# CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
# SOUTH ZONAL BENCH
# BANGALORE

Appeal(s) Involved:

**E/271/2008-DB**

*[Arising out of Order-in-Original No. 16/2007 dated 23/10/2007 passed by the Commissioner of Central Excise, Bangalore.]*

**M/s. SURAJ MACHINE TOOLS**
PLOT NO-98/ OFICERS MODEL HOUSING
COLONY T. DASARAHALLI,
BANGALORE – 560 057.

Appellant(s)

**Versus**

**The Commissioner of Central Excise**
**BANGALORE-III**
PB.NO.5400, QUEENS ROAD,
CENTRAL REVENUES BUILDING,
BANGALORE - 560001
KARNATAKA

Respondent(s)

**Appearance:**

**Mr. Raghavendra, Advocate**
G.SAMPATH & S. RAGHU
543,12TH CROSS,8TH MAIN
J.P NAGARA 2ND PAHASE,
BANGALORE – 560 078.
KARNATAKA

For the Appellant

**Mr. Madhup Sharan,**
**Asst. Commissioner (AR)**

For the Respondent

Date of Hearing: 15/05/2019
Date of Decision: 07/06/2019

**CORAM:**

**HON'BLE SHRI S.S GARG, JUDICIAL MEMBER**
**HON'BLE SHRI P. ANJANI KUMAR, TECHNICAL MEMBER**

## Final Order No. 20456 /2019

**Per : P. ANJANI KUMAR**

The Appellants, are a Proprietorship concern; Sri K.R. Suraj was nominal Proprietor; entire affairs of the said firm were taken care of by his father late Shri. K.G. Ravindran; they are engaged in the manufacture of Borewell Button Bits; principle raw material was steel and carbide tips, supplied by Sri. A. G. Surendra of M/s. Canara Steels, Bangalore and Sri A. Satish of M/s Vignesh Enterprises, Bangalore. Officers of DGCEI Officers of Bangalore Regional Unit conducted simultaneous searches on various places on 17.11.2000 and seized certain documents, including, a Pocket Note book maintained by Sri Basheer Ahmed and Exercise Notebook alleged to have been written by Sri Shivaraj, four files from the residence of Sri Basheer Ahmed; and invoices issued by SMT for the years 1999 to 2001 from the residence of Sri Basheer Ahmed. Officers have also recorded the statements of some personnel of company, dealers, job workers and a transporter. On completion of Investigation, a SCN dated 29.10.2001, proposing to demand Central Excise duty of Rs.77,30,293/- along with interest, on the alleged manufacture and clandestine clearances of borewell button bits and parts of Hammers, during the period from 1996-97 to 2000-2001 while proposing penalty on Sri K.G. Ravindran, and Sri A.G. Surendra, S. Satish and Basheer Ahmed. Ld. Commissioner of Central Excise, Mangalore vide Order-in-Original No.18/2006 dated 22.12.2006 confirmed the demands and imposed personal penalties.

**2.** On appeals filed by the concerned, Tribunal, vide Final Order Nos.1213 - 1216/2006 dated 20.07.2006, allowed the appeal by way of remand, keeping all issues open while observing that even *though the pocket dairy contained details of alleged supplies made to dealers investigating officers have not contacted the dealers and recorded their statements; there is also no proof of purchase of raw material required for the alleged clandestine manufacture and clearance; we do not find any justification to hold that for a part of the period Surendra and Satish should be held as manufacturers; legally the proprietor is Sri K.R. Suraj and the duty liability for the entire period should be on him.* Ld. Commissioner, after conducting cross-examination and following principles of natural justice, passed Order-in-Original No.16/2007 dated 26.09.2007 / 23.10.2007 confirming the duty, after allowing cum duty benefit, imposing penalty on the Appellant as well as on late Sri. K.G. Ravindran and dropping penalty on Sri A.K. Suraj

**3.** Learned Counsel for the appellants submits that confirmation of demand in respect of Annexure- D1 (pocket note book seized from the residences of Basheer Ahmed and Shivaraj) is beyond the scope of the remand order passed by the Tribunal in the first round of litigation; no investigation was carried out in so far as Annexure- D1 is concerned and hence, the findings arrived at by the Ld. Commissioner placing reliance on the statements of dealers and transporters related to Annexure-D2 and D3 cannot be sustained at all; in the absence of challenge to the findings of the Tribunal, the same cannot be questioned in the *de novo* proceedings as it attained finality; demand in respect of Annexure- D4 cannot be sustained in respect of goods which were not removed from the factory as on the date of visit by the officers as the Department has not produced any documents to prove that there was clearances of goods.

**3.1** Learned Counsel for the appellants also submits that allegation of clandestine removal cannot be sustained in the absence of corroborative evidences in the form of consumption of electricity, purchase of raw materials, manpower for manufacture, machinery for manufacture, sales of final products, transportation, receipt of sales proceeds, financial capacity of the assessee to undertake huge quantity of manufacture etc; in any case, the unit of the Appellant started only from 06.11.1996 and commenced its production only thereafter and hence, the demand for the period starting from 25.05.1996 to 06.11.1996 cannot be sustained; demand for the period after 10.05.1999 cannot be sustained as the unit of the Appellant was leased out to Sri. A.G. Surendra and Sri. A. Satish which is further supported by the statements of Bhasheer Ahmed, K.G. Ravindran and K.R. Suraj; Appellant admitted to duty liability in respect of Annexure- D2 and D3 subject to considering the claim of SSI exemption and thereby duty liability comes to Rs.23,751; Appellant is entitled for SSI exemption in respect of all the clearances and hence, it is only during the year 1999-00 and 2000-01, the value of clearances were exceeded the SSI exemption limit and thereby, duty liability can be sustained only on the value of Rs.7,91,700/- which should be considered as cum-duty price; demand of the period prior to October 1996 is beyond the period of five years and hence, barred by law.

**3.2** Learned Counsel for the appellants further submits that Hon'ble Tribunal had already given a finding regarding non availability of any corroborative evidence in the form of transport documents, purchase of raw materials, invoices, raw material consumption, etc., to prove the clearances as per annexure D1; the Commissioner knowing fully well that there are no documentary evidences, has chosen to once again rely on these statements, which is clearly beyond the scope of remand order without the authority of law; Ld. Commissioner has totally erred and has over stepped while adjudicating the case in the *de novo* proceedings; in para 13 of the impugned order wherein the Ld. Commissioner has held that the statement of the proprietor of Shiva Transport Company prove regarding transport of goods etc., are all with reference to the demand raised in respect of annexure D2 and D3 and not with reference to D; the buyer A. Mani has admitted having made an annual transaction of Rs. 10 lakhs only and the transporter, Shiva Transport company has also stated that only 3-4 consignments were being transported per week. Apart from this oral statement there are no other documents / evidences except notings made in the private dairy; the statements of Shiva Transport Company and A Mani accompanied with documentary details as brought out under annexures D2 and D3 has not been countered by the appellant except for the benefit of SSI exemption; the appellants accept the duty liability of Rs.23,751, after extending the benefit of SSI exemption, for the years 99-2000.

**3.3** Learned Counsel for the appellants further submits that he relies ratio of the following decisions wherein it is clearly held that the allegation based on private documents without corroborative evidences are not sustainable.

***(i). Filton Tobaco – 2005 (183) ELT 378 Bng***
***(ii). Khamar Ali & Sons – 2006 (200) ELT 104 Kol***
***(iii). CCE Vs Rahul Beedi – 2007 (208) ELT 452***
***(iv). Bhor Rubber Factory – 2006 (74) RLT 212 Mum***
***(v). Prince Gutka Pvt. Ltd., - 2005 (69) RLT 231 Delhi***
***(vi). Rajasthan Foils – 2005 (69) RLT 131 Delhi***
***(vii). Tigiya Steels pvt. Ltd., - 2005 (69) RLT 362***
***(viii). Essvee Polymers Vs CCE – 2004 (165) ELT 291***

***(ix). CCE Vs Velavan Spinning Mills – 2004 (167) ELT***
***(x). Decon India Vs CCE – 2004 (62) RLT 1004***
***(xi). T.G.L. Poshak Corporation Vs CCE Hyderabad 2002 (140) ELT 187***
***(xii). Monarch (I) Pvt. Ltd. Versus CCE, Kolkata-V - 2006 (197) E.L.T. 396 (Tri. - Kolkata)***

**3.4** The Appellant also submits that it is well established position that in the absence of corroborative evidences in the form of consumption of electricity, purchase of raw material, electricity consumption, receipt of sale proceeds and other documentary evidences the allegation of clandestine removal does not sustain in view of the following:

***(i). Suntrek Aluminum P. Ltd. vs. CCCE & ST., Rajkot - 2013 (288) ELT 500 (Guj.)***
***(ii). Continental Cement Co. vs. UOI - 2014 (309) ELT 411 (All.)***
***(iii). CC CE & ST., Ghaziabad vs. Auto Gollan Industries P Ltd. - 2018 (360) ELT 29 (All.)***
***(iv). Surya Alloy Industries Ltd. vs. UOI - 2014 (305) ELT 340 (Cal.)***

**3.5.** Learned Counsel for the appellants also submits that in any case, the unit of the Appellant was started only from 06.11.1996, as evident from the lease agreement dated 06.11.1997, demand for the period starting from 25.05.1996 to 06.11.1996 cannot be sustained at all; demand for the period prior to October 1996 is barred by law as the Department can recover duty only for the period of five years; as the appellant has not involved in any clandestine removal, demand invoking larger time limit is clearly barred by limitation; imposition of penalty is incorrect as no duty can be fastened; moreover, imposition of penalty both under Section 11AC as well as under Rule 173Q is also bad in law; Sri. K.G. Ravindran died on 07.07.2017 and therefore, penalty imposed has to abate.

**3.6.** Learned Authorised Representative for the department reiterated the findings of OIO and OIA and submitted that the D-1 is based on the pocket note books, maintained by Shri P.M. Basheer the then Manager of the Appellant unit and contained the details of goods manufactured, sold and mount due etc; Shri Basheer Ahmed in the statement dated 17.09.2000 had clearly stated that the pocket note books were maintained by him to tack of production, sales and assured commission; in his statement dated 17.11.2000 of Shri K. G. Ravindran, had fully accepted the the statement given by Shri Basheer Ahmed; in the statement dated 17.11.2000, Shri. Suraj, proprietor and son of Shri K. G. Ravindran had clearly confirmed the statement of Shri K. G. Ravindran confirmed the details given by Shri. Basheer Ahmed; various Job Workers had confirmed that they had done job work for the Appellant for which Shri K G Ravindran or Shri Basheer Ahmed used to contact them; Various dealers who received the goods from the Appellant unit confirmed that had received the goods without any invoice and all procurements were received only under chits; Shri A Mani of Kunnathore, confirmed his statement dated 16.04.2001(Para 2 to 11).

**4.1.** In reply to the averment that the Commissioner has proceeded beyond the scope of remand, Learned AR stated that CESTAT, vide its Final Order No. 1213 - 1216/2006 dated 20.07.06, has remanded the case to the Commissioner for *de novo* adjudication in view of the fact that there is no corroborative evidence in respect of the clearances mentioned in the pocket diary; case of clandestine removal of the goods has already been discussed in detail in para 13 of the *De novo* 010 No. 16/2007 dated 23.10.07; it could be seen that statements of Shri A. Mani, Sri P.M. Basheer Ahmed, Shri Ravindran, Sri A**.**G. Surendra & Sri Satish, transporters, suppliers of raw-materials as well as from some of the dealers, had accepted clandestine supply without bill on the strength of chits destroyed later.

**4.2.** On the issue of limitation and penalties imposed, learned AR submitted that the appellant were aware of the fact that the goods are excisable and they have cleared the excisable goods without raising any invoices and without accounting in the statutory records but accounted in their private records with an intent to evade payment of duty; therefore, proviso to Section 11A of the Central Excise Act, 1944 is applicable; CESTAT, Bangalore vide Final Order No. 1035 & 1036/2004 dated 02.06.04, has upheld the penalty, of Rs.1,00,000 and Rs.50, 000 respectively on S/Shri A**.**G. Surendra and S. Satish; as the appellant has suppressed and willfully misstated the facts with intent to evade payment of duty, penalty under Section 11AC is imposable On them; as they have contravened the provisions of Central Excise Rules, 1944 imposition of penalty under Rule 173Q is correct; as the proprietor and the firm are one and the same, proposal to impose penalty on Sri. K Suraj tinder Rule 209A of the erstwhile Central Excise Rules, was dropped. With reference to Sri K. G. Ravindran, he submitted that as mentioned in para 19 of the 010, Sri K. G. Ravindran was managing the day to day affairs of the units; was fully aware of the fact of excisability of drill/button bits; manufactured and cleared without records and without payment of duty and hence penalty was rightly imposed on him.

**4.3.** Learned AR relied upon the following cases:

***(i)*** ***Gulabchand Silk Mills Pvt. Ltd. v. Commissioner of C.Ex, Hyderabad-II – 2005 (184) ELT 263 (Tri. Bang.)***

***(ii)*** ***Collector of Customs, Madras and others v. D. Bhoormull – 1983 (13) ELT 1546 (SC).***

***(iii)*** ***Columbia Electronics Ltd. v. Commissioner of Central Excise, Indore-2002 (143) ELT 635 (Tri. Del.).***

***(iv)*** ***Commissioner of Central Excise, Trichy v. Anjaneya Steel Rolling Mills – 2005 (185) ELT 1589 (Tri. Chennai)***

***(v)*** ***Motorol Technologies Ltd. v. Commissioner of Central Excise, Vadodara – 2009 (245) ELT 278 (Tri. Ahmd.)***

***(vi)*** ***Beauty Dyers v. Commissioner of Central Excise, Chennai – 2001(136) ELT 339 (Tri. Chennai)***

***(vii)*** ***Gopal Industries Ltd. v. Commissioner of Central Excise, Indore – 2007 (7) STR 502 (Tri. LB).***

***(viii)*** ***Commissioner of Central Excise, Mumbai v. Kalvert Foods India Pvt Ltd. – 2011 (270) ELT 643 (SC).***

**5.** Having heard rival submissions and having gone through the records of the case, we find that the brief issues involved in the case are to decide whether learned Commissioner has exceeded the brief in relation to the CESTAT's order while continuing proceedings in remand; whether the appellants are liable to pay the duty on the alleged clandestine removal and whether the penalty imposed against a person who is no more abates.

**5.1** Coming to the first question, we find that CESTAT vide Final Order No.1213-1216/2006 dated 28.7.2006 has observed in para 5 that *"We have gone through the records of the case carefully. The total demand of duty in OIO dated 28.5.2002 comes to Rs.77,30,293/-. The above demand is based on Annexures D1 to D4 of the show-cause notice. It is the contention of the appellant that the amount shown in Annexure-D1 is as per the pocket notebook maintained by Shri P. M. Basheer Ahmed and Shri Shivraj. There are absolutely no corroborative evidences in the form of transport of documents, purchase of raw materials, invoices, raw material consumption etc. to prove the clearances as per Annexure-D1. The appellants contend that the demands raised under Annexures-D2 and D3 are acceptable. In that case, the duty liability would be restricted to only Rs.7,43,000/-. Even though the pocket dairy contained details of alleged supplies made to dealers, the investigating officers have not contacted dealers and recorded their statements. There is also no proof for the purchase of raw materials required for the alleged clandestine manufacture and clearance. There is also an allegation by the appellants that Shri Basheer Ahmed was under the clutches of Shri Surendra and Shri Satish who were the raw material suppliers. It has also been stated that for the period from 10.9.1999 to 2000-2001, Shri Surendra and Satish only were allowed to run the factory as Shri Ravindra owed money to them. We do not find any justification to hold that for a part of the period, Surendra and Satish should be held as manufacturers. Legally, the proprietor is Shri K. R. Suraj and duty liability for the entire period should be on him. However, in view of the observation that there is no corroborative evidences in respect of pocket dairy, we deem it proper to remand the entire case to the adjudicating authority (Commissioner) for de novo decision. The appellant shall make all their submissions before the adjudicating authority. Needless to say that while calculating duty liability, the benefit of cum-duty value has to be given. All issues are kept open……."*

**5.2** From the above, we find that this Bench has given a categorical finding, not once but twice, in the above cited order that the entries at the pocket dairies are not corroborated by any evidences. Therefore, we find that there is substance in the submissions of the appellants, as far as the impugned order travelling beyond the remand order is concerned. The Learned AR for the department has reiterated the findings of the OIO and submitted that learned Commissioner has dealt with the evidences in detail in para 13 of OIO dated 26.9.2007. We find that learned Commissioner has given similar findings as in the earlier order based on the statements recorded only. The key issues, raised by the Tribunal, like corroborative evidences in the form of transport documents, purchase of raw materials, invoices, raw material consumption etc. to prove the clearances, were not discussed. Therefore, even accepting the contention of the learned AR that all issues were kept open, we find that as observed by the Tribunal in the above cited order, no corroborative evidences to prove the clandestine removal alleged in Annexure-D1 to the show cause notice are coming forth. We find that Tribunal in the case of *Nova Petrochemicals* v. *CCE, Ahmedabad-II*, this Tribunal in its Final Order Nos. A/11207-11219/2013, dated 26-9-2013 has held in (Para 40) as under:

> *"After having very carefully considered the law laid down by this Tribunal in the matter of clandestine manufacture and clearance, and the submissions made before us, it is clear that the law is well settled that, in cases of clandestine manufacture and clearances, certain fundamental criteria have to be established by Revenues which mainly are the following :*
>
> *(i) There should be tangible evidence of clandestine manufacture and clearance and not merely inferences or unwarranted assumptions;*
> *(ii) Evidence in support thereof should be of :*
> *(a) raw materials, in excess of that contained as per the statutory records;*
> *(b) Instances of actual removal of unaccounted finished goods (not inferential or assumed) from the factory without payment of duty.*
> *(c) Discovery of such finished goods outside the factory*
> *(d) Instances of sales of such goods to identified parties.*
> *(e) receipt of sale proceeds, whether by cheque o by cash, of such goods by the manufacturers or persons authorized by him;*
> *(f) use of electricity for in excess of what is necessary for manufacture of goods otherwise manufactured and validity cleared on payment of duty*

*(g)* *statements of buyers with some details of illicit manufacture and clearance;*

*(h)* *proof of actual transportation of goods, cleared without payment of duty*

*(i)* *links between the document recovered during the search and activities being carried on in the factory of production; etc.*

As we find that none of the above evidences have been put up in the show-cause notice and discussed in the OIO, we hold that demand as per as Annexure -D1 should go away. Therefore, we set aside the duty demand as per Annexure D1 to the show-cause notice.

**5.3** Coming to the demand as per Annexures-D2 and D3 of the show cause notice are concerned, we find that the appellants have accepted the liability only with a request for extending cum-duty benefit. We find that the request can be accepted. For computation of duty, the matter needs to go back to the original authority.

**5.4** Coming to the duty demand as per Annexure-D4, the appellants contended that the goods were very much lying in the factory and as such, no duty can be demanded as it is not the case of the department that the goods have been removed without payment of duty.

**5.5** Coming to the penalty imposed on the main appellant i.e., M/s. Suraj Machine Tools, we find that since the duty is confined only to Annexures-D2 and D3, we hold that penalty will be equivalent to the duty payable by the appellants in terms of the annexures after extending cum-duty benefit.

**6.** In view of the above, the impugned order is set aside and the appeal is allowed by way of remand in the following terms:

(i). Demand related to Annexure-D1 of the show cause notice is set aside.

(ii). The issue related to duty demand as in Annexures-D2 and D3 is remanded back to the original authority with a direction to compute the duty liability after allowing cum-duty benefit.

(iii). M/s. Suraj Machine Tools shall pay penalty equivalent to the duty payable in (ii) as above.

(iv). Demand as in Annexure-4 is set aside.

(Order was pronounced in Open Court on **07/06/2019**.)

**S.S GARG**
**JUDICIAL MEMBER**

**P. ANJANI KUMAR**
**TECHNICAL MEMBER**

rv...