IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL SOUTH ZONAL BENCH, CHENNAI

C/230 - 232/2011

(Arising out of Order-in-Original No. 14898/2011 dated 28.02.2011 passed by the Commissioner of Customs (Seaport -Export), Chennai).

1. M/s. Thir'ven Steels Pvt. Ltd. — Appellants
2. Shri A.V. Subba Reddy
3. Shri D. Ramana Reddy

Vs.

CC (Port – Import), Chennai — Respondent

Appearance

Shri S.Jaikumar, Advocate, for the Appellant
Shri K. Veerabhadra Reddy, JC (AR), for the Respondent

CORAM

Hon'ble Shri D.N. PANDA, Judicial Member
Hon'ble Shri DEVENDER SINGH, Technical Member

Date of Hearing: **09.08.2016, 10.08.2016, 11.08.2016, 12.08.2016** and **17.08.2016**

Reserved on: **17.08.2016**

Pronounced on: 19.7.2017

FINAL ORDER NOs. 41246-41248/2017

Per: Devender Singh

On behalf of three appellants viz., **M/s. Thirven Steels Pvt. Ltd, Shri A.V. Subba Reddy,Shri D. Ramana Reddy** in appeal Nos. **C/230 - 232/2011,** ld. Counsel submits that the appellant

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M/s.Thirven Steels Pvt. Ltd., is the manufacturer of MS Ingots, who imported **"Non Alloy Steel melting scrap"** from Singapore during the period **1999 to 2001** in terms of **66 Bills of Entry**. The quantity imported was **1332.4 MTs.** There was claim of Cenvat credit of additional duty of customs of **Rs. 73,53,294/-** paid on such import by the appellant. That was allowed to the appellant in **Excise adjudication order No. 01/2011 dated 27.01.2011.**

1.2 Above imported consignments of scrap were cleared from Chennai Port **availing basic customs duty concession in terms of Notification No. 20/99-cus dated 20.02.99, 16/2000-Cus dated 01.03.2000 and 17/2001-Cus dated 01.03.2001** and were transported to the factory of the appellant at Cuddapah in Andhra Pradesh. However before transportation the goods cleared from the port were first **stored in the godown of Shri Shantilal Kothari at Thondiarpet.** Thereafter the goods were transported to the factory of the appellant and used in the manufacture for which end use certificates were issued by the **Dy. Commissioner Mrs. Parvathi kailasam and those were accepted in the excise proceeding for grant of cenvat credit of additional duty of Customs of Rs.73,53,294/- paid on the imported scrap.**

1.3 The goods imported were purchased by appellant in high seas from **Shri Shantilal Kothari and Pradeep Kabra.** Although Shri Shantilal Kothari and Shri Pradeep Kabra were party in the show cause notice (SCN) dated 31.07.2003, Customs adjudication proceeding against them were dropped. **Revenue alleged that the goods imported were not transported from the godown of Shantilal kothari to the factory of the appellant.** Accordingly the allegation is that such scraps were not used in the

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manufacture, but were diverted elsewhere. Therefore Revenue sought to recover the basic Customs duty forgone by Customs at the time of import due to claim of duty concession under aforesaid Notifications causing loss to the exchequer.

1.4 According to appellants the allegation made as above was merely on the basis of certain statements recorded without any evidence. Even though the appellant provided end use certificate to the department and all the imported scrap were used in the manufacture of its final products, **adjudication was made ex-parte** Wide **adjudication order No.6180/2007 dated 29.03.2007,** without providing relied upon documents to the appellant. When violation of principle of natural justice was challenged before Tribunal in **appeal No.C/297,298 and 299/2007,** the Tribunal by **Final Order No.1440-1442 dated 03.12.2007 remanded** the matter to the adjudicating authority to follow the course of natural justice and providing necessary documents to the appellant shall re-adjudicate the matter in accordance with law.

1.5 Consequent upon remand of the matter by Tribunal as above, **present impugned order No. 14898/2011 dated 28.02.2011 has emerged.** By this order, the Customs Commissioner has denied concession in basic customs duty availed by the appellant and sought **recovery of Customs duty of Rs. 294,35,480/-** with consequence of penalty and interest enumerated in para 22 of the said order.

1.6 Prior to the passing of above readjudication order dated 28.02.2011 the excise Commissioner issued SCN to the appellant on **08.03.2005** and proposed to deny the cenvat credit of additional duty of customs of **Rs.73,53,294/-** paid on the

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imported scraps. On examination of various evidences, the Excise Commissioner dropped the proceedings by **order No. 01/2011 dated 27.01.2011. Revenue did not go in appeal against that order.** Therefore findings there on reached to finality. Whether there was review of that order to file appeal by Revenue or not is not known.

1.7 It was further submission of the appellant that when the imported scrap were found by Excise Commissioner to have been used in the manufacture of final products by the appellant in its factory and allowed Cenvat credit thereon by **adjudication order dated 27.01.2011,** there is no question of denial of basic customs duty concession to the appellant under any suspicion in the Customs proceeding. Dropping of excise proceeding establishes that the imported scrap were received in the factory of the appellant and were not diverted elsewhere. Revenue's allegation of diversion of imported scrap is therefore without any evidence.

2.1 Learned Counsel further submitted that the appellant having succeeded in the excise proceeding (Ref: page 119 to 130 of the appeal folder) accepting the end use certificates issued by the **Dy.Commissioner, Smt. Parvathi Kailasam,** that proves receipt of the imported scrap in the factory of the appellant and use thereof in the manufacture. Accordingly there is no scope to hold otherwise in the customs proceeding. The adjudicating authority extracted the Dy. Commissioner's statement recorded on 28.06.2002 in para 11 of the adjudication order dated 27.01.2011 passed in the excise proceeding.

2.2 The excise Commissioner was of the opinion that the certificates issued by the Dy. Commissioner were based on the records produced by the appellant. The Dy. Commissioner in one or

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two occasions had physically inspected the factory. The Excise Commissioner relied on the decision of the Bangalore Bench of the Tribunal in the case of *Thriven Steels Pvt. Ltd Vs. CC, Cochin*, in appeal No. C/18-19/2006 disposed vide Final order No.676-677/2009 dated 28.05.2009. **In that case the pipes imported by same appellant through Cochin Port were found to have been used in manufacture on the basis of end use certificate issued by the same Deputy Commissioner.** When that order was appealed by appellant on valuation issue, before the Apex Court in civil appeal No.6086-6087/2014, that was dismissed on that account recording no merit in the appeal as reported in 2015 (318) ELT A246 (S.C.). But on all other aspects decided by Tribunal, that was become final.

2.3 Placing reliance on the order of the ld. Excise Commissioner, Chennai, it is the submission of the appellant that when the benefit of Cenvat credit was not denied to the appellant, that establishes that the appellant had used the imported scrap in the manufacture of the final products in its factory in Cuddapah. But the adjudicating Commissioner under customs law although depicted the extract of statements of the Dy. Commissioner recorded on 28.6.2002 in para 12, at page 6 of the **readjudication order dated 28.2.2011,** he disbelieved the appellant's plea of transportation of the scrap through alternate economical routes and held that the scrap upon clearance from Chennai Port, reached the godown of Kothari group of Companies in Chennai, and were not transported to the appellant's factory.

2.4 The investigating authorities made correspondence with the Commercial Tax Officer to ascertain transportation of the goods from Chennai to Cuddapah in A.P. Also certain communications

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were exchanged between them. But the appellant was not confronted with the outcome of the enquiry made with the Commercial Tax Officer. The Customs adjudicating Commissioner denied cross-examination of the Commercial Tax officer.

2.5 When Shri D. Ramana Reddy, Manager of appellant stated in his statement dated 5.3.2002 (in the Mahazar) during investigation that there were two heaps of scrap available in the factory, those were neither weighed by the investigating authorities nor enquiry was made as to whether that consisted the imported scrap.

2.6 Elaborately placing the arguments on paras 10 to 18 of re-adjudication order dealing with finding and conclusion, ld. Counsel submitted his para-wise defence as under:

(a) So far as para-10 is concerned, the issue framed by the adjudicating authority was "whether the importer M/s. Thir'ven Steels Pvt.Ltd., violated the conditions stipulated in the Customs Notification No. 70/99, 16/2000 and 17/2001" and "whether the goods imported by the appellant are liable for confiscation under Section 111 (I) of the Customs Act, 1962" and "that whether the noticees individually are liable to penalty under Section 112 (a) of the said Act". But he proceeded to decide these issues against appellant.

(b) So far as para-11 of the re-adjudication order is concerned there was no defense led.

(c) So far as para-12 is concerned, the re-adjudication order simply relied on the previous adjudication order which was set aside by the Tribunal vide **Final Order No. 1440 – 1442/2007 dated 03.12.2007** and irrelevant considerations were made to drop the charge against **Pradeep Kabra of M/s. Time Enterprises,** and **Shri Shantilal Kothari of M/s.**

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Kothari group of Companies as well as Smt.Parvathi Kailasam, Dy. Commissioner. When **Shri Shantilal Kothari and Shri Pradeep Kabra were issued SCNs, they should have been made party in the fresh readjudication proceedings** consequent upon set aside of the previous adjudication by the above order of the Tribunal. **For no good reason, they were baselessly exonerated from charges by the re-adjudication order.**

(d) So far as para-13 of the re-adjudication order is concerned, the adjudicating authority has dealt the position of law in that para. Therefore, to that extent there is no defence. But so far as the conclusion that the imported goods were diverted is concerned, that was baseless without any evidence to the contrary. The allegations in the SCN were without any substance.

(e) In reply to para-14 of the re-adjudication order, it was submitted that the imported scrap were cleared by the CHA **M/s. ACE Kargoways Pvt. Ltd.** and **M/s. Sri Saravana Shipping** Services. The transporter **Shri Abdul Hakim of M/s. Mercury Transports, Chennai,** transported the goods. The authority without making any enquiry, dropped the proceeding against them. He only held against the appellant that the imported scrap were neither transported to the factory nor used in manufacture by appellant. The adjudicating authority fully relied on the decision of his predecessors in respect of **Shri Shantilal Kothari** and **Shri Pradeep Kabra** even though statements of Sh. Shantilal Kothari and Shri Pradeep Kabra were on record admitting that the goods upon clearance were transported to the godown of M/s. Kamachi Steel Ltd., belonged to the Kothari Group of Companies. There was presumption by the Customs commissioner that the goods without being transported to the factory of the appellant were diverted from the premises of Kothari Group of Companies elsewhere. That Authority recorded in his order that the appellant failed to produce evidence in respect of movement of goods from Chennai to its factory at Cuddappah in A.P, discarding plea of transport through alternate route.

(f) Placing defense on para-15 of the impugned order, it was submitted on behalf of the appellant that when the authority had all the material before him to appreciate that the Dy. Commissioner had issued end-use certificate on the basis of the outcome of her visit to the factory of appellant, the certificate issued by her should not have been discarded.

(g) So far as the defense on para-16 of impugned order is concerned, it was submitted that the outcome of the enquiry made with the Commercial Tax officer, was neither confronted to the appellant nor it was allowed to cross examine that authority. Therefore that evidence cannot be used against the appellant.

2.7 Placing defense on para-17 of the re-adjudication order, it was pleaded by the appellant that truthfulness of the end use certificate cannot be doubted being relied by the excise commissioner and there was no incriminating evidence brought by Revenue on record to discard her certificates. Those certificates were not yet cancelled.

2.8 Defending on para-18 of the readjudication order, ld. Counsel submitted that the imported pipes through Cochin Port was made by same appellant and evidence in both Cases are same. But the Customs commissioner distinguished that without assigning any reason. Order of Bangalore Bench of Tribunal in respect of the above import having reached to finality due to dismissal of Civil

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appeal of Revenue by Apex Court as reported in 2015 (318) ELT A256 (S.C.), the authority has no reason to differ with the principle laid down in the order of Tribunal. In that Cochin import case, the same end-use certificates issued by the same Dy. Commissioner was relevant evidences and were subject matter of scrutiny by CESTAT, Bangalore Bench. Therefore there is nothing to differ with that in the present proceeding.

3.1 Learned Counsel reiterated his stand that end use certificate being genuine and accepted by the Central Excise Commissioner and having evidentiary value, not being cancelled so far, the Customs Commissioner ought not have discarded the same. He submitted that learned Excise Commissioner relied on the Final order of Bangalore Bench of Tribunal order and no different conclusion was drawn by that authority.

3.2 Explaining the findings and observations of the Commissioner in para-19 of the impugned order, it was submitted by the ld. Counsel that the Excise Commissioner's order not being reviewed by the Committee of Commissioner and that being within the knowledge of the adjudicating Commissioner of Customs, he should not have made any contrary finding against appellants in customs proceeding. The end use certificate which were relied in the excise proceedings were good evidence in favour of the appellant and that is even in the Customs proceeding.

3.3 Placing defence on para-20 of the re-adjudication order, ld. Counsel emphasized that the customs Commissioner has exonerated **Mr. Shantilal Kothari** and **Pradeep Kabra**, even though investigation gathered evidence to show that they took delivery of imported scrap and transported to their godown without enquiring where the goods have gone thereafter. **Shri Pradeep**

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Kabra was the owner of **M/s. Time Enterprises** and he was **agent of Shri Shantilal Kothari** who jointly dealt with the imported goods and he being his representative opened the bank account in **Union Bank of India** under the control of **Shri Shantilal Kothari**, and dealt the proceeds of the deals. **Shri Pradeep Kabra** categorically stated in his statement dated 06.09.2002 at page 110 of the appeal folder that he knew the MD of the present appellant i.e., Shri A.V. Subba Reddy, only through **Shri Shantilal Kothari**. But such facts were brushed aside by adjudicating Commissioner.

3.4 Placing the statement recorded from **Shri Shanthilal Kothari** on 06.09.2002, learned Counsel brought out that certain crucial answers were given by Shri Kothari in reply to question Nos. 15, 18, 19& 20 such as **" i do not have any reply"** He only pretended to be innocent to the deal. But he was consciously involved in the import. The Customs Commissioner did not examine his statements at all. But relieved him and Sri Kabra from the charge. **That has caused serious prejudice to the case of the appellant.** The CHA and the transporter were also aware of import of the scrap which went to the Thondiarpet godown of Shri Kothari. That was an undisputed fact. Despite cogent evidence on record imputing Shri Kothari and Shri Kabra, transporter as well as CHA, they were all exonerated from charge unreasonably.

3.5 Analysing the contents of para-21 of the re-adjudication order, it was submitted by the ld. Counsel that the said para dealt with the analysis of law and no argument is required thereon because proposition of law shall apply to the facts and circumstances of the case.

3.6 Placing the statement recorded from Shri Subba Reddy, M.D of appellant on 9.9.2002 copy of which is available at **page 85 to 97 of the appeal folder,** ld. Counsel summarized that the factory of the appellant had under gone industrial and financial sickness. Raising unsecured loan and earning agricultural income, he remitted money for deposit in **Union Bank of India in Chennai** securing assistance of employees of **M/s. Kothari Group of Companies**. Such money were utilized for different payments in Chennai. Factory of the appellant was under compounded levy scheme from 1997 to 2000 and due to industrial sickness, statutory records were not available for production before investigating authority. Those were maintained by the person at Tirupathi including accounts maintained by him. **It was categorically stated by the M.D. that Shri Kothari and Shri Kabra were the mastermind behind the imports and imported goods were transported to the godown of Kothari Group of Companies.** From their godown, the goods went to the appellant's factory through different routes and were used in the manufacture. Because of the sickness of the factory, income tax return could not be filed and also audited balance sheet could not be produced. The appellant has also faced Debt Recovery proceedings being initiated by SBI, Rajampet. Therefore certain crucial answers were given by him to the investigation stating **"no","Ï can't answer" "Ï do not know"** etc. as well as **"I shall produce document within 15 days",** because of the above difficulties of the appellant.

4.1 Learned Counsel summarized his arguments as under:-

(a) Dy. Commissioner's end use certificates were relied in a proceeding before the **Bangalore Bench of Tribunal** in which the appellant was the party and that proceeding went in favour of the

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appellant in terms of **Final Order No. 676 & 677/2009** dated **28.05.2009.** That also **reached finality** due to dismissal of **Civil Appeal** by the Apex Court as reported in **2015 (318) ELT A256** (S.C.). Accordingly that evidence cannot be contradicted in the present proceeding to draw any contrary view.

(b) End use certificate proves receipt of goods by the appellant in its factory and use thereof in manufacture. That satisfies the condition of the imported scrap. The end use certificates were found to be proper by a detailed examination in the excise proceeding of the same appellant in the **order No.01/2011 dated 27.01.2011 (Ref. page 119 of the appeal folder).** Veracity of the certificate in customs proceeding cannot be questioned.

(c) The chronology of the case as argued in the proceeding paras proves manufacture of goods by the appellant using imported scrap and that cannot be undisputed.

(d) The goods manufactured out of use of imported scrap having suffered excise duty, manufacture is not doubtable. That proves receipt of imported goods in the factory and use thereof in manufacture.

(e) The Bangalore Bench decision having reached finality on facts and evidence, that proves no breach of law made by appellant.

(f) The allegation of no transport of goods has no meaning when alternate routes were available to the appellant to transport the goods to factory. Department did not make any enquiry as to transit of goods from the godown of M/s. Kothari Group of Companies to the factory of the appellant although appellant stated the name of the transporter in reply to question No. 59 in his statement at page 93 of the appeal folder. Therefore, transport of imported scrap to factory of appellant is free from doubt.

(g) Transport of goods from the godown of M/s. Kothari Group of Companies was not examined by the investigating team to allege diversion of imported scarp to elsewhere. Accordingly there is no scope to make allegation that the goods did not reach at the **factory of the appellant** in **Cuddappah, in Andhra Pradesh,**

(h) When the Customs Commissioner exonerated **Sri Kothari** and **Sri Kabra** that proves that there was no diversion of goods. Those were reached in the **factory of the appellant in Cudappah in A.P.** and used in manufacture.

(i) Tribunal when made open remand of the case by its order dated: **3/12/2007,** it was open on all issues against all the parties in the SCN, for which the Commissioner of customs should have re-examined all the parties and evidence to ascertain their role in the alleged import and loss of revenue if any, without simply relying on his predecessor's order to exonerate some parties from charge.

(j) M/s. Mercury Transports who transported the goods from the place of import to the godown of M/s. Kothari was not examined but was exonerated from the charge.

(k) When there was no replenishment of the imported stock at any place at any point of time, the allegation of diversion has no basis at all.

In view of the above merits of the appellant, there shall not be penalty on any of the appellants and readjudication is unsustainable both on law and facts.

5.1 Per contra, assailing the arguments of the appellants, ld. DR on behalf of Revenue argued as under:-

(a) The object of the Central Excise Act 19944 and Customs Act, 1962, are to achieve object of the respective statute. Therefore adjudication orders are passed under the provisions of different statutes on different issues, under two different premises of law, jurisdiction and distinct provision of the respective law. **Excise Commissioner was concerned with the controversy on the claim of cenvat credit by M/s. Thriven Steels Pvt Ltd.** That is distinct from the controversy on grant of duty concession availed by the importer appellant. Duty Concession Notification has certain Conditions. Those were violated by the appellate company.

(b) Bill of Entries were filed by the appellant M/s. Thriven Steels Ltd., claiming to be the importer of the imported scrap from the high seas sellers in the course of import for which this appellant is answerable to the allegations in the SCN and is liable to the consequence of re-adjudication

(c) Excise proceeding was completed on the basis of end use certificate obtained fraudulently from the Dy. Commissioner Smt. Parvathi Kailasam and in view of **various incongruity and inconsistency in her statement dated 28.6.2002. Certificates issued by her, are not reliable in the customs proceeding.** Those are liable to be discarded being issued without any basis.

(d) When the appellant gave an undertaking to use the imported scrap in manufacture of the final products, such undertaking was not complied with due to **false end use certificate** adduced by the appellant. **Such certificates were dubiously obtained to defraud Revenue.**

(e) The Dy. Commissioner had issued the end use certificates only on request of the appellant but **not in discharge of her regular official duties in absence of any proof on record of the jurisdictional commissionerate in that behalf.**The Dy. Commissioner had confessed that only when certain records were

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(f) When the end use certificates were not issued in the normal course of discharge of official duty and without any order of higher authority to issue such certificate, that is no evidence in the eyes of law. **Public record not containing such evidence, does not lend support to the case of appellant company.**

(g) Investigation into the factory premises of the appellant on **5.3.2002** revealed that there was closing stock of imported scrap of **3489 MTs** on that date. But that was not available physically for verification. Nothing was proved by the attendant **Shri Ramana Reddy** at the time of search to demonstrate that 3489 MTs of imported scrap was really existing. Two heaps of scrap were shown by him to search party. One of the heaps consisted locally procured scrap without payment of duty as well as unaccounted and the other heap was found to be not consisting imported scrap since the contents thereof were loose and small pieces of metals and rusted paint tins as well as baby food tins of Indian origin.

(h) Investigating team could not find any imported scrap weighing 3489 MTs in the factory of the appellant although that appeared as closing stock in statutory record on 05.03.2002. The RG 23 A register was not disowned by M/s. Thiruven Steel Pvt. Ltd. Accordingly the authority had every reason to believe that the imported stock appearing as closing stock on the date of search was neither in the factory of the appellant nor used in the manufacture of the final products.

(i) Appellant **did not discharge its burden of proof** to show that the imported scraps were received in its factory and were used in the manufacture.

(j) SCN was issued on the basis of material facts and evidence came to the notice of investigation and allegations made were well founded. Production record was not produced before search party for verification of clearances. **No excisable goods were manufactured by appellant using imported scraps.** When appellant **did not come out with clean hands** to produce statutory record for scrutiny, no afterthought pleas of appellant are entertained by Adjudicating Authority.

(k) When no document of imports were available in the searched premises and investigation was answered stating that the documents are with CHA, that proved that the **appellant has never brought imported goods to its factory nor used the same in manufacture.** But were **diverted from the godown of M/s. Kothari Group of Companies** and whereabouts thereof was not made known to investigation. Revenue confronting all such material facts discharged its burden of proof and preponderance of probability was in its favour.

(l) When CHA was examined, he denied possession of the export documents. This amply proved that statement of **Shri Subba Reddy** was false and there was no receipt of imported scraps in the factory of appellant nor used in the manufacture. Although **Bills of Entry had destination as Cuddappah in A.P.,** the imported scrap upon clearance **were unloaded at Thondiarpet, Puzal and Sri Kamatchi Steels premises in Chennai belonging to Kothari Group of Companies. That did not reach the factory of the appellant.** Transport thereof to the factory of the appellant could not be proved by them. That is sufficient proof of pilferage of imported scraps and loss of Public Revenue, deliberately caused by the appellants. Revenue relied on the decision of the Tribunal in the case of CCE, Chandigarh Vs. Kisco Castings – 2010 (261) ELT 90 (Tri.-Del.) to support its contention that **non-receipt of raw materials in the premises of manufacture disentitles it to the benefits granted by law.**

(m) Appellant **failed to prove the transportation of the imported scrap from the godown of Kothari Group of Companies.** Burden of proof was not discharged by the appellant. Therefore, it is **dis-entitled to duty concession.** To support his argument, ld. DR relied on the decision of the Hon'ble Supreme Court in the case of Kanungo & Co. Vs. CC, Calcutta – 1983 (13) ELT1486 (S.C.)

(n) Ld. DR submitted that in absence of transport documents demonstrating the place of origin and destination of goods as well as the mode of transport, appellant's defence **plea that the imported scraps received** in the factory of the appellant and use thereof in manufacture **is baseless. It fabricated documents and engineered the end use certificate to defraud Revenue.**

(o) When the appellant refused to reply to the relevant question in respect of transport of imported scrap from the godown of Kothari Group of Companies, the conclusion that can be drawn is that appellant's pleas are fake. To support its contention, Revenue relied on the decision of the Tribunal, in the case of CC, Mumbai Vs. Nav Maharashtra Chakkan Oil Mills – 2004 (168) ELT 234 (Tri.-Del.).

(p) Appellant's plea that the there were **alternate routes** available for transportation of goods instead of the route touching commercial tax check post **is a futile exercise** in absence of cogent and credible evidence to demonstrate that the goods were transported as claimed by appellant. Enquiry made with the

Commercial Tax Department revealed that not even a single truck carrying any imported scrap had crossed the commercial tax check post route. Appellant failed to adduce any proof to establish its plea for which it was liable to the consequences of adjudication. To support its contention, Revenue relied on the judgement in the case of **Kanungo & Co. Vs. CC, Calcutta- 1983 (13) ELT 1486 (S.C.). According to Revenue, preponderance of probability is in its favour** relying on the decision in the case of CCE Vs. Gujarat Ambuja exports 2016 TIOL – 118-SC-Cus. 2002- TIOL-253-SC-Cus.

(q) When the goods did not reach to the factory of the appellant, **Dy. Commissioner's certificates were proved to be false and Sri Subba Reddy's reply** to the question No. 20 stating that no records other than RG 23A were available in factory premises **corroborated that.** When relevant records were not produced to prove that imported scraps were received in the factory and used in manufacture, appellant was liable to the consequence of re-adjudication.

(r) When the end use certificates were issued by the Dy. Commissioner at the instance of appellant but not on any reference by higher authority of the Department that has no value in the eyes of law. Shri Subba Reddy, M.D. gave evasive reply to the investigating team stating that "I do not know" and like this in reply to various questions. **Dy. Commissioner did not keep any copy of the certificate in office records. Therefore her certificates cannot be relied upon to hold in favour of the appellants**

(s) **Shri Subba Reddy, Shri Kothari and Shri Kabra, were members of the racket to open and operate bank account in Union Bank of India to deceive Revenue** showing that sales proceeds of the manufactured goods using imported scrap were dealt therein. But in reality that it was not so in absence of chain of evidence from the stage of transport of goods to factory till clearance of finished goods established by statutory record. **Money of Shri Kothari and Shri Kabra were only routed through the union bank of India** account to deceive Revenue. They coloured the transaction as if that was sent by Mr. Reddy, the M.D. of the appellant company to deposit in the bank account with the assistance of employees of Shri Kothari.

(t) **Bank transactions made in Union Bank were under forged signature of Shri Reddy** on different cheques as stated by him to investigation on 9.9.2002 Had it been a genuine transaction made by him, he would not have stated so in his deposition. He was **member of evasion racket** and **did not proceed against bank for honouring forged signature cheques. Nor he made any police complaint for investigation.** This establishes he was beneficiary of the fraud kept silence. There were no records available in the searched premises as to the bank deposit made by the appellant in Union Bank. None of the transactions stated in the deposition of Sh. Reddy were proved with basis. Oblique motive of the racket came to broad day light and their questionable modus operandi surfaced. Fabrication of records was proved. Entire racket was actively and consciously involved in defrauding Revenue.

(u) The **facts before the Bangalore Bench were altogether different** and that Bench had decided the issue before it on the arguments advanced by the appellant. Decision was on different analogy to exonerate the Dy. Commissioner from penalty as reported in the case of Smt. Parvathy Kailasam Vs. CCE, Tirupathi –

2010-TIOL-357-CESTAT-Bang. **That has no consequence to the present proceeding. On the plea of exoneration of the Dy. Commissioner on different ground appellant should not get any sympathy and relief in the present appeals when the adjudication is based on evidence.** That is sustainable.

(v) The **re-adjudication is supported by evidence.** That having been made according to the remand direction, the authority has not acted beyond its scope. The parties before the Chennai Bench of Tribunal were only re-adjudicated and consequence of adjudication has rightly flown against them.

5.2 In rejoinder, on behalf of the appellants learned Counsel submits as under:-

(a) The mahazar dated 5.3.2002 shows that two heaps of scrap were available in the searched premises. But the search party did not make any weighment thereof nor also found out physically the contents thereof. They merely relied on the witness of the panchnama. Therefore, Shri Ramana Reddy in his statement dated 5.3.02 in replied to question No. 4 stated that the stock of quantity of imported goods did not exist in the heaps and that was retracted later. Revenue cannot further hold that the heaps contain only indigenous scraps.

(b) The punchnama witnesses were not competent witnesses who merely subscribed to the writings of the search without knowing the truth.

(c) The alternate routes through which the imported materials were transported were not investigated. Department did not find that the goods form M/s. Kothari premises were sold. In absence of any findings of such the sale of the imported scrap form that premises, the inference that can be drawn is that the appellant had taken the goods to its factory.

(d) When the department relied on the statement of transporter i.e., M/s. Mercury Transports, as to the transport of the goods from the Port of clearance to the godown of Shri Kothari in the similar manner, the statement of Shri Subba Reddy, MD, should have been relied. Department did not make any enquiry from the Redhills transporter, although that was informed to them. Preponderance of probability is in favour of appellants and they are covered by the judgment of the Apex Court in the case of *Bhoormal Premchand Vs. CC, Madras* – 2000 (125) ELT 118 (Mad.).

6. While arguing the appeals on penalty imposed on the other two appellants, it is the submission of the ld. Advocate on their behalf that they did not act *malafide* and when the main appellant succeeds on merits, they being neither actively nor consciously involved to cause loss to revenue, should not be penalised. Such submission of the appellants is denied by the Revenue on the ground that they were found to be Conduits for levy of proper penalty under law.

7. Heard the rival submissions and perused the records.

8. The main argument which has repeatedly been adduced by the learned Advocate is that the end use certificate issued by the Deputy Commissioner, Srimati Parvathi Kailasam proves the receipt of the imported scrap in the factory of the appellant and its use in the manufacture. It was contended that the said certificate had been accepted in the excise proceedings relating to denial of cenvat credit on imported scrap wherein the proceedings had been dropped by the Commissioner and no appeal has been filed. According to the appellant, this proves that the goods were

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received in the factory and used there. It was also argued that in another case of import of pipes by the same appellant through Cochin port, the certificate of the same Deputy Commissioner was relied on. It was also argued that in the latter, the appeal of the appellant on valuation issue was dismissed by the Hon'ble Supreme Court, and thus the said order of the Tribunal has become final. We find that the end use certificate issued by the Deputy Commissioner Srimati Parvathi Kailasam is not a reliable document for more than one reason. The Deputy Commissioner has issued end use certificate at the request of the appellant, but not in discharge of her regular duty. No mandatory verification report was called for from the concerned field office. No copy of the certificate was kept in office records and no relevant proof emanated from jurisdictional Commissionerate in that regard. It is also not disputed that the Deputy Commissioner has admitted that she had issued the certificate only on the basis of records presented by the appellants without physically verifying the receipt or use of imported scrap. Destuffing of scrap from the container was not physically verified by the Deputy Commissioner. Besides, there are clear inconsistencies in the statement dated 28.6.2002 of Mrs.Parvathi Kailasam. In her statement dt.28.6.2012, she claims to have visited factory on 16.2.2001 whereas her XT-1 diary entries showed that she attended to office work and night halt at headquarter. Hence, the absence of any public record and the circumstances of its issuance cast a very serious doubt on the validity of the certificate and its reliability as admissible evidence. As to the contention of the appellant that in other proceedings under Central Excise Act or in relation to other goods, namely, pipes, the certificate of the Deputy Commissioner was accepted has to be

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viewed in proper perspective. In this regard, we find force in the contention of Ld.AR that in the Central Excise Act and Customs Act, the adjudications are done under distinct provisions of different statutes under different premises of law in order to effectuate provisions of that Act only. Besides, the standard of burden of proof is different in the case of cenvat credit and in the case of availing exemption notification. It is settled law that the conditions for availing the exemption notification have to be strictly interpreted. Further, acceptance of certificate given by Deputy Commissioner Smt.Kailasam in the import of pipes cannot validate the end-use certificate for other imports. The circumstances of the issuance of this certificate being abnormal and contrary to established procedures with no physical examination of goods raises serious question about its admissibility. In view of these facts, the argument that the certificate should be accepted is not tenable, particularly given dubious methodology of issuance of certificate writ large on the circumstances. Hence, we conclude that the certificate of the Deputy Commissioner Mrs.Parvathi Kailasam is not an admissible piece of evidence.

9. It was argued at one stage that exoneration of Smt. Kailasam from penalty proceedings by the Tribunal Bench in Bangalore proves that end use certificate issued by her can be accepted. We find that the main basis of examination was whether there was *mens rea* in her action or not. Any finding on that fact cannot take away from the entire set of evidences in the present proceedings, which point to issuance of a dubious end use certificate

10. We find that the investigating team during their visit on 5.3.2002 could not find any imported scrap in the factory of the

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appellant even though RG-23A Part I register reflected the closing balance as 3489 MT. However, the said quantity of imported scrap was not available physically for verification. At no stage, the RG-23A register has been disowned or disputed by the appellant. The representative of the appellant, Shri D.Ramana Reddy who was present at the time of search failed to demonstrate that 3489 MT of imported scrap actually existed. He showed two heaps of scrap to the search team. One heap consisted of locally procured scrap without payment of duty for which no account was maintained and the other heap which he showed consisted of loose and small pieces of metals and rusted tins of paint and baby food tins of Indian origin. Thus verification by investigation team showed that the closing stock of imported scrap was not there on the day of search. We are not convinced by the argument that panchnama witnesses were not competent witnesses who subscribed to the panchnama without knowing the truth. Panchas do not have to be experts in a field. They have to be independent and neutral, which is not proved otherwise in this case.

11. We also find it strange that the appellant failed to produce production records before the search party for verification of any clearance. No proof was shown that the imported scrap was received in the factory and used in the manufacture. As a matter of fact, no document of import was available in the said premises and the investigating team were told that the documents were with the CHA. When the CHA was examined, he denied the possession of the said documents. Thus, the appellant not only could not produce the documents, they also tried to mislead the investigating team. This shows that the statement of Shri A.V.Subba Reddy, MD of the appellant company was false and misleading.

12. The appellants have argued that there was presumption by the Customs Commissioner that the goods without being transported to the factory of the appellant were diverted from the premises of Kothari Group of Companies or elsewhere. The plea of the appellant is that the goods were transported through alternate routes, which were economic for them. We find that the appellant have failed to substantiate transport of the imported scrap from godown of Kothari Group of Companies. While the bills of entry had destination as Cuddapah in Andhra Pradesh, imported scrap after clearance appears to have been unloaded in godown at Thondiarpet and M/s.Kamachi Steels in Chennai, which belonged to Kothari group of Companies. Transport from those premises to the factory of the appellant has not been proved or documented by them. Since it was a question of availment of exemption notification, burden of proof was squarely on the appellant, which was not discharged. Although they have been at great pains to point out alternate routes where commercial tax may not be payable, the appellant failed to produce even a single piece of document to show as to how such a massive quantity of 15000 tons was transported from godown of Kothari Group of Companies to their factory. In their statement, they assured the Central excise authorities that they would submit these documents but nothing has been submitted to substantiate their claim. Absence of even a scintilla of evidence to corroborate the appellant's claim of transport of 15000 tons to their factory from the said godown strongly goes against the truthfulness of their claim of transporting the goods via alternate routes or in any manner. The enquiries made with the commercial tax department have established that not even a single truck carrying any imported scrap had crossed

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Customs, Excise & Service Tax Appellate Tribunal commercial check post. In this regard, in an identical case where the benefit of customs duty in terms of notification no.17/01-Cus was availed for import of scrap and subject to use of goods in question in concerned unit, this Tribunal has held that when there is no material on record to reveal that the authority issuing end use certificate had occasion for physical verification of the material or utilization thereof, such end use certificate cannot by itself establish actual use of material and the onus shifts to the respondent to establish transport of material, (CCE, Chandigarh vs.Kisco Castings, 2010 (261) ELT 190 (Tri.-Del.) Hence, in this case, the burden was evidently on the appellant to establish true state of affairs in relation to transport of imported scrap. This burden was not discharged by the appellant and therefore, they are not entitled to the duty concession. The argument of appellant that Abdul Hakim only took cash and hence there were no lorry receipts does not wash as payment in cash does not *ipso facto* preclude issuance of lorry receipt. Besides, Abdul hakim categorically denied transporting goods to Cudappah. We also find that documents submitted by Abdul Hakim show that Mercury Transport handled the consignments of M/s Thirven Steels Pvt ltd for transport to local destinations. Transport charges of Rs 1400 per container is also consistent with local transportation charges. In fact, in the absence of transport documents showing place of removal, origin and destination of the goods, and mode of transport and details of carrier, the appellant's plea that imported scrap reached their factory and was used in the manufacture appears to be bogus. Their claim that they would produce documents to substantiate transport of the goods was also a bogus claim. During recording of the statement, the appellant refused to reply to the question

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pertaining to the transport of imported scrap and did not back up their claim with any positive piece of evidence. In the case of CCE, Import, Mumbai vs. Nav Maharashtra Chakkan Oil Mlls-2004 (168) ELT 234 (Tri.-Del.), this tribunal has held that when a person in possession refuses or fails to produce the best evidence in support of a claim, conclusion to be drawn is that claim is unfounded or false.

13. As for cross examination of the Commercial tax officer, no prejudice has been caused to the appellants as their own claim is that they transported entire 15,000 tons via alternate routes. Further, in the case of Kanungo & Co. vs. Collector of Customs, Calcutta-1983 (13) ELT 1486 (SC), Hon'ble Supreme Court has held as below:

> ***12.*** *We may first deal with the question of breach of natural justice. On the material on record, in our opinion, there has been no such breach. In the show cause notice issued on August 21, 1961, all the materials on which the Customs Authorities have relied was set out and it was then for the appellant to give a suitable explanation. The complaint of the appellant now is that all the persons from whom enquiries were alleged to have been made by the authorities should have been produced to enable it to cross-examine them. In our opinion, the principles of natural justice do not require that in matters like this the persons who have given information should be examined in the presence of the appellant or should be allowed to be cross-examined by them on the statements made before the Customs Authorities. Accordingly we hold that there is no force in the third contention of the appellant.*

Hence, we find no infirmity in the denial of cross examination of commercial tax officer in the facts and circumstances of this case.

14. At one stage, learned Advocate for the appellant submitted that diversion, if any happened, it happened in Kothari godown and not at the factory. It was argued that the Commissioner had exonerated Shri Shantilal Kothari and Pradeep Kabra, even though the investigation showed that they had taken the delivery of the

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imported scrap and transported the same to their godown without enquiring where the goods have gone thereafter. Shri Pradeep Kabra was an agent of Shri Shantilal Kothari and under his control. In his statement dated 6.9.2002, Shri Kabra stated that he knew, MD of the appellant, Shri A.V. Shri Subba Reddy only through Sh. Kothari. He also referred to the evasive reply of Shri Kothari to certain questions and claimed that he was consciously involved in the import. Likewise CHA and transporter were also aware of the import of scrap which went to Thondiarpet. Hence it was argued that exonerating these people is unreasonable and prejudicial to the appellant. We find that the above claim of the appellant is based on assumptions and presumptions. Admittedly, the responsibility for the receipt and use in the manufacture of imported scrap lies with the importer, who are availing the benefit of exemption notification. The role of above persons has been duly analyzed by the Commissioner. It is for the appellant to show that the goods which were delivered at the premises of Kothari Group of Companies were actually transported to their factory. The facts that since Shri Kabra was an agent of Shri Kothari and knew Shri A.V. Subba Reddy through Sh.Kothari are inadequate to form any conclusion. It is also difficult to accept that their exoneration has been prejudicial to the case of the appellants, especially when they are unable to produce any reliable evidence of transport and use of imported scrap in their factory.

15. The appellant have also argued that there has been no enquiry for transport of the goods from Kothari godown to the factory nor source of replenishment was investigated. In this regard, we find that the present case is about availment of duty exemption for the basic customs duty. In the case of availment of

exemption the burden is on the importer to prove that the goods have actually been received in the factory and used for manufacture. We find that the appellants have failed to discharge that burden.

16. We also find that the bank transactions in the Union Bank of India UBI) account were made under forged signature of Shri Subba Reddy on different cheques as informed by him in his statement dated 9.9.2002. The said account was opened with the help of Shri Shantilal Kothari and appears to have been a ploy to show that the sale proceeds of manufactured goods using imported scrap were deposited there. Mr. Subba Reddy claimed that the cash deposited was unsecured loan obtained from friends and money from agricultural income. But the names and details of the said friends were never submitted and this account was never submitted to the income authorities. Besides, operation of account of UBI was not reflected in the balance sheet. Shri Subba Reddy claimed that the amount deposited in UBI was used for raw material and petty expenses. We find it strange that despite the bank transactions having been made under forged signature of Mr. Subba Reddy, no action was taken by him against the bank or by way of police complaint. Only a beneficiary of fraud would keep silent in such a situation. We also note that none of the transactions stated in the deposition of Mr.Reddy were proven by facts. All the above facts indicate that the so-called bank transactions were an elaborate modus operandi to camouflage their misuse of notification.

17. The appellant have relied on the case law of Bhoormal Premchand vs. CC, Madras – 2000 (125) ELT 118 (Mad.) to argue

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hat preponderance of the probability was in their favour. On analysis of relevant facts and circumstances, we are not in agreement with this proposition. On the contrary, we find that Revenue has proved that there is much higher probability of goods not having reached the factory and not used for manufacture in the factory of the appellant.

18 In view of foregoing discussion and findings, we find that the impugned goods never reached the factory of the appellant and were not used in the factory for intended manufacture. As a result, the appellant failed to fulfil the condition of the notifications mentioned in the show cause notice rendering the goods liable to confiscation. Commissioner has therefore rightly confirmed the demand of duty from appellant no1 and imposed penalty on appellant no 1. We also find that the role of Shri A.V. Subba Reddy and Sh.D.Ramana Reddy in diversion of the impugned goods and rendering them liable to confiscation has been correctly analysed by the Ld. Commissioner in para 20 and 21 of the impugned order. Penalties imposed against both of them are also upheld.

19. In view of the above, we find no infirmity in the order the Ld. Commissioner and no merit in the appeals of the appellants.

20. In the result, all the three appeals are dismissed.

(Pronounced in the open court on 19.7.2017)

30/06/2017

(D.N.PANDA)
JUDICIAL MEMBER

D. Singh
(DEVENDER SINGH)
TECHNICAL MEMBER

KSR / Mahesh

Customs, Excise & Service Tax Appellate Tribunal

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