CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
CHANDIGARH
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REGIONAL BENCH – COURT NO. 1

Excise Appeal No. 908 Of 2008

[Arising out of Order-in-Original No.09-10/Commr/SU/08/CE dated 29.02.2008 passed by the Commissioner of Central Excise, Rohtak, Haryana]

M/s Tibrewala Industries (P) Limited **: Appellant (s)**
Shiv Vihar, Kharkhoda Road,
Kheri, Sampla, Haryana

Vs

The Commissioner of Central Excise
And Service Tax, Rohtak **: Respondent (s)**
2nd Floor, Pacific City Centre,
Opposite Shangrila Hotel,
Near Jat Bhawan, Delhi Bypass
Rohtak, Haryana-124001

With

Excise Appeal No. 909 Of 2008

[Arising out of Order-in-Original No.09-10/Commr/SU/08/CE dated 29.02.2008 passed by the Commissioner of Central Excise, Rohtak, Haryana]

Shri Anil Kumar Tibrewala, Director
M/s Tibrewala Industries (P) Limited **: Appellant (s)**
Shiv Vihar, Kharkhoda Road,
Kheri, Sampla, Haryana

Vs

The Commissioner of Central Excise
And Service Tax, Rohtak **: Respondent (s)**
2nd Floor, Pacific City Centre,
Opposite Shangrila Hotel,
Near Jat Bhawan, Delhi Bypass
Rohtak, Haryana-124001

APPEARANCE:
Shri R.K. Hasija and Shri Shivang Puri, Advocates for the Appellants
Shri Aneesh Dewan and Shri Shivam Syal, Authorised Representatives for the Respondent

AND

Excise Appeal No. 1159 Of 2008

[Arising out of Order-in-Original No.09-10/Commr/SU/08/CE dated 29.02.2008 passed by the Commissioner of Central Excise, Rohtak, Haryana]
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M/s R.K. Trading Company **: Appellant (s)**
3007, Bahadurgarh Road,
Saini Market, Delhi-110055

Vs

The Commissioner of Central Excise
And Service Tax, Rohtak **: Respondent (s)**
SCO No.6 to 8 & 10, Sector-1, Huda
Market, Rohtak, Haryana-124001

APPEARANCE:
Shri Naveen Bindal, Advocate for the Appellant
Shri Aneesh Dewan, Authorised Representative for the Respondent

CORAM :
HON'BLE Mr. S. S. GARG, MEMBER (JUDICIAL)
HON'BLE Mr. P. ANJANI KUMAR, MEMBER (TECHNICAL)

FINAL ORDER Nos.60195-60197/2023

Date of Hearing: 05.07.2023

Date of Decision: 19.07.2023

Per : **P. ANJANI KUMAR**

These appeals are filed against OIO No.09-10/Commr./SU/08/CE dated 29.02.2008 (impugned order), passed by the Commissioner of Central Excise, Rohtak, in remand proceedings consequent to the Final Order No.391-393/07-EX dated 04.07.2007 of CESTAT.

2. Brief facts of the case are that M/s Tibrewala Industries Pvt. Ltd. (Appellant No. 1, Appeal No. E/908/2008-Ex-DB) are engaged in the manufacture of sheathing compound; they obtain their main raw material i.e. plastic granules from M/s Gas Authority of India Limited (GAIL). On an investigation conducting by the officer of DGCEI on the appellants and R.K Trading Company (appellant in Appeal No.

E/1159/2008), a stockist of M/s GAIL, it appeared to the Department that the appellants were diverting the plastic granules, purchased from M/s GAIL, through the stockist M/s R.K. Trading Company, and were availing CENVAT credit fraudulently. Search of the premises of the appellants, the stockist and other places; it also appeared that there were certain other violations committed by the appellant; statements of different persons were recorded and on the completion of investigation, show cause notice dated 05.04.2002 was issued to the appellants seeking to seize the unaccounted raw material/ process material found at the premises of appellant No.1 and SCN dated 30.04.2003 seeking to recover CENVAT credit of Rs.55,29,455/- alleged to have been fraudulently availed by the appellant No.1 along with interest and seeking to impose penalties on appellant No.1, Shri Anil Kumar Tibrewala, Director of appellant No.1 (Appeal No.E/909/2008-EX-DB) and the stockist R.K. Trading Co. (Appeal No. E/1159/2008), the said SCNs were adjudicated vide Order-in-Original No. 05-6/Commr./RP/2007 dated 16.01.2007.

3. On an appeal filed by the appellants, CESTAT, vide Final Order cited above set aside the impugned order and remanded the case back to the Adjudicating Authority with a direction to allow the appellants to file written replies and to accord a personal hearing. Accordingly, the impugned order as cited above has been passed. Learned Adjudicating Authority:

(i) Confiscated seized goods valued at Rs.55,46,830/- under Rule 25 (1) (b) of Central Excise Rules, 2001 read with Rule 13 of CENVAT Credit Rules, 2001; however, the goods were permitted to be redeemed on payment of redemption fine of Rs.5 Lakhs; imposed a penalty of Rs.10 Lakhs on appellant No.1

(ii) Ordered recovery of CENVAT credit of Rs.55,29,455/- under Section 11A of Central Excise Act, 1944 read with Rule 57AH (1) of Central Excise Rules, 1944 and Rule 12 of CENVAT Credit Rules, 2001/2002 along with interest, from appellant No.1.

(iii) Imposed an equal penalty on the appellant No.1 under Section 11AC of Central Excise Act, 1944 read with Rule 57AH (2), Rule 173Q of Central Excise Rules, 1944, Rule 13(2) of CENVAT Credit Rules, 2001/2002, Rule 25 of Central Excise Rules, 2001/2002.

(iv) Imposed a penalty of Rs.10 Lakhs on Shri Anil Kumar Tibrewala, Director of appellant No.1.

(v) Imposed a penalty of Rs. 10 Lakhs on R.K. Trading Company.

4. Accordingly, this set of three appeals, No. E/908/2008-EX (DB) by appellant No.1; appeal No. E/909/2008-EX (DB) by Shri Anil Kumar Tibrewala, Director and appeal No. E/1159/2008-EX (DB), have been filed.

5. Shri R.K.Hasija assisted by Shri Shivang Puri, learned Counsels, appearing for the appellant No.1 and its Director, submits that the entire case of the Department is based on statements of different persons and non-corelated documents and that the Department has initiated proceedings against R.K. Trading Company, on the same set of evidence, vide show cause notice dated 05.04.2002; the said show cause notice was dropped vide Order-in-Original dated 30.01.2004, holding that Department has not investigated the matter properly; the

said order has been accepted by the Department and no appeal has been preferred. He submits that, therefore, the present proceedings also are liable to be set aside.

6. Learned Counsel for the appellants submits, as far as the first show cause notice involving confiscation, that it is incorrect to state that 67.50 MT of finished goods were lying unaccounted; matter of the fact is that the material was accounted but the records were not available in the factory premises as they were taken to their head office for internal audit and Puja, the re-constructed RG-I reflects the said material. As regards the allegation of re-processed granules of 31.70 MT, he submits that those were semi-finished goods and not re-processed plastic; the officers took the samples vide Panchnama dated 10.10.2001 but have not produced any testing report till date; he submits that raw material and semi-finished products cannot be seized in the factory premises; sheathing compound cannot manufacture by re-processed plastic. Regarding the EVA Plastic of 3000Kgs, he submits that the same was purchased from *M/s Aksh Optifiber* and was issued to the shop floor as can be seen from the Entry No.60 dated 29.08.2001 in RG-23A Part-1. Regarding 8325Kgs of granules received from M/s GAIL and 1275Kgs of granules from IPCL found in the factory on 10.10.2001, he submits that 9000Kgs granules of M/s GAIL was lying in balance as on 15.09.2001 and 5675kgs procured from Balaji Polymers (IPCL Stockist) as on 16.09.2001 and both were issued for production. Regarding 18125kgs of granules received from M/s GAIL and 325kgs of granules received from IPCL, he submits that 19,500kgs granules were received from M/s GAIL and 2000kgs of

granules received from M/s IPCL were issued for production as can be seen from Entries No. 70-72 and 77 of RG-23A Part-1. He submits that raw material and semi-finished goods cannot be seized as held in the following case law:

- *Packagers (P) Ltd.- 2006 (196) ELT 381 (Tri. Del.)*
- *Kiran PodyChems Ltd.- 2009 (248) ELT 434 (Tri. Chennai).*
- *Aishwarya Plast Exports Pvt. Ltd.- 2009 (246) ELT 728 (Tri. Ahmd.)*
- *Ravi Enterprises- 2004 (170) ELT 443 (Tri. Mumbai)*
- *Unimark Remedies Ltd.- 2006 (204) ELT 49 (Tri. Mumbai).*
- *Kartar Steels (Pvt.) Ltd.- 1997 (93) ELT 443 (Tri. Delhi)*
- *S.B. Industries- 2007 (213) ELT 79 (Tri. Kolkata)*
- *CC Vs Parvesh Casting (P) Ltd.- 2001 (136) ELT 1185 (Tri. Delhi).*

7. Regarding the allegation of fraudulent availment of CENVAT credit, learned Counsel submits that the Department alleges that plastic granules seized at Jindpur and Kirti Nagar, Godowns of M/s R.K. Trading belong to the appellant No.1 which were diverted after availing CENVAT credit; the Department has grossly failed to make a note of the fact that Lot/ Batch numbers of seized goods do not tally with those issued by M/s GAIL to the appellant No.1; M/s R.K. Trading have accepted that they have purchased the same in the open market; Department, on the one hand, alleges that the granules seized at M/s R.K. Trading belong to the appellant No.1 and on the other hand, the proceedings initiated against M/s R.K. Trading have been dropped and very same material has been handed over to M/s R.K. Trading; as the goods were returned to M/s R.K. Trading, they

become the owners of the goods rather than appellant No.1 as alleged.

7.1. Regarding the findings on cash seized from the office of M/s R.K. Trading, learned Counsel submits that the Department alleges that the amount is sale proceeds for the goods diverted by appellant No.1 to M/s R.K Trading; M/s R.K. Trading are consignment agents of M/s GAIL and at times, payments to M/s GAIL were diverted through M/s R.K. Trading; when funds were short, cash dealings were made and this is a common practice in the trade; the appellant No.1 has received only four consignments from M/s R.K. Trading; whereas the appellant No.1 has purchased a total quantity of 1078MT from M/s GAIL during the period August 2000 to October 2001, purchase from M/s R.K. Trading was only 9.50MT, as can be seen from the gate register of the appellant No.1; Department while relying on the gate register to establish the case of fraudulent availment of CENVAT credit, ignores the facts recorded in the gate register; it is on record that the goods seized from the premises of R.K. Trading do not match in Batch/ Lot numbers with the goods issued by M/s GAIL; therefore, the allegations of the Department are devoid of any evidence.

7.2. Learned Counsel submits that the Department relies on the statement of Shri Parmeshwar Lal Sharma, Accountant of M/s R.K. Trading; however, even after making a request, opportunity to cross-examine Shri P.L. Sharma and Shri Vijay Kumar Tekriwal was not given in contravention of principles of natural justice and the provisions of Section 9D of Central Excise Act, 1944; Department is oblivious of the fact that the amounts of cash shown to have been withdrawn is not matching with the amounts paid in cheque.

7.3. On the ledgers seized from M/s P.G. Enterprises on 10.10.2001, learned Counsel submits that the Department alleges on the basis of this ledger that there are sales of plastic granules by M/s P.G. Enterprises to the appellant No.1; the records maintained by the appellant evidence purchase of 159.027MT of plastic granules as against the purchase of 1781.072MT of prime quality plastic granules from M/s GAIL; he submits that the allegation of the Department does not stand scrutiny as sheathing compound manufactured by the appellants is used in the manufacture of telecom cables, where quality standards are strictly maintained and moreover, a person from Department of Telecommunication is always available in the factory of the appellant No.1 to supervise the quality; the customers of the appellant No.1 would not have tolerated any inferior quality as it would have resulted heavy loss of money as well as reputation.

7.4. Learned Counsel further submits that the Department has conveniently ignored the fact that M/s T.R. Plastics, M/s Rajat Plastics, M/s Tibrewala Plastics have altogether purchased 159.027MT of re-processed plastic granules from M/s P.G. Enterprises and have taken the delivery of the material at Delhi and used the same for trading purposes; M/s P.G. Enterprises have, in fact, submitted in Affidavit that they have not supplied any material to the appellant No.1.

7.5. Regarding the allegation that goods were removed from the appellant No.1 on job-work challans and sold in the open market as is evidenced by the words “Sanjay” written on the challans would indicate sale to M/s P.G. Enterprises, learned Counsel submits that the allegation is false as the goods were sent to the job worker M/s Rajat Industrial Corporation, whose employee’s name incidentally happens to be “Sanjay” and therefore, his name was written on the challan.

7.6. Adverting to the allegation that goods purchased by the appellant No. 1 from M/s Shri Balaji Polymers were not received in the factory but were diverted into the open market, learned Counsel submits that the statement of persons of M/s Shri Balaji Polymers and the transporters to the effect that the material was delivered at the premises of the appellant No.1 have not been relied upon.

7.7. On the allegation that the appellant No.1 has removed virgin plastic granules under the guise of job-work to M/s RIC, learned Counsel submits that the Department contends that job-work was not done at the premises, mentioned in the challan, i.e. 5307 Chandrawal Road, Delhi, learned Counsel submits that the job-work could not be done due to electricity problem in the premises; wherever job-work was not completed, charges were deducted; job-work was done in another unit of M/s RIC at 1629, Sohan Ganj, Delhi; there is enough evidence in the form of delivery challans, GRs/ bilties/ST-38 etc; the total material sent for job-work was 2,32,606kgs, out of which, 1,72,060kgs was done of M/s RIC and 60,546kgs was done by others; out of job work challan Nos. 01 to 16 (except 12) belong to job-work done by others whereas the Department claims that all job work were done by M/s RIC.

7.8. Learned Counsel submits that the Department mis-quoted the statement of Shri Ajay Kumar of M/s Ajay Plastic India that plastic granules received from M/s GAIL were diverted to them by the appellant No.1 through M/s R.K. Trading; Shri Ajay Kumar never stated the same; in fact, the material received by the appellant No.1 is not suitable to M/s Ajay Plastic India as they are making PE Bags which are soft in nature whereas the appellant No.1 is manufacturing sheathing compound, which is a hard substance; request for cross-examining, Shri Ajay Kumar was not accepted by the Adjudicating Authority.

7.9. Learned Counsel further submits that the Department heavily relies on the despatch registers and records found with M/s Bombay Golden (India) to allege that some consignments of the granules from M/s GAIL were off-loaded at the godown of M/s R.K. Trading at Delhi; he submits that no inference can be availed from the above statement as at times, depending on the non-availability of trucks, material is off-loaded at Delhi and at times, it was taken to the factory of the appellant at Sampla; request for cross-examination of Shri Harish Arora of M/s Bombay Golden (India) was also not allowed by the Adjudicating Authority.

7.10. Learned Counsel submits that in view of the inadequacies of the evidence, lacklustre investigation by the Department and dropping of the show cause notice issued to M/s R.K. Trading Company, the impugned order's merits to be set aside. Accordingly, the demand of CENVAT credit and the penalties imposed on the appellant No.1 are liable to be set aside. Learned Counsel further submits the arguments, in brief, point-wise, along with the case law:

(i) Third party documents not sufficient evidence.

- *V.P.D. Industries Pvt. Ltd.- 2016 (340) ELT 249 (Tri. Del.)*
- *Rajratan Synthetics Ltd.- 2013 (297) ELT 63 (Tri. Del.)*
- *Jai Mata Industries Ltd.- 2013 (293) ELT 539 (Tri. Del.)*
- *ManmeetIspatPvt. Ltd.- 2019 (368) ELT 1101 (Tri.Del.)*

(ii) Documentary proof of correctness of quantification.

- *Poonam Tex. Chem- 2010 (251) ELT 405 (Tri. Ahmd.)*
- *Mittal Pigment Pvt. Ltd.- 2018 (360) ELT 157 (Tri. Del.)*
- *CCE Vs Mittal Pigment Pvt. Ltd.- 2018 (15) GSTL (Raj.)*

(iii) Charge cannot be made on assumptions and presumptions.

- *Oudh Sugar Mills- 1978 (2) ELT (J 172) (SC)*
- *Alps Container Pvt. Ltd.- 2018 (364) ELT 103*
- *Kirloskar Oil Engines Ltd.- 2017 (364) ELT 103*

(iv) Apprehension however grave cannot take place of evidence.

- *Dakeshwari Cotton Mills Ltd.- [1954] 26 ITR 775 (SC).*
- *Lal Chand Bhagat Ambika Ram-CIT [1959] 37 ITR 28 (SC)*
- *Omar SalayMohd. Seth- [1959] 37 ITR 151 (SC)*

(v) Not allowing cross examination is against principles of *natural* **justice.**

- *CCE Vs New Kishan Cement Pvt. Ltd.- Appeal No. 1226 of 2014 (Guj.-HC)*
- *CIT Vs Ahwinin Gupta, ITA 1264/2008 (Delhi-HC)*

(vi) Not allowing cross examination is against the provisions of Section 9D of the Central Excise Act, 1944.

- *Jindal Drugs Pvt. Ltd.- 2016 (340) ELT 67 (P&H)*
- *J&K Cigarettes Ltd.- 2009 (242) ELT 189 (Del.)*

- *CCE Vs Kuber Tobacco India Ltd.- 2016 (338) ELT 113 (Tri. Del.)*
- *Alliance Alloys Pvt. Ltd.- 2016 (338) ELT 749 (Tri. Chan.)*
- *Premier Alloys Ltd.- 2019 (366) ELT 659 (All.)*

(vi) Penalty on Director of Company not maintainable in every case.

- *Conic Electronics Pvt. Ltd.- 2004 (173) ELT 490*
- *Sanjay Gupta- 2004 (172) ELT 58*

7.11. Learned Counsel requests to consider the above submissions in respect of the other appeal i.e. Appeal No. E/909/2008-EX (DB) and set aside the penalties.

8. Shri Naveen Bindal appearing on behalf of M/s R.K. Trading Co. and submits that Adjudicating Authority did not consider various submissions properly; the adjudicating authority failed to appreciate that the SCN relating to seizure of goods of M/s GAIL at appellant's premises had already been set aside vide OIO dated 30.01.2004; in Para 25 of the Order, it was found that the Department had not brought any evidence on record to show that the invoice though issued in the name of appellant No.1, the goods never reached the appellant No.1; Adjudicating Authority held that it was not the case of the Department that the goods were only sold to the appellant No.1 by M/s GAIL. Learned Counsel submits that learned Commissioner has erred in finding that dropping of the previous SCN has no bearing on the present proceedings as the present case is based on different grounds; this observation is not acceptable as both relate to seizure of goods at the appellant's premises. He further submits that out of the total demand of Rs.55,29,455/-, Rs.25,81,603/- is worked out on the basis of cash alleged to have been deposited by the appellant No.1 in

the Bank. No short payment can be alleged on such goods; the penal proceedings merit to be set aside.

9. Shri Aneesh Dewan assisted by Shri ShivamSyal, Learned Authorized Representatives appearing on behalf of the respondents and reiterates the findings of the OIO and submits that the appellants have fraudulently availed CENVAT credit to the tune of lakhs of rupees. He submits that the appellants have not maintained RG-I Register properly and as such, there were un-accounted material in the factory. Similarly, semi-processed and un-finished goods were also not accounted for; this non-accountal is an offence which renders the goods liable for confiscation and *mens rea* is not required to be shown; the voluminous evidence put forth by the Department is enough to prove fraudulent availment of CENVAT credit by the appellants; therefore, the appeals are liable to be dismissed.

10. Heard both sides and perused the records of the case. The main contention of the appellants is that the allegations in the show cause notice are mainly based upon statements of the persons, stray and partial un-official records. Learned Counsel for appellant No.1 submits that the Department has built up the case on the basis of the raw material, purchased by the appellant No.1 from M/s GAIL, which was found in the premises of R.K. Trading Company; on this basis, it was alleged that the appellant No.1 has diverted the prime purchase from M/s GAIL and purchased seconds material from open market and availed CENVAT credit fraudulently on the strength of invoices issued by M/s GAIL; however, the Department has not bothered to compare

the Batch/ Lot numbers of the raw materials; the Batch/ Lot numbers of the materials seized from M/s/ R.K. Trading do not match with that of the material purchased from M/s GAIL and therefore, the entire argument of the Department falls flat. It is also argued that the Department having drawn samples of the so-called raw material used by the appellant No.1 but have not got it tested to ascertain the fact as to whether the same was prime material or otherwise.

11. The appellants also contend that a show cause notice has been issued to M/s R.K. Trading (Appeal No. E/1159/2008) on the same set of investigation and has been dropped by the Adjudicating Authority and the Department has accepted the said order by not preferring to make any further appeal. Under the circumstances, it is not open for the Department to substantiate a case against the appellants on the same set of evidence. The Department has also not considered the fact that the appellant No.1 have been supplying the material to telecom companies which have high quality standards; Department has also ignored the fact that a representative of the telecom companies was always present in the premises of the appellant No.1 to supervise the quality of production. It was not possible for the appellant No.1 to produce the sheathing compound required by the telecom companies using low standard raw material.

12. The learned Counsel for the appellants further submits that principles of natural justice have been violated even in the second round of litigation though only on this ground the matter was remanded to the Original Authority by CESTAT vide Final Order No.

391-393/07-EX dated 04.07.2007. While in the first round, they have not given copies of the relied upon/ non-relied upon documents, opportunity to participate in the proceedings by giving sufficient time to submit a written reply and to be heard personally. In the second round, no opportunity for cross-examination of the key witnesses was provided even though a specific request was made to the Adjudicating Authority.

13. We find that vide Letter dated 27th August, 2007, the appellants have requested the Commissioner that they would like to cross-examine the witnesses or persons whose statements were relied upon by the show cause notice. During the course of arguments, learned Counsel for the appellants submits that the statement of Shri Ajay Kumar, operator of M/s Ajay Plastics India, dated 10.01.2002 was relied upon and requests for cross-examination of Shri Ajay Kumar was not granted; this is in clear violation of the provisions of Section 9D of Central Excise Act, 1944. However, we find that there is no finding given in the impugned order regarding the request for cross-examination and as to why, the same has been denied. We find that provisions of Section 9D of Central Excise Act, 1944 are as follows:

> *"Section 9D. Relevancy of statements under certain circumstances- (1) A statement made and signed by a person before any Central Excise Officer of a gazetted rank during the course of any inquiry or proceeding under this Act shall be relevant, for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which it contains, -*
> *(a) when the person who made the statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay*

or expense which, under the circumstances of the case, the Court considers unreasonable; or

(b) when the person who made the statement is examined as a witness in the case before the Court and the Court is of opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interests of justice.

(2) The provisions of sub-section (1) shall, so far as may be, apply in relation to any proceeding under this Act, other than a proceeding before a Court, as they apply in relation to a proceeding before a Court."

14. We find that Hon'ble Punjab & Haryana High Court observed in the case of *Jindal Drugs* Pvt. Limited (supra) held that:

*"**15.**Once discretion, to be judicially exercised is, thus conferred, by Section 9D, on the adjudicating authority, it is self-evident inference that the decision flowing from the exercise of such discretion, i.e., the order which would be passed, by the adjudicating authority under Section 9D, if he chooses to invoke clause (a) of sub-section (1) thereof, would be pregnable to challenge. While the judgment of the Delhi High Court in J&K Cigarettes Ltd. (supra) holds that the said challenge could be ventilated in appeal, the petitioners have also invited attention to an unreported short order of the Supreme Court in UOI and Another v. GTC India and Others in SLP (C) No. 2183/1994, dated 3-1-1995 wherein it was held that the order passed by the adjudicating authority under Section 9D of the Act could be challenged in writ proceedings as well. Therefore, it is clear that the adjudicating authority cannot invoke Section 9D(1)(a) of the Act without passing a reasoned and speaking order in that regard, which is amenable to challenge by the assessee, if aggrieved thereby.*

***16.**If none of the circumstances contemplated by clause (a) of Section 9D(1) exists, clause (b) of Section 9D(1) comes into operation. The said clause prescribes a specific procedure to be followed before the statement can be admitted in evidence. Under this procedure, two steps are required to be followed by the adjudicating authority, under clause (b) of Section 9D(1), viz.*

(i) the person who made the statement has to first be examined as a witness in the case before the adjudicating authority, and

(ii) the adjudicating authority has, thereafter, to form the opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interests of justice.

17.*There is no justification for jettisoning this procedure, statutorily prescribed by plenary Parliamentary legislation for admitting, into evidence, a statement recorded before the Gazetted Central Excise Officer, which does not suffer from the handicaps contemplated by clause (a) of Section 9D(1) of the Act. The use of the word "shall" in Section 9D(1), makes it clear that, the provisions contemplated in the sub-section are mandatory. Indeed, as they pertain to conferment of admissibility to oral evidence they would, even otherwise, have to be recorded as mandatory.*

18.*The rationale behind the above precaution contained in clause (b) of Section 9D(1) is obvious. The statement, recorded during inquiry/investigation, by the Gazetted Central Excise Officer, has every chance of having been recorded under coercion or compulsion. It is a matter of common knowledge that, on many occasions, the DRI/DGCEI resorts to compulsion in order to extract confessional statements. It is obviously in order to neutralize this possibility that, before admitting such a statement in evidence, clause (b) of Section 9D(1) mandates that the evidence of the witness has to be recorded before the adjudicating authority, as, in such an atmosphere, there would be no occasion for any trepidation on the part of the witness concerned.*

19.*Clearly, therefore, the stage of relevance, in adjudication proceedings, of the statement, recorded before a Gazetted Central Excise Officer during inquiry or investigation, would arise only after the statement is admitted in evidence in accordance with the procedure prescribed in clause (b) of Section 9D(1). The rigour of this procedure is exempted only in a case in which one or more of the handicaps referred to in clause (a) of Section 9D(1) of the Act would apply. In view of this express stipulation in the Act, it is not open to any adjudicating authority to straightaway rely on the statement recorded during investigation/inquiry before the Gazetted Central Excise Officer, unless and until he*

> *can legitimately invoke clause (a) of Section 9D(1). In all other cases, if he wants to rely on the said statement as relevant, for proving the truth of the contents thereof, he has to first admit the statement in evidence in accordance with clause (b) of Section 9D(1). For this, he has to summon the person who had made the statement, examine him as witness before him in the adjudication proceeding, and arrive at an opinion that, having regard to the circumstances of the case, the statement should be admitted in the interests of justice.*
>
> ***20.****In fact, Section 138 of the Indian Evidence Act, 1872, clearly sets out the sequence of evidence, in which evidence-in-chief has to precede cross-examination, and cross-examination has to precede re-examination.*
>
> ***21.****It is only, therefore, -*
>
> *(i) after the person whose statement has already been recorded before a Gazetted Central Excise Officer is examined as a witness before the adjudicating authority, and*
>
> *(ii) the adjudicating authority arrives at a conclusion, for reasons to be recorded in writing, that the statement deserves to be admitted in evidence,*
>
> *that the question of offering the witness to the assessee, for cross-examination, can arise.*

We find that the Hon'ble High Court has followed the above in the case of *G-Tech Industries- 2016 (339) ELT 209 (P&H)* also.

15. We find that Hon'ble Supreme Court in the case of *Andaman Timber Industries- 2015 (324) ELT 641 (SC)* observes that:

> *" **6.** According to us, not allowing the assessee to cross-examine the witnesses by the Adjudicating Authority though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity inasmuch as it amounted to violation of principles of natural justice because of which the assessee was adversely affected. It is to be borne in mind that the order of the*

> *Commissioner was based upon the statements given by the aforesaid two witnesses. Even when the assessee disputed the correctness of the statements and wanted to cross-examine, the Adjudicating Authority did not grant this opportunity to the assessee. It would be pertinent to note that in the impugned order passed by the Adjudicating Authority he has specifically mentioned that such an opportunity was sought by the assessee. However, no such opportunity was granted and the aforesaid plea is not even dealt with by the Adjudicating Authority. As far as the Tribunal is concerned, we find that rejection of this plea is totally untenable. The Tribunal has simply stated that cross-examination of the said dealers could not have brought out any material which would not be in possession of the appellant themselves to explain as to why their ex-factory prices remain static. It was not for the Tribunal to have guess work as to for what purposes the appellant wanted to cross-examine those dealers and what extraction the appellant wanted from them.*
>
> ***7.*** *As mentioned above, the appellant had contested the truthfulness of the statements of these two witnesses and wanted to discredit their testimony for which purpose it wanted to avail the opportunity of cross-examination. That apart, the Adjudicating Authority simply relied upon the price list as maintained at the depot to determine the price for the purpose of levy of excise duty. Whether the goods were, in fact, sold to the said dealers/witnesses at the price which is mentioned in the price list itself could be the subject matter of cross-examination. Therefore, it was not for the Adjudicating Authority to presuppose as to what could be the subject matter of the cross-examination and make the remarks as mentioned above. We may also point out that on an earlier occasion when the matter came before this Court in Civil Appeal No. 2216 of 2000, order dated 17-3-2005 [2005 (187) E.L.T. A33 (S.C.)] was passed remitting the case back to the Tribunal with the directions to decide the appeal on merits giving its reasons for accepting or rejecting the submissions.*

16. With due difference to the Hon'ble Supreme Court and Hon'ble High Court of (Punjab & Haryana), we find that not allowing the cross-examination of key witnesses vitiates the proceedings even under the quasi-judicial proceedings. Therefore, as requested by the learned Counsel for the appellants, we are inclined to accept the contention and the request of learned Counsel for the appellants that the interest

of justice would be properly served if the case goes back to the Adjudicating Authority to adjudicate the case afresh after giving the opportunity to the appellants to cross-examine the key witnesses whose statements have been relied upon by the impugned order.

17. In the result, we find that in the interest of justice, the matter requires to go back to the Adjudicating Authority. Therefore, we set aside the impugned order and remand back the cases, in all the three appeals (E/908/2008, E/909/2008 and E/1159/2008) to the Adjudicating Authority for a fresh re-consideration of the issue involved after duly allowing, the appellant No.1, to cross-examine key witnesses Shri Parmeshwar Lal Sharma, Munim of M/s R.K Trading and Shri Ajay Kumar, operator of M/s Ajay Plastics India. It is to reiterate that this Bench has not expressed any opinion on the merits of the case. Keeping in view the fact that the case pertains to the year 2001, it is directed that the Adjudicating Authority shall decide the case within a period of sixteen weeks from the date of receipt of this order. Appellants are directed to co-operate with the Adjudicating Authority in the speedy disposal of the proceedings.

(Pronounced in the open Court on 19/07/2023)

(S. S. GARG)
MEMBER (JUDICIAL)

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)

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