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

REGIONAL BENCH - Division Bench B1

Excise Appeal No. E/481,482 of 2011

(Arising out of Order-in-Appeal No. 17 & 18/2011 (M-IV) dated 29.06.2011 passed by the Commissioner of Central Excise (Appeals), Chennai).

1. M/s. Navneet Rubber Factory Pvt. Ltd. — Appellant
34/1, First Main Road, Vanagaram Road,
Ayanambakkam, Post, Maduravoyal
Chennai – 600 095.

2. P. Rakesh Jain, Managing Director,

Vs.

The Commissioner of Central Excise (Appeals) — Respondent
No. 26/1, Mahatma Gandhi Road,
Nunbambakkam, Chennai-34.

<u>APPEARANCE:</u>

Shri M. Karthikeyan, Advocate, for the appellants

Shri B. Balamurugan, AC (Authorised representative of the respondent-Revenue)

CORAM :

HON'BLE MR MADHU MOHAN DAMODHAR, Technical Member
HON'BLE MR P.DINESHA, Judicial Member

FINAL ORDER No. 40681-40682/2019

Date of Hearing: **11.01.2019**
Date of Pronouncement: **26.04.2019**

Per: P.Dinesha,

The Revenue carried out a search in the factory and office premises of the appellant, apart from carrying on the search activity in respect of some of the dealers. The Show Cause Notice issued on 30.11.2007 alleges the drawing of mahazar vide various annexures on different dates, it also talks of a hard disk recovered at the office premises of the appellant, printout of the same was taken of about 167 pages, mahazar proceedings at DGCEI office vide annexure-A8 drawn, similarly floppy disk recovered. There is also mention about recording of statements of various persons like Directors, Managing director, Shri P. Rakesh Jain, Shri Uttam Chand Surana, Proprietor of Surana Tyres, Statement of Shri M. Raja, Branch Manager, Sri Dhanalakshmi, Lorry Services, Shri Mahendra Giridharilal Agrawal, Proprietor, M/s. Jitendra Tyre House, Shri Vijay Kumar, Proprietor, M/s. Kalpaka Rubbers, Shri S. Sathish Kumar, Proprietor of M/s. Supreme Motor Cycle Parts, etc., and therefore proceeded on the basis of the above statements and the evidences/documents available in floppy disk and hard disk, to allege that the appellant was manufacturing scooter tyres, auto tyres, tractor tyres, jeep tyres and van tyres under the brand names Powermax, Anchor, Steel Plus, Milo, Olympic, etc., which were removed under the invoice of Global Tyres, a bogus firm, without accounting and without payment of duty which amounted to manufacture and clandestine removal of the excisable goods namely tyres. It was also proposed recovery of Central Excise duty under the proviso to Section 11A (1) of the Central Excise Act along with penalty under Section 11 AC and interest at appropriate rates under Section 11 AB ibid. It was also proposed in the above SCN as to the imposition of penalty under Rule 26 on the Managing Director.

2. The appellant offered its explanation resisting the allegation of clandestine removal and also requesting for allowing them to cross-examine the persons whose statements were relied on by the Revenue, to allege clandestine removal.

3. After considering the request and replies, the adjudicating authority passed the Order-in-Original dated 15.09.2008 from which the following points emerge:-

- Consumption of electricity – admission by the then Managing Director, Smt. Sheetal Gulecha given to City Union Bank (Annex. C-2-6 to SCN) wherein the consumption has apparently increased from fifty to sixty thousand rupees to rupees one lakh and fifty thousand from which the Revenue has concluded that the appellant had produced more tyres and removed the same without payment of duty by suppressing the actual production;
- Evidence of printouts recovered from the hard disk and floppy disk;
- Balance sheet of the appellant wherein it is alleged that there was a huge difference when compared with that of the dealers, transporters, raw material suppliers, etc.;
- The evidence of actual sale figure submitted with the bank but failing to raise invoice in order to remain in the SSI exemption limit;
- Various documents including invoices of the same number used for removals recovered from the dealers;
- No documents kept for most of the dispatches as against Way Bills from transporter, etc. The Order-in-Original also considers the purchase of raw materials also alleges that the appellant had not kept documents like purchase register or stock register or raw material, consumption register, but refers to the letters issued by raw material suppliers but do not record any statement of drivers of the transporting vehicles nor is there any reference to the inward register maintained at the security office with the security, also proceeds on the basis of the statement of the appellant's auditor who is alleged to have inflated the value of the commercial production and finally summarizing all the above

<u>demands proposed in the SCN</u> was confirmed including interest and penalty and also penalty on the Managing Director. The adjudicating authority in the said order has recorded that the cross-examination of the officers of the DGCEI were permitted but not that of the dealers whose statements were relied on.

4. Aggrieved by the above demand as also the denial of cross-examination, the appellant preferred an appeal before the first appellate authority, who vide common Orders-in-Appeal dated 29.06.2011 rejected the same, against which, the present appeals are filed.

5.1 Heard Shri M. Karthikeyan, Ld. Advocate for the assessee and Shri B. Balamurugan, AC, Ld. AR for the Revenue, perused the documents placed on record and have also gone through the order relied on during the course of the arguments. The primary contention of the assessee is the denial of cross-examination of the dealers whose statements were made use by the Revenue in order to fasten the duty liability. Ld. Advocate's other contention is the non-compliance with the requirement of Section 36 B of the Central Excise Act when the Revenue has relied on the extracts/printouts of the floppy disk and hard disk. He also contended that the Revenue has nowhere obtained a certificate in terms of Clause-4 to Section 36 B and in this regard, relied on the order of the New Delhi Bench of the Tribunal in the case of M/s. Popular Paints and Chemicals Vs. CCE, Raipur-
2018 (8) TMI-473 –(CESTAT-New Delhi).

5.2 Undoubtedly, there is no reference to any certificate obtained by the Revenue while relying on the printouts of floppy disk and hard disk and hence, the appellant's reliance on the order of the Delhi Bench is well founded. Section 36 B (A) mandates such Certificate if a computer/hard disk/floppy disk pen drive is seized and its contents in the form of print out is tried to be used as a document of evidentiary value. There is no such certificate and therefore, respectfully following the order of the co-ordinate Bench (supra), we have to hold that in the absence of certificate prescribed in the statute, the documents such as printouts, are of no legal value and therefore to be ignored.

5.3 With regard to other evidence of electricity consumption, it is not the cases of the Revenue that the appellant's electricity consumption was not disclosed or that the excess consumption of electricity was discovered by the State Electricity Board for which the appellant was fastened with penalty, etc. Moreover, apart from merely alleging that the excess usage of electricity had resulted in more production which was not recorded, the Revenue has not led any positive evidence to prove that the appellant did receive or found with cash which was also not recorded. There is also an allegation with regard to purchase of excess raw materials but, however, there is no positive evidence placed on record as to the excess/un-recorded cash found to have been used for the purchase of alleged excess raw materials nor is there any evidence or even reference to entry of vehicles/trucks into the factory premises for loading of goods thereon, security gate records, statement of lorry drivers, etc., and therefore, the other evidences are also of no weightage to conclusively hold that there is clandestine activities.

5.4 The only other aspect left is the evidentiary value of un-corroborated statements of dealers. The Hon'ble Supreme Court has settled this issue, in the case of *M/s. Andaman Timber Industries Vs. Commissioner of Central Excise, Kolkatta-II* reported in 2015 (324) ELT 641 (S.C.). It is the settled position therefore that a statement which is sought to be used against a person shall be given to the person against whom it is being used, that person should also be provided with an opportunity of cross-examining such other person which is also the requirement of law as well as natural justice. Even though, the cross-examination was sought for, the Revenue not only denied and rejected the appellant's request, but also made use of such un-corroborated statements to demand duty on the allegations of clandestine removal, which is not permissible as held by the Hon'ble Supreme Court in *M/s. Andaman Timber Industries* (supra).

6. For the above reasons, we do not find any reason to sustain the impugned orders as well as demand and therefore the same are set aside. Appeals are allowed with consequential benefits, if any, as per law.

(Order pronounced in the Open Court on 26.04.2019)

(MADHU MOHAN DAMODHAR)
TECHNICAL MEMBER

(P. DINESHA)
JUDICIAL MEMBER

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