed with any penalty.

7. Heard Shri R.P. Singh learned Advocate on behalf of M/s Mayank Metals. He has submitted that on the basis of above stated investigations a demand of Central Excise duty of Rs.2,32,94,419/- was raised against the appellant. Out of the said demand a demand of Rs.2,10,59,744/- was on the basis of private records recovered from the residential premises of Shri Subodh Gupta. Further, a demand of around Rs.22 lakhs was on the basis of private records recovered from the factory premises of the appellant. The said demands were confirmed with interest and penalties. The said order was challenged before this Tribunal. This Tribunal through the Final Order Nos.70198-70204/2017 dated 30 January, 2017 remanded the matter to Original Adjudicating Authority with directions which are already stated in the foregoing paragraphs. Accordingly, appellants requested to call prosecution witnesses for cross examination

through 7 letters sent to the adjudicating authority during the period from 27.04.2017 to 01.04.2018. The learned Counsel submitted that the adjudicating authority did not make available Shri Subodh Gupta for cross examination inspite of directions of Tribunal in the aforesaid final order dated 30.01.2017. Further, he has submitted that since the cross examination was not allowed, the said witnesses cannot be taken into consideration for decision against the appellant as held by the Hon'ble Allahabad High Court in aforesaid case of Commissioner of Central Excise, Meerut-I Vs Parmarth Iron Pvt. Ltd. He has further submitted that for making allegations of duty evasion revenue did not produced any evidence of procurement of raw material, installation capacity, availability of labours and consumption of electricity. Further, the demand of Central Excise duty of around Rs.2.1 crores was confirmed on the basis of statement of third party where the prosecution witnesses were not made available for cross examination. Therefore, as held by this Tribunal in the case of M/s Rama Spinners Pvt. Ltd. Vs Commissioner of Central Excise, Hyderabad reported at 2017 (348) ELT 321 (Tri.-Hyd.), the evidence is not sufficient for confirmation of demand. Further, in respect of demand of around 22 lakhs he has submitted that the panchnama drawn in the factory premises on 27.07.2010 is not reliable as revealed during the cross examination of Shri Balaram Shrivastava. Therefore, relying on the decision of this Tribunal in the case of M/s Kuber Tobacco Works Vs Commissioner of Central Excise, Delhi reported as 2013 (290) ELT 545 (Tribunal-Del.) the said confirmation of demand is not sustainable. He has further submitted that the statement of proprietor of the appellant was taken under duress and the same was retracted on the very next day. During the cross examination on 23.04.2014 the proprietor of the appellant stated that he does not know Shri Sandeep Gupta and SMS. He has further submitted that he has made transaction through cheques only and Department has recorded statement under threat and coersion. He further submitted that on the basis of said submissions the demand is liable to be set aside including all penalties against the appellant and its proprietor.

8. Heard Shri Rajesh Chhibber learned Advocate on behalf of M/s Shivam Metal. He has submitted that the demand of Central Excise duty of around Rs.2.9 crores along with interest and penalty was confirmed against the appellant on the basis of third party document received from the residence of Shri Subodh Gupta. The matter was remanded by this Tribunal through aforesaid Final Order dated 30 January, 2017 with directions to the adjudicating authority to provide opportunity of cross examination. However, Shri Subodh Gupta was not produced for cross examination and without allowing the cross examination of Shri Subodh Gupta demand was confirmed by learned Original Authority and he confirmed the demand in violation of directions of this Tribunal. Further, no evidence was relied upon in the form of procurement of raw materials and excess manpower used, excess electricity used and use of transport etc. for alleged clandestine removal. Further, the allegation of clandestine

removal was from a place in Delhi to another place in Ghaziabad and the said transaction requires interstate crossing where record of truck movement is maintained at State Entry Point. Revenue did not bring any such record to establish that any such clandestinely cleared Copper Ingots were transferred to SMS. Therefore, relying on the ruling by Hon'ble Allahabad High Court ruling in the case of M/s Parmarth Iron Pvt. Ltd. the demand is not sustainable.

9. Heard Shri Rajesh Chhibber on behalf of M/s Vasudev Udyog Ltd. He has submitted that on the basis of third party evidence demand of Central Excise duty of around Rs.41 lakhs was confirmed along with interest and penalty against the appellant. Shri Sanjeev Gupta Proprietor of M/s Shivam Metal had stated before the Central Excise officers that they had supplied Copper Ingots on cash basis without invoices to SMS. However, cross examination of Shri Sanjeev Gupta was allowed during the earlier round of proceedings of adjudication and during cross examination he had stated that he had never transacted with SMS and did not even know Shri Sandeep Gupta. Further, in respect of M/s Vasudev Udyog Statement of Shri Jai Bhagwan Authorised Signatory was recorded by Central Excise Officers wherein it was stated that M/s Vasudev Udyog had supplied Copper Ingots on cash basis without invoices to SMS whereas during cross examination Shri Jai Bhagwan stated that M/s Vasudev Udyog had never transacted with SMS and they were coerced to implicate Shri Sandeep Gupta with the threat of arrest. He has further submitted that both of them were not

once again cross examined during denovo proceedings. However, their earlier statements are not sustainable in view of their depositions during the course of cross examination, as stated above. Therefore, they were not eligible to imposition of penalty.

10. Heard Shri Tarun Chawla learned Advocate on behalf of Shri Mukesh Chauhan. He has submitted that the appellant was working as employee of SMS and he was maintaining Central Excise records. Appellant was categorically doing account related works and has no role in the clearance of the goods much less clandestine clearance of goods. He has further submitted that in the absence of any specific allegations with corroborative evidence about appellant knowing any clandestine activity or involving himself in any clandestine activity penalty cannot be imposed on him. Further, since there was no clandestine activity going on, the question of imposition of penalty on the appellant does not arise.

11. Heard Shri Rajeev Ranjan learned Addition Commissioner, Shri Sandeep Kumar Singh, Learned Deputy Commissioner & Shri Shiv Pratap Singh, learned Deputy Commissioner on behalf of revenue. They have reiterated the findings of Original Adjudicating Authority in both the impugned Orders-in-Original.

12. Having considered the submissions from both the sides and on perusal of records, we note that the case of revenue is that Shri Sandeep Gupta was employee of SMS. At the residential premises of Shri Sandeep Gupta officers found 31 small spiral pads and 9 small files containing loose papers.

Officers recorded statement of Shri Subodh Gupta who decoded the entries made in the said spiral pads and files containing loose papers and decoded information revealed that SMS was receiving raw materials i.e. Copper Ingots from M/s Mayank Metals, M/s Shivam Metals and M/s Vasudev Udyog without payment of Central Excise duty and without raising of invoice on cash basis. The said fact was also accepted by the representative of M/s Mayank Metals, M/s Shivam Metals and M/s Vasudev Udyog through the statements recorded before the Central Excise Officers. On the basis of decoded information revenue was able to know that M/s Mayank Metal supplied around 7.1 lakhs Kg of Copper Ingots to SMS without payment of Central Excise duty. Further, it was revealed through decoding that M/s Shivam Metal supplied around 11.5 lakhs Kg of Copper Ingots and M/s Vasudev Udyog supplied around 1.41 lakh Kg of Copper Ingots to SMS in similar manner. On the basis of said decoding demand of Central Excise duties were raised against M/s Mayank Metals, M/s Shivam Metals and M/s Vasudev Udyog The said raw material received by SMS was used in the manufacture of Copper Wires and Copper Strips by SMS and the manufactured final products were cleared by SMS without payment of Central Excise duty and therefore, demand of Central Excise duty of around Rs.6.71 crores was raised against SMS. On the contrary, the contention of SMS is that in the earlier round of adjudication representative of M/s Mayank Metals, M/s Shivam Metals and M/s Vasudev Udyog during the cross examination before Original Adjudicating Authority had deposed that they never transacted with SMS and they were coerced to implicate Shri Sandeep Gupta with the threat of arrest. Further, the Order-in-Original dated 30.05.2014 was set aside and matter was remanded through the Final Order dated 30 January, 2017 by this Tribunal with a direction to allow cross examination of all the persons requested by the appellant and to convey the reason to the appellant for refusal of cross examination of the persons if the same is denied. The case of SMS is that though Shri Subodh Gupta appeared before the Original Adjudicating Authority on 01.02.2018 but the Original Adjudicating Authority did not give opportunity of cross examining Shri Subodh Gupta by the other appellants and accordingly, the directions of this Tribunal for allowing cross examination was violated and that all the evidence that were collected by revenue through Shri Subodh Gupta has become inadmissible in view of the ruling by Hon'ble Allahabad High Court in the case of Commissioner of Central Excise, Meerut-I Vs M/s Parmarth Iron Pvt. Ltd. (supra). Further, revenue does not have any information required to establish clandestine manufacture and removal as required as per the ruling by Hon'ble Allahabad High Court in the case of M/s Continental Cement Vs Union of India (supra). In his grounds of appeal before this Tribunal Shri Subodh Guptra has denied all the submissions recorded by the Department and submitted that submissions in the said statements were not voluntary and he did not know any code language and he was forcefully made by the Department to write such statement giving code language so used in the statement. The case of M/s Mayank Metals, M/s

Shivam Metals and M/s Vasudev Udyog is that they never received any raw material for manufacture of such huge quantity of Copper Ingots and their statement recorded before the Central Excise Officers were denied by them during cross examination they never transacted with SMS. For the appreciation of above stated contentions, we consider that reproduction of para no.40 from the impugned Order-in-Original No.02 is essential:-

"40. The opportunity of Personal Hearing was given to the notice Shri Subodh Gupta on 19.05.2017, 24.05.2017, 01.06.2017, 26.09.2017, 30.11.2017, 01.02.2018 and 12.02.2018. Shri Subodh Gupta (appeared on 01.02.2018) and Shri Jatin Mahjan, Advocate appeared for personal hearing on the behalf of the above notice and reiterated their written submissions dated 01.02.2018 and 12.02.2018.

40.1. In the reply dated 01.02.2018 of Shri Subodh Gupta submitted that the counsel/authorized person who pursued the matter is out of station in connection with some personal urgent matter and at the time of hearing today at 15.30 hrs dated 01.02.2018, I am personally present and submits as under -

1.) In the aforesaid matter. I have been falsely implicated. I am not connected with M/s SMS (Proprietor Sandeep Gupta) and others against when allegations of evasion of excise duty has been made. That I pray for giving me an opportunity for written and/or submission on next earliest possible date. That Sandeep Gupta, Prop. M/s SMS had already made the submission and other notices have also already made their submissions in the aforesaid context in competent courts and before competent Authorities and it transpires from their submission that I am not connected with the aforesaid matter.

2.) That I pray for allowing me to give me an opportunity when I shall be present with my counsel and written/oral submissions.

40.2 In the reply dated 12.02.2018, it was submitted by Advocate Jatin Mahajan on behalf of Sh. Subodh Gupta that the notice was an employee having duties assigned by his superiors in M/s

SMS. On the basis of some information received by the DGCEI investigation regarding evasion of Central Excise Duty at SMS manufacturing strips owned by Sh. Sandeep Gupta was initiated. The procurement of raw material and modus operandi adopted by SMS caught the attention of investigating officers. As a follow up action, search was conducted by the department at various places related to SMS however the notice was not present when the search was conducted at the factory of SMS. Statement of the noticee was recorded wherein the noticee stated that he was not concerned with the preparation of sale invoices, purchase invoices, accounts and excise related records. The notice denied any involvement in excise duty evasion activity of SMS. Further he also stated that he had no knowledge of illegalities going on at the end of M/s SMS. The notice was issued SCN proposing penalty under rule 26(1) of the Central Excise Rules 2002.

(i) The notice denies all the above allegations made in the present show cause notice.

(ii) It is submitted that even otherwise also the noticee has very good and strong case on merits. The noticee would like to make following submissions on merits of the case.

(iii) It is submitted that the notice was not at all involved in the evasion if at all done by M/s SMS and he was not having any knowledge about the same. Therefore the allegations in the SCN is not at all sustainable and it needs to be dropped.

(iv) It is submitted that the statement so recorded by the department are all recorded under pressure and were all dictated by the department. It is submitted that the noticee deny from all the submissions made in the statements so recorded by the department. It is submitted that the statement recorder by the department are not at all voluntary statement but recorder under threat. It is submitted that in these facts and circumstances that the statement cannot be relied upon as the statement is not a voluntary statement at all. Hence the impugned SCN is liable to be dropped.

(v) It is submitted that whatever stated in the statement by the noticee are all dictated terms by the department and the noticee is not at all aware of any of any code language used as stated in the statements. It is submitted that the department forcefully made the noticee to write such statement giving the code language so used in the statement. It is submitted that the noticee was at no fault as he was not aware of any of the wrong activities if at all going on. Hence the penalty on noticee not imposable.

(vi) It is submitted that it is an admitted fact in the SCN that the noticee was not the proprietor of the SBU and he was only an employee used by the main noticee, therefore admittedly there is no involvement on the part of the noticee in any evasion of duty. Hence it is submitted that the noticee under any circumstance is liable for imposition of any penalty."

13. We further note that the appellants have relied on the ruling by Hon'ble Allahabad High Court in the case of Commissioner of Central Excise, Meerut-I Vs Parmarth Iron Pvt. Ltd. (supra) and in the case of M/s Continental Cement Vs Union of India (supra). We, therefore, reproduced para-16 from the ruling by Hon'ble Allahabad High Court in the case of Commissioner of Central Excise, Meerut-I Vs Parmarth Iron Pvt. Ltd.:-

> *"16. We, therefore, have no hesitation in holding, that there is no requirement in the Act or Rules, nor do the principles of natural justice and fair play require that the witnesses whose statements were recorded and relied upon to issue the show cause notice, are liable to be examined at that stage. If the Revenue choose not to examine any witnesses in adjudication, their statements cannot be considered as evidence. However, if the Revenue choose to rely on the statements, then in that event, the persons whose statements are relied upon have to be made available for cross-examination for the evidence or statement to be considered."*

14. Further, we reproduce para no.12 & 13 from the ruling by Hon'ble Allahabad High Court in the case of Continental Cement Vs Union of India:-

> *"12. Further, unless there is clinching evidence of the nature of purchase of raw materials, use of electricity, sale of final products, clandestine removals, the mode and flow back of funds, demands cannot be confirmed solely on the basis of presumptions and assumptions. Clandestine removal is a serious charge against the manufacturer, which is required to be discharged by the Revenue by production of sufficient and tangible evidence. On careful examination, it is found that with regard to alleged removals, the department has not investigated the following aspects :*
>
> *(i) To find out the excess production details.*
> *(ii) To find out whether the excess raw materials have been purchased.*
> *(iii) To find out the dispatch particulars from the regular transporters.*
> *(iv) To find out the realization of sale proceeds.*
> *(v) To find out finished product receipt details from regular dealers/buyers.*
> *(vi) To find out the excess power consumptions.*
> *13. Thus, to prove the allegation of clandestine sale, further corroborative evidence is also required. For this purpose no investigation was conducted by the Department."*

15. We note that the representatives of M/s Mayank Metals, M/s Shivam Metals and M/s Vasudev Udyog have denied the statements recorded before Central Excise Officers during their cross examination. They have categorically stated that they did not have any transactions with SMS. We further note that revenue has not collected any evidence of procurement of raw materials by M/s Mayank Metals, M/s Shivam Metals and M/s Vasudev Udyog nor they have collected any evidence in respect of excess production, dispatch of the goods, transport of goods, realization of sales proceed etc. and therefore, as held by Hon'ble Allahabad High Court in the case of Continental Cement Vs Union of India clandestine manufacture & removal of Copper Ingots by M/s Mayank Metals, M/s Shivam Metals and M/s Vasudev Udyog is not establish. Further, Shri Subodh Gupta though had appeared before the Original Adjudicating Authority

on 01.02.2018 was not offered for cross examination by the Original Adjudicating Authority. The main case of revenue is based on decoding of the information from 31 small spiral pads and nine files containing loose papers recovered from the residential premises of Shri Subodh Gupta. Applying the ruling of Hon'ble Allahabad High Court in the case of Commissioner of Central Excise, Meerut-I Vs Parmarth Iron Pvt. Ltd. the evidence recovered from Shri Subodh Gupta is not admissible in the present case. For that reason also the clandestine manufacture and clearance by M/s Mayank Metals, M/s Shivam Metals and M/s Vasudev Udyog is not establish. We, therefore, set aside the impugned Order-in-Original No.03 and allow all the appeals filed by M/s Mayank Metals, M/s Shivam Metals, M/s Vasudev Udyog and Shri Subodh Gupta.

16. The case of revenue is that SMS received raw material clandestinely cleared by M/s Mayank Metals, M/s Shivam Metals and M/s Vasudev Udyog and manufactured Copper Wires and Copper Strips and cleared the same without payment of duty. Since it is establish that M/s Mayank Metals, M/s Shivam Metals and M/s Vasudev Udyog did not clear Copper Ingots in clandestine manner to SMS, therefore, receipt of raw materials by SMS is not established. Further, revenue has not brought on record any other source of receipt of non duty paid raw material by SMS. Therefore, by applying the ruling by Hon'ble Allahabad High Court in the case of Continental Cement Vs Union of India (supra) clandestine manufacture by SMS is not established. Further, the only evidence against SMS was said 31 small spiral

pads and 9 files containing loose papers recovered from the residential premises of Shri Subodh Gupta. Shri Subodh Gupta appeared before the Original Adjudicating Authority on 01.02.2018 and was not offered for cross examination. As per ruling by Hon'ble Allahabad High Court in the case of Commissioner of Central Excise, Meerut-I Vs Parmarth Iron Pvt. Ltd. (supra) the said 31 small spiral pads and 9 files containing loose papers are not admissible as evidence for the reason that cross examination of Shri Subodh Gupta was not carried out. We, therefore, hold that the impugned order bearing no.02 is not sustainable. We, therefore, allow the appeals filed by M/s Sandeep Manufacturing Strips, Shri Subodh Gupta and Shri Mukesh Chauhan.

17. In above manner all the seven appeals are allowed and both the impugned orders are set aside.

(Pronounced in open court on-30 July, 2019)

(Archana Wadhwa)
Member (Judicial)

(Anil G. Shakkarwar)
Member (Technical)

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