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

E/00395,00396/2006

[Arising out of Order-in-Original No.9/2006, dated 31.01.2006 passed by the Commissioner of Central Excise, Chennai]

M/s.JAIBHAVANI STEEL ENTERPRISES (P) LTD. APPELLANT/S
ASHOK SARAF

Versus

COMMISSIONER OF CENTRAL EXCISE, CHENNAI-II RESPONDENT

Appearance:

For the Appellant Shri G. Natarajan, Adv.
For the Respondent Shri R. Subramaniyan, AC (AR)

CORAM:

Hon'ble Smt. Archana Wadhwa, Member (Judicial)

Date of hearing **03-07-2017**
Date of pronouncement 06-07-2017

FINAL ORDER NO. 41142 - 41143/2017

Per Archana Wadhwa:

Both the appeals are being disposed by a common order as they arise out of the same impugned order of the Commissioner, vide which he has confirmed demand of duty of Rs.15,01,046/- [Rupees Fifteen Lakhs One Thousand and Forty Six only] against M/s. Jai Bhavani Steel Enterprises (P) Ltd., (hereinafter referred to as "JBSE") along with imposition of penalty of Rs.3,00,000 (Rupees Three Lakhs only) imposed under Rule 173Q of Central Excise Rules, 1944 along with imposition of penalty of Rs.20,000/- [Rupees Two Thousand only] stand imposed on them in terms of Rule 226 of the said rules. Further penalty of Rs.60,000/- [Rupees Sixty Thousand only]stand imposed on the other appellant Shri Ashok Saraf, Managing Director of JBSE under Rule 209A of the Central Excise Rules, 1944.

2. As per facts on records M/s. JBSE is engaged in the manufacture of M.S. Ingots falling under Chapter 72 of the Central Excise Tariff Act, 1985. Their factory was visited by the Central Excise officers on 12.11.1990, who conducted various checks and verifications. On scrutiny of the records maintained by the said manufacturing Unit, it was found that they were maintaining Outgoing Material Register as also Private Gate Pass Register. Comparison of the entries made in the said private records with the statutory records revealed that the entries made therein were not reflected in the statutory registers maintained by the appellant. By entertaining a view that the appellant was indulging in clandestine activities, the relevant records were seized. Further, the Dispatch Register and Receipt Register maintained in the factory as also in the Head Office were also seized by the officers.

3. During the post seizure investigations, statements of various persons were recorded. Shri Ashok Saraf, Managing Director of M/s. JBSE in his statement recorded on 14.11.1990 admitted that the entries made in the Private Gate Pass and Outgoing Material Register were in respect of their final product actually cleared from their factory without payment of duty and without reflecting the same in the statutory records. It was also deposed that the expression *"w/o"* mentioned in the said records means — "without payment of duty". Though, the said statement of Shri Ashok Saraf was subsequently retracted by him vide his letter dated 15.11.1990 but the said Shri Ashok Saraf again on 21.11.1990 deposed that the said retraction may

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not be taken cognizance of and he agrees with the statement made by his clerk Shri V. Suresh and also with the statement of the Quality Controller Shri Jacbo Raja of M/s. Sree Ganesh Steel Rolling Mills to whom the clandestinely removed goods were supplied.

3.1 During the course of investigation, statement of Shri R.S. Mishra, Supervisor of the said appellant as also of Shri Sadasivam Pillai, Security Officer was recorded, wherein, they admitted to have cleared the goods mentioned in the said Private Gate Passes as also in the Outgoing Material Register, without payment of duty. It was also seen that during the year 1988-89 and 1990-91, the appellant had received a sizeable quantity of raw material i.e., Waste and Scrap, which was not entered in the statutory records.

4. Based upon the evidences collected by Revenue, proceedings were initiated against the appellants by way of issuance of show-cause notice dated 03.09.1991, alleging clandestine removals with a proposal to confirm the demand of duty against them as also for imposition of penalties. The said notice culminated into an order passed by the Commissioner, confirming the allegations and the proposals made in the show-cause notice.

4.1 The said Order dated 29.05.1992 was appealed against by the appellant before Tribunal, who vide their Order dated 20.03.1996 remanded the matter to the original adjudicating authority with directions to look into the explanation given by the appellant as regards the receipt of the alleged excess waste and scrap. The matter was taken up by the adjudicating authority in terms of the said remand order of the Tribunal and vide Order-in-Original dated 17.10.2001, the demand was again confirmed along with imposition of penalties. On taking up the matter in appeal before Tribunal, the CESTAT vide its Final Order dated 21.08.2003 observed that the directions contained in the first remand order do not stand complied with by the adjudicating authority while passing the order in remand proceedings. As such, the matter was once again sent back to the adjudicating authority re-decide the same. The present impugned order stands passed by the adjudicating authority in remand, following the directions contained in the Tribunal's order.

5. Shri G. Natarajan, Advocate appearing for the appellant submits that the entire case of the Revenue is based upon the excess receipt of the raw materials i.e., Waste and Scrap. He has produced a chart explaining the discrepancies pointed out by the Revenue in respect of waste and scrap. Learned advocate submits that unaccounted raw material received by them during the period 1998-99 to 2000-01 was to the extent 6695.785 Metric Tonnes. They had already produced before the adjudicating authority the break-up of the said scrap along with the treatment of the same. According to the learned advocate, the said excess is on account of the fact that certain double entries were made in the private records as regards receipt of the scrap. Further, a part of the scrap received by them were cleared "as such" and accordingly, cannot be held to be unaccounted and unexplained stock of the scrap which has been used by them in the manufacture of the final products. It is the contention of the learned advocate that inasmuch as, they had explained the usage of the entire scrap and inasmuch as, [except a small quantity] and the Commissioner has accepted their contentions of removal of scrap "as such" and double entries, the confirmation of demand on the said

ground is not justified. He also submits that the Commissioner, instead of looking into the cumulative differences of the scrap quantity as explained by the appellant, has observed that if year-wise details are examined there is a huge unexplained receipt of raw materials. Accordingly, he prays that the appellant having explained the usage of the entire unaccounted raw material alleged to have been received by them, the adjudicating authority was not justified in confirming the demand on the findings of clandestine manufacture and removed of their final products. He, accordingly, prays for the setting aside the impugned order.

6. Learned Shri R. Subramaniyan, AC (AR) appearing for the Revenue has drawn my attention to the detailed findings given by the Commissioner and submits that the Revenue's case is not based only on unaccounted receipt of raw material but the adjudicating authority has primarily gone by the "Private Gate Passes" and entries made by the appellant in the "Outgoing Material Register". The said details contain all the relevant facts such as date of dispatch, description of goods, weight of the material, parties name and dispatch challan nos. etc. The said entries also stand accepted not only by the Managing Director but also by other representatives of the appellants. The appellant, at no stage have disputed the said entries and have not raised any arguments as to why the same should not be taken as entries of clandestine removal. In absence of any challenge to the said entries, the findings arrived at by the adjudicating authority cannot be held to be perverse. Accordingly, he prays for upholding the order and rejecting the appeals.

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7. In his rejoinder, learned advocate Shri G. Natarajan, when questioned about the entries in the "Outgoing Material Register" and the "Private Gate Passes" fairly agreed that there is no explanation given from the appellant as regards the said entries.

8. After going through the impugned order and after appreciating the submissions made by both the sides, I find that the Revenue's case is primarily and mainly based upon the entries made in the "Private Gate Passes" and the "Outgoing Material Register". Admittedly, such entries contained all the relevant particulars concerning the removal of the goods. The "Private Gate Passes" prepared by the appellant indicate all the particulars required to be indicated in the Central Excise Invoices/Gate Passes. The Managing Director of the appellant-Company, in his initial statement has admitted that such gate passes stand used by them for removal of their final product without reflecting the same in their statutory records. Not only that the expression *"w/o"* mentioned in the said gate passes also stand explained by Shri Ashok Saraf has meaning "without payment of duty". The statements of his employees including the Supervisor corroborated the statement of Shri Ashok Saraf. As rightly observed by the adjudicating authority, that even though the first statement was subsequently retracted by Shri Ashok Saraf but such retraction is of no consequence as Shri Ashok Saraf himself in his subsequent statement admitted the initial facts disclosed by him in his first statement and also submitted that retraction may be considered to be of no consequence.

9. The contention of the appellant that the duty demand stands raised on the basis of the unaccounted and unexplained excess raw

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material is not factually correct. The reference to the unaccounted raw material is only with an intention to corroborate the allegation and charge of clandestine manufacture and removal of the final product. On going through the order, I find that the findings of the adjudicating authority are based upon the entries in the private records and not on the basis of the excess raw materials. As such, the explanation rendered by the appellant in respect of such excess raw materials is of no consequence as long as the appellant have not explained the entries made in the "Private Gate Passes" and "Outgoing Material Register". The adjudicating has rightly observed that the appellant has neither disowned the said entries nor have uttered a word against the same in the reply to the show-cause notice, either at the stage of original adjudication or during the appellate proceedings. The fact that Shri Ashok Saraf admitted the said entries along the admission of Supervisor responsible for preparing the "Private Gate Passes" along with the fact that "*w/o*" stand explained as "without payment read with statement of the recipient of the goods" only point out to one fact that the appellant was indulging in clandestine activities.

10. Further, it is seen that the said clandestine removal of goods, were mainly and in majority of the cases was supplied to one M/s. Sree Ganesh Steel Rolling Mills [hereinafter referred to as "Sree Ganesh"] who is engaged in the manufacture of CTD bars and is the appellant's own rolling mills. Shri Jacob Raja, Quality Controller of M/s. Sree Ganesh in his statement had clearly deposed that they have received number of consignments from M/s. JBSE without payment of duty. The said statement does not stand retracted and the appellant has even not requested for the cross-examination of Shri Jacob Raja to

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test the veracity of his statement. In view of the fact that M/s. Sree Ganesh is the appellant's own Unit, the appellant's contention that there is no proof of receipt of consideration for the said unaccounted supply of final product, does not carry much weight. Even though, the charges of clandestine removal are required to be established by the Revenue by production of sufficient tangible evidences but the acceptance of such evidences, depends upon the facts of each and every case. In my view, the appellant having not challenged and contested the entries made in the private records which stand corroborated by the recipient of the goods along with fact of findings of unaccounted excess raw materials inspire confidence in the Revenue's case. As such, I find no infirmity in the impugned order. Accordingly, the confirmation to demand of duty is upheld.

11. As regards, the penalties, I find that the same are on the lower side and require no interference by the Tribunal. Similarly, penalty imposed upon Shri Ashok Saraf is proper and appropriate inasmuch as, the entire evidences on record lead to the factum of involvement of the Managing Director in such clandestine activities of the manufacturing Unit.

12. In view of the above, I find no justifiable reasons to interfere in the impugned order. Accordingly, the same is upheld and both the appeals are rejected.

(To be pronounced in open court on 6/7/17

5/7/17

(ARCHANA WADHWA)
MEMBER (JUDICIAL)

ksr
05-07-2017

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प्रमाणित प्रति / Certified True Copy
3/1/17
सहायक पंजीकार / Asst. Registrar
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चेन्नै / Chennai