CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
<u>CHANDIGARH</u>

REGIONAL BENCH - COURT NO. I

Appeal No. E/60548/2017 -[DB]

(Arising out of Order-in-Appeal No. LUD-EXCUS-000-COM-011-16-17 dated 05.04.2017 passed by the Commissioner (Appeals), Ludhiana)

M/s Vee Kay Concast Pvt Ltd **......Appellant**
(Village Kanganwal, P.O Jugiana, Ludhiana)

VERSUS

Commissioner of Central Excise & S.T. Ludhiana **......Respondent**
(F- Block rishi Nagar Ludhiana Punjab 141001)

WITH

Appeal No. E/60549/2017 -[DB]

(Arising out of Order-in- Appeal No. LUD-EXCUS-000-COM-011-16-17 dated 05.04.2017 passed by the Commissioner (Appeals), Ludhiana)

M/s Waryam Steel Castings Pvt. Ltd **......Appellant**
(Village Kanganwal, P.O Jugiana, Ludhiana)

VERSUS

Commissioner of Central Excise & S.T. Ludhiana **......Respondent**
(F- Block rishi Nagar Ludhiana Punjab 141001)

AND

Appeal No.E/61907, 61909/2018, E/60491,60505, 60537, 60552, 60553, 60661/2017 -[DB]

(Arising out of Order-in- Appeal No. LUD-EXCUS-000-COM-011-16-17 dated 05.04.2017 passed by the Commissioner (Appeals), Ludhiana)

Shri M K Gupta
Shri Atul Gupta
M/s. C.L. Engineering **......Appellant**
M/s. Noble Steels Pvt.Ltd.
M/s. Vallabh Steels Ltd.
R Ess Iron And Steel Pvt.Ltd.
Aps Associated Pvt.Ltd.

Renny Steel Castings Pvt.Ltd.

VERSUS

Commissioner of Central Excise & S.T. Ludhiana **......Respondent**

<u>APPEARANCE:</u>

Shri K.K.Anand, Advocate for the Appellant

Shri Vijay Gupta, AR for the Respondent

<u>CORAM:</u> **HON'BLE MR. ASHOK JINDAL, MEMBER (JUDICIAL)**
HON'BLE MR. BIJAY KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NO.60636-60645 of 2019

DATE OF HEARING: 23.05.2019
DATE OF DECISION: 23.05.2019

PER ASHOK JINDAL

The appellants are in appeal against the impugned order.

2. The facts of the case are that the appellant M/s. Vee Kay Concast Pvt.Ltd. (in short M/s. Vee Kay) engaged in the manufacture of alloy and non alloy steel rounds/bars etc. falling under chapter 72 of the Central Excise Tariff Act, 1975. They are availing Cenvat credit on inputs, namely, MS/LC/En8D ingots. Shri Atul Gupta S/o Shri M.K.Gupta is a director of the said company.

3. M/s. Vee Kay Iron & Steel Traders (in short traders) was engaged in sale/purchase of alloy and non alloy steel rounds/bars etc.

under the proprietorship of Shri M.K.Gupta, father of Shri Atul Gupta, Director of M/s. Vee Kay.

4. M/s. Waryam Steel Casting Pvt. Limited (in short M/s. Waryam) is engaged in the manufacture of MS/LC/En8D ingots. The authorized signatory of this company is Shri Atul Gupta. Based on some intelligence, two premises of traders well as M/s. Waryam were searched on 22.3.3005. During the course of investigation, the officers seized various records/documents including one laptop Sl.No.CNF 35112KDP Compacq n x 9010, belonging to Shri Atul Gupta and one CPU No.P116BX3Z0747, belong to the traders. Printouts were taken from the computer/laptop and seized. On the basis of these printouts, it was revealed that M/s. Vee Kay had clandestinely procured large quantities of raw materials/inputs, which had been subsequently been used in the clandestine manufacture and sale of finished goods without payment of duty. It was also revealed that M/s. Vee Kay had procured 12342.44 MT of ingots clandestinely from various manufactures/suppliers including M/s.Waryam and procured 12095.59 MTs of non alloy steel rods/bars clandestinely and sold them to various buyers without accounting in their record and without payment of duty of Rs.4,93,50,012/-. It was also revealed that the quantity of steel rods/bars clandestinely manufactured and sold by M/s. Vee Kay were shown in record to have been sold and traded by the sister trading unit, i.e. M/s.Vee Kay Iron and Steel Traders, which has been described as dummy. The statements of Shri Atul Gupta and Shri M.K.Gupta were also recorded. The officers of Central Excise also investigated a number of ingots manufacturers, M/s. Waryam and the traders were investigated, it has been alleged that they have

clandestinely manufactured/sold ingots to M/s. Vee Kay. The computer printouts also allegedly showed clandestine supply of MS ingots by various traders but none of them contacted nor their statements recorded. Investigation was also conducted to ascertain the supplies of goods to traders, one such supplier was M/s. Shree Durga Enterprises supplied 2671.815 MTs of steel rounds valued at Rs.6,54,08,261/- but the party found non existent at given address. Investigation was conducted from various buyers, who confirmed that they are buying the goods from the traders. On the basis of investigation, the department issued show cause notices dt.1.5.2009 to M/s. Vee Kay to demand duty of Rs.4,93,50,012/- and Rs.2,27,74,215/- from M/s. Waryam alleging that these two units were manufacturing the goods and clearing the same clandestinely without payment of duty. Penal provisions were also invoked against all the appellants. The show cause notices were issued to the other ingots manufacturers, were allegedly supplied the ingots, clandestinely to M/s. Vee Kay. They were separately assessed. The appellants sought soft copy of the printouts of computer/laptop but the same were not supplied to the appellants. The appellant M/s. Vee Kay also sought cross examination of panch-witnesses as well as Central Excise officers, who had conducted the search but the same were not granted to them. The demand of duty was confirmed against the appellants. The said order was challenged before this Tribunal and this Tribunal vide Final Order dt.21.7.2014 set aside the order of the adjudicating authority and remanded the matter back to the adjudicating authority with the direction to supply the soft copies of the printouts and to allow the cross examination. In remand proceedings, the adjudicating authority has passed the following order:-

(i) Demanding duty of Rs.4,93,012/- from M/s. Vee Kay along with interest

(ii) Imposing equivalent penalty of Rs.4,93,50,012 on M/s. Vee Kay

(iii) Demanding duty of Rs.2,27,74,215/- from M/s. WSCPL along with interest

(iv) Imposing equivalent penalty on M/s. Waryam.

(v) Imposing a penalty of Rs.4,93,50,012/- on M/s. Vee Kay Iron & Steels Traders (VKSIT) under Rule 26 of Central Excise Rules, 2002, read with section 11AC of the Central Excise Act, 1944.

(vi) Imposing a penalty of Rs.4,93,50,012/- on Shri Atul Gupta, Director of the appellant company and authorized signatory of M/s. Waryam, under Rule 25 of the Central Excise, 2001 read with Section 11AC of the Central Excise Act, 1944.

(vii) Imposing a penalty of Rs.4,93,50,012/- on Shri M.K.Gupta, proprietor of M/s.Vee Kay Iron & Steel Co.Ltd., under Rule2 5 of the Central Excise, 2001 read with Section 11AC of the Central Excise Act, 1944.

Against the said order, the appellants are before us.

5. Ld. Counsel appearing for the appellant submits that the adjudicating authority has not followed the remand direction of this Tribunal in earlier round of litigation as and no soft copies of the printouts were provided nor allowed cross examination of panchas

and central excise officers, who were present at the time of search on 22.03.2005. Therefore, the impugned order is to be set aside on this ground alone.

6. He further submits that the panchnama dt.22.3.2005 was drawn at the office of M/s. Vee Kay Iron and Steel commenced at 12.30 am and concluded 22.00 am and had the signature of Shri Atul Gupta. It is on record that Shri Atul Gupta fell ill during the panchnama proceedings and had to be hospitalized from where he was discharged only at 2.00 am the next day, i.e. on 23.3.2005. Hence, the panchnama is factually incorrect and hence loses its evidentiary value.

7. He further submits that the panchnama mentioned seizure of two electronics devices namely a CPU and a laptop. Some printouts and resumption memo were taken but it is not clear from which electronic device, it was taken. In the impugned order, it has been stated that printouts were taken from CPU whereas the show cause notice states that the printouts were taken from the laptop. The laptop belonged to Shri Atul Gupta, director of the appellant company whereas the CPU belonged to the traders.

8. He further submits that Shri Atul Gupta's laptop was password protected and it was for the first time on 13.11.2006 that Shri Atul Gupta provided password to the officers in that case how could the officers extract the printout from his laptop on 22.3.2005 at the time of search, the data captured in the printout is upto 3.11.2004 whereas the electronic devices were seized on 22.03.2005 that is more than 3 and half months later. This means that the data was not being regularly fed in those devices. This makes the printouts inadmissible as evidence for non compliance with the provisions of section 36B of

the Central Excise Act, 1944. He further submits that the appellants were manufacturing both alloy and non alloy products. The demand is in respect of non alloy products only. How is it possible that the printouts do not contain any data regarding unaccounted clearances of alloy products. The computer printouts are not admissible as evidence in this case since the provisions of section 36B ibid have not been complied with. He also submits that Shri Atul Gupta in his statement dt.12.3.2009 clarified that he had not signed on any invoices by the traders. The department has controveted this by relying on the statement dt.16.8.2005 of Shri M.K.Gupta. However, neither did the department identify any sale bill of trader carrying the signature of Shri Atul Gupta nor was any such signature certified by any handwriting expert as being those of Shri Atul Gupta.

9. He further submits 16 manufacturers of ingots, who were supplying raw materials to the appellants were identified by the department from the printouts. Out of 14 could be contacted and their statements recorded. 11 of them confirmed supply of ingots on payment of duty as recorded in the books of M/s. Vee Kay and denied having supply any raw materials other than these and which were reflected in computer printouts and remaining three denied having supplied any raw materials to the M/s.Vee Kay.

10. He further submits that the adjudicating authority has held that the veracity of the printouts cannot be challenged since a number of manufacturers of ingots had accepted the demand raised on them on the basis of the printouts. It is submitted that the payment were made by five such companies to avoid harassment and not as an admission of guilt. He submits that the show cause notices were

issued to two units and against those units, the proceedings have been dropped by this Tribunal in the case of M/s. A,K,Alloys Pvt.Ltd. vide Final Order No.A/60944/2017 dt.17.5.2017 and in the case of M/s. Malerkotla Steel & Alloys Pvt.Ltd. vide Final Order No.A/61203/2017- dt.29.6.2017. Therefore, the said printouts having no evidentiary value to allege clandestine receipt of the goods by M/s. Vee Kay from manufacturer M/s. Waryam. It is also submitted that the penalty imposed on M/s. Vee Kay and its director Shri Atul Gupta and the same has been set aside by this Tribunal. He therefore submits that the printouts cannot be admissible evidence. None of the traders, whose name appears in the computer printouts as having supplied MS ingots to M/s. Vee Kay, were ever contacted by the department. Therefore, no corroboration has been established. It has been alleged that M/s. Durga Enterprises, one of the supplier of goods to the trader is non existent. The department has relied on a visit panchnama dt.1.8.2009 and the show cause notice has been issued for the period from 1.4.2004 to 31.3.2005, therefore, it is quite possible that the trading firm could have closed down or shifted to another location. No investigation has been conducted to this effect. The department also contacted 5 buyers of traded goods from 'the buyer' and all of them confirmed having received goods from 'the trader'.

11. It has been alleged that the production of M/s. Vee Kay increased significantly after booking the present case. It is his submission that the investigation in this case started in March 2005 whereas the production figures for the period 1.4.2004 to 31.3.2005 reveals that production in October and November, 2004 was 974.205

MT and 904.530 MT, respectively, which is more than the double the production of 459.310 MT and 468.365 MT of February, 2005 and March, 2005 respectively.

12. He further submits that to establish clandestine clearances of over 12,000 MT of finished goods clinching evidence is required on following aspects:-

(i) Identification of some buyers of such goods;

(ii) Identification of transporters and drivers who would have transported, not only the clandestinely manufactured finished goods, but also the clandestinely procured raw materials;

(iii) Possible seizure of any consignment of clandestinely procured raw materials or clandestinely cleared finished goods;

(iv) Discrepancy in stock of raw materials as well as finished goods with respect to recorded balance;

(v) Identifying the cash trail or seizing any amount of cash as the whole transaction of unaccounted raw materials and finished goods would involve cash of over Rs.50 crores.

(vi) Excess consumption of electricity

(vii) Determining the production/installed capacity of the unit;

(viii) Inculpatory statements from employees or Directors of the company

No evidence is available to allege clandestine removal of the goods.

13. In the impugned order, the adjudicating authority has held that the trader was a dummy unit, no evidence has been produced about any money flow back from the trader to M/s. Vee Kay or of management control or of profit sharing or that the trader exists only on paper. On the contrary there is ample evidence of sale and

purchase of goods by the trader, who were also regularly filling VAT returns and were aloes filing income tax returns.

14. With regard to the demand of duty confirmed against M/s. Waryam, two final orders passed in respect of A.K.Alloys Ltd. And M/s. Malerkotla Steel & Alloys Pvt.Ltd. on the identical facts of M/s. Waryam, therefore, the demand against M/s. Waryam is not sustainable.

15. He further submits that the department itself had assessed the annual production capacity M/s. Vee Kay at 10781.59 MT. If the alleged clandestine production is taken into account, the total clearances by M/s. Vee Kay worked out to 18641.01 MT. Therefore, charge of clandestine removal remains un-established. In that circumstance, the impugned order be set aside and appeals be allowed.

16. On the other hand, Ld. AR supported the impugned order and submits that computer printouts have been taken during the course of investigation itself and the buyers of the goods stated that they have purchased the goods without invoice from the trader. Moreover, the whole gamut of the documents revealed that M/s. Waryam and M/s. Vee Kay were hand in glove for the clandestine manufacture and clearance of the goods. Therefore, the demand of duty has rightly been raised against the appellants.

17. Heard the parties and considered the submissions.

18. On the basis of various documents/records placed before us, we find that during the investigation one laptop and one CPU was recovered and printouts have been taken. For admissible of computer

printouts as evidence, section 36B provided the procedures which is reproduced below:

"SECTION 36B. Admissibility of micro films, facsimile copies of documents and computer print outs as documents and as evidence. — (1) Notwithstanding anything contained in any other law for the time being in force, —

(a) a micro film of a document or the reproduction of the image or images embodied in such micro film (whether enlarged or not); or
(b) a facsimile copy of a document; or
(c) a statement contained in a document and included in a printed material produced by a computer (hereinafter referred to as a "computer print out"), if the conditions mentioned in sub-section (2) and the other provisions contained in this section are satisfied in relation to the statement and the computer in question,

shall be deemed to be also a document for the purposes of this Act and the rules made thereunder and shall be admissible in any proceedings thereunder, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible.

(2) The conditions referred to in sub-section (1) in respect of a computer print out shall be the following, namely :—

(a) the computer print out containing the statement was produced by the computer during the period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period by the person having lawful control over the use of the computer;

(b) during the said period, there was regularly supplied to the computer in the ordinary course of the said activities, information of the kind contained in the statement or of the kind from which the information so contained is derived;

(c) throughout the material part of the said period, the computer was operating properly or, if not, then any respect in which it was not operating properly or was out of operation during that part of that period was not such as to affect the production of the document or the accuracy of the contents; and

(d) the information contained in the statement reproduced or is derived from information supplied to the computer in the ordinary course of the said activities.

(3) Where over any period, the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in clause (a) of sub-section (2) was regularly performed by computers, whether —

(a) by a combination of computers operating over that period; or

(b) by different computers operating in succession over that period; or

(c) by different combinations of computers operating in succession over that period; or

(d) in any (other manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers,

all the computers used for that purpose during that period shall be treated for the purposes of this section as constituting a single computer; and references in this section to a computer shall be construed accordingly.

(4) In any proceedings under this Act and the rules made thereunder where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say, —

(a) identifying the document containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that document as may be appropriate for the purpose of showing that the document was produced by a computer;

(c) dealing with any of the matters to which the conditions mentioned in sub-section (2) relate,

and purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

For (5) the purposes of this section, —

(a) information shall be taken to be supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of any appropriate equipment;

(b) whether in the course of activities carried on by any official, information is supplied with a view to its being stored or processed for the purposes of those activities by a computer operated otherwise than in the course of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities;

(c) a document shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment.

Explanation*.* — For the purposes of this section, —

(a) "computer" means any device that receives, stores and processes data, applying stipulated processes to the information and supplying results of these processes; and

(b) any reference to information being derived from other information shall be a reference to its being derived therefrom by calculation, comparison or any other process."

18. How printout is admissible has been examined by this Tribunal in the case of Agarvanshi Aluminum Limited vs. CC, Nahvasheva (299) ELT 83 (Tri.-Mum.), wherein this Tribunal has observed as under:-

"**12.** From the above provisions, it is clear that for admissibility of computer printout there are certain conditions have been imposed in the said section. Admittedly condition 4C of the said section has not been complied with and in the case of Premier Instruments & Controls (supra) this Tribunal relied on the case of International Computer Ribbon Corporation - 2004 (165) E.L.T. 186 (Tri.-Chennai) wherein this Tribunal has held that "computer printout were relied on by the adjudicating authority for recording a finding of clandestine manufacture and clearance of excisable goods. It was found by the Tribunal that printouts were neither authenticated nor recovered under Mahazar. It was also found that the assessee in that case had disowned the printout and was not even confronted. The Tribunal rejected the printouts and the revenue's finding of clandestine manufacture and clearance. Thereafter it was found that there is strong parallel between the instant case and the case cited. Nothing contained in the printout generated by the PC can be admitted as evidence for non-fulfilment of the statutory condition." In this case also, we find that the parallel situation as to the decision of Premier Instruments & Controls (supra).

13. Therefore, the printout generated from the PC seized cannot be admitted into evidence for non-fulfilment of statutory condition of Section 138C of the Customs Act, 1962."

19. In view of the above decision of this Tribunal, in this case , we hold that the procedure prescribed under section 36B of Central Excise Act, 1944 has not been followed. Therefore, the printouts taken from CPU are not admissible evidence to allege clandestine manufacture and clearance. Moreover, in earlier round of litigation, this Tribunal has directed to supply soft copies of the documents but the direction of this Tribunal has not been complied with. Therefore, we hold that as the adjudication authority has not followed the direction of this

Tribunal, on this ground alone, the impugned order is liable to be set aside.

20. We also take note of the fact that in the show cause notice, it has been alleged that printouts have been taken from the laptop whereas in the adjudication order, the adjudicating authority held that the printouts taken from the CPU which creates doubt. In that circumstance, on the basis of electronic printouts, the demands against the apellants are not sustainable.

21. We take note of the fact that on similar investigation, two show cause notices were issued to A.K.Alloys Ltd. and M/s. Malerkotla Steel & Alloys Pvt.Ltd alleging clandestine manufacture and clearance of the ingots to the appellants namely M/s. Vee Kay and those matters travelled upto this Tribunal and this Tribunal after considering the evidence placed on record observed as under:

> "5.Heard the parties and considered the submissions. I find that the charge of clandestine removal has been alleged against the appellant on the basis of record retrieved from the computer seized from Shri Atul Gupta, Director of M/s. Vee Kay Concast Private Limited. There is no other evidence available on record to show that the appellant was engaged in the activity of clandestine removal of the goods. No corroboration of evidence has been made by the Revenue to substantiate the allegation of clandestine removal. Moreover, no statement of transporter is recorded and no mode of payment is determined by the Revenue while investigating the case. All the more, during course of investigation, nothing adverse was found against the appellant and the appellant has made a categorical statement that they have not supplied any goods without cover of invoice. In that circumstances, without any positive evidence of clandestine removal of goods, the charge of clandestine removal against the appellant is not sustainable. In that circumstance, the impugned order has no merit and the same is set aside. Consequently, the appeal is allowed."

22. Therefore, relying on the decision of this Tribunal in the case of A.K.Alloys Ltd. and M/s. Malerkotla Steel & Alloys Pvt.Ltd. (supra), we hold that the allegation against M/s. Waryam manufacturer of ingots is

not sustainable as no other corroborative evidence has been produced by the Revenue on record. Therefore, the demand confirmed against M/s. Waryam is set aside.

23. In the case of M/s. Vee Kay, we find that the production capacity has been worked out to 10781 MT by the department itself if we take alleged clandestine production into consideration the total production worked out to 18641.01 MT which is beyond annual production capacity of M/s.Vee Kay and to allege clandestine manufacture and clearance of the goods, the following parameters are to be followed:-

(i) Identification of some buyers of such goods;

(ii) Identification of transporters and drivers who would have transported, not only the clandestinely manufactured finished goods, but also the clandestinely procured raw materials;

(iii) Possible seizure of any consignment of clandestinely procured raw materials or clandestinely cleared finished goods;

(iv) Discrepancy in stock of raw materials as well as finished goods with respect to recorded balance;

(v) Identifying the cash trail or seizing any amount of cash as the whole transaction of unaccounted raw materials and finished goods would involve cash of over Rs.50 crores.

(vi) Excess consumption of electricity

(vii) Determining the production/installed capacity of the unit;

(viii) Inculpatory statements from employees or Directors of the company

24. No such evidence has been brought on record by the Revenue.

Furthermore, In the remand, proceedings, the adjudicating authority was directed to allow cross examine of the panchas and central excise officers whose statements relied upon by the adjudicating authority but no cross examination has been granted to the appellant. Therefore, the impugned order has been passed in gross violation of principles of natural justice and not following the direction of this Tribunal.

25. As the Revenue has failed to come with positive evidence except printouts taken from the laptop/CPU, the charge of clandestine manufacture is not sustainable against M/s. Vee Kay. Therefore, the demand against M/s. Vee Kay is not sustainable. As no demand of duty is sustainable against M/s. Vee Kay and M/s. Waryam, therefore, we hold that no penalty is imposable on all the appellants.

26. In view of the above observations, we set aside the impugned order and allow the appeals with consequential relief, if any.

(Operative part of order was pronounced in the open court)

(ASHOK JINDAL)
MEMEBR (JUDICIAL)

(BIJAY KUMAR)
MEMBER (TECHNICAL)

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