CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH – COURT NO. – IV

Excise Appeal No. 51631 of 2018 [SM]

[Arising out of Order-in-Appeal No.82 (RK)CE/JPR/2017-18 dated 28.03.2018 passed by the Commissioner (Appeals), Central Excise & CGST, Jaipur]

M/s.Jagdamba TMT Mills Ltd. **...Appellant**
Plot No.A-127-128A, S.K.S. Industrial Area,
Reengus-332404, Dist.-Sikar

VERSUS

Commissioner
Central Excise & CGST, Jaipur **...Respondent**
NCRB, Statute Circle, Jaipur-302005.

WITH

Excise Appeal No. 51950 of 2018 [SM]

[Arising out of Order-in-Appeal No.141-142 (SJ) CE/JPR/2018 dated 29.05.2018 passed by the Commissioner (Appeals), Central Excise & CGST, Jaipur]

M/s.B.L. Gupta, Director of
M/s. Jagdamba Ispat **...Appellant**
Plot No.A-338 C, Road No.17-1218A, VKI, Jaipur

VERSUS

Commissioner of Central Excise & CGST, Jaipur ...Respondent

AND

Excise Appeal No. 52027 of 2018 [SM]

[Arising out of Order-in-Appeal No.141-142 (SJ) CE/JPR/2018 dated 29.05.2018 passed by the Commissioner (Appeals), Central Excise & CGST, Jaipur]

M/s.Jagdamba Ispat **...Appellant**
Plot No.A-338 C, Road No.17-128A, VKI, Jaipur

VERSUS

Commissioner of Central Excise & CGST, Jaipur ...Respondent

APPEARANCE:

Shri Jayant Kumar & Shri Anirudh Samantarey, Advocates for the Appellant
Shri K. Poddar, Authorised Representative for the Respondent

Coram: HON'BLE MRS. RACHNA GUPTA, MEMBER (JUDICIAL)

FINAL ORDER No. 51303-51305/2019

DATE OF HEARING : 05.09.2019
DATE OF DECISION: 10.10.2019

RACHNA GUPTA:

Present order disposes of 3 appeals, as the issue involved being common and appellants being the co-noticees. The details of three of these appeals are as follows:-

Sl. No	Appeal No. and name of appellant	S.C.N. No. & Date	Period	Demand	O-I-O No. & Date	O-I-A No. & Date	Remarks
1	Excise Appeal No. 51631 of 2018 [SM] M/s.Jagdamba TMT Mills Ltd.	V(H) Adj.-1/CE-72/162/2012 Dated 23.12.2012	2009-10 & 2010-11	Rs.22,88,508/-	16/CE/Demand/2016-17	No.82 (RK)CE/JPR/2017-18 dated 28.03.2018	Appeal dismissed
2.	Excise Appeal No. 51950 of 2018 [SM] M/s.B.L. Gupta, Director of M/s. Jagdamba Ispat	IV (H) Adj.-I/CE-72/161/2012 dated 29.10.2014	2009-10 & 2010-11	Rs.2,00,000/-	14 to 16/2016-17 dated 14/16.06.2016	141-142 (SJ) CE/JPR/2018 dated 29.05.2018	Appeal dismissed
3.	Excise Appeal No. 52027 of 2018 [SM] M/s.Jagdamba Ispat	IV (H) Adj.-I/CE-72/161/2012 dated 29.10.2014	2009-10 & 2010-11	Rs.19,26,012 & Penalty Rs.5,00,000/-	14 to 16/2016-17 dated 14/16.06.2016	141-142 (SJ) CE/JPR/2018 dated 29.05.2018	Appeal dismissed

The Order-in-Appeals have been challenged by the appellants mainly on two counts:-

1. That the persons whose statements have been relied upon by the adjudicating authority were not allowed to be cross examined by the appellant
2. There is no evidence produced by the Department to prove the allegation that M/s. Isha Enterprises has fraudulently passed on the Cenvat Credit to the various manufacturers alongwith the appellants.

2. The appellants herein are engaged in manufacture of MS Ingots and MS Bars. The Department observed that appellants

have fraudulently availed cenvat credit of the amount as mentioned above based on the cenvatable invoices issued by M/s. Isha Enterprises in favour of the various dealers including the appellants without supplying any goods as mentioned therein.

3. I have heard Shri Jayant Kumar, ld. Advocate for the Appellant and Shri K. Poddar, ld. Authorised Representative for the Department.

4. It is submitted on behalf of the appellant that passing of cenvat credit without actual delivery of goods is a positive act, which is required to be proved by tangible, direct reliable and affirmative evidences but the demand in this case is based only on some handwritten Ledger Accounts and slip-pads allegedly seized from the house of Mr. Baldev Raj Bhatia. It is impressed upon that the documents were collected from the appellants' premises as well which rather prove that the goods were actually received by the appellant. It is further submitted that appellants made a request for cross-examination of witnesses whose statements have been relied upon by the adjudicating authority. The same has also been acknowledged by the Department not only in their inward register but also in the order under challenge. The absence of such opportunity supports has relied the appellants' case while relying upon the following case laws:-

1. Andaman Timber Industries v. Commissioenr of Central Excise, Kolkata-II [2015 (324) ELT 641 (SC)]

2. Kishinchand Chellaram v. CIT, Bombay [AIR 1980 SC 2117]

3. CCE v. Parmarth Iron Pvt. Ltd. [2010 (260) ELT 514 (All.)]

4. Monarch Metals P. Ltd. v. Commissioner of C. Ex., Ahmedabad [2010 (261) ELT 508 (Tri.-Admd.)] affirmed in 2014(34) STR 155 (Guj.)

Orders under challenge are prayed to be set aside and Appeals are prayed to be allowed.

5. While rebutting these arguments, ld. D.R. has mentioned that order has been passed on such an evidence which has sufficient degree of preponderance about the existence of the alleged fact. Otherwise also the burden to establish eligibility to the credit was on the appellants. They have failed to discharge the said liability. Adverse inference against them has rightly been taken. Finally relying upon **AN Guha & Co. vs. Collector reported in 1996 (086) ELT 333** that the Department has not to establish a fact with mathematical procession. That orders under challenge are prayed to be upheld and appeals to be dismissed.

6. After hearing both the parties, the grounds of challenging the Orders-in-Appeal are decided as follows:-

(A) The denial of opportunity to cross-examine to cross-examine the witnesses by the Adjudicating Authority:

The statements of witnesses namely Mr. Jadish Lal Bhatia & Mr. Gulshan Bhatia both partners of M/s. Isha Enterprises were made the basis of the impugned order alongwith the documents as were recovered from the house of Baldev Raj Bhatia, a relative of above two witnesses. Admittedly neither both the witnesses were allowed to be cross-examined by the appellant nor the opportunity to confront those documents was given. I am of the opinion that same amounts to a serious flaw which makes the order under challenge nullity inasmuch as it amounted to violation of principles of natural justice because of which the assessee was adversely affected. Even when the assessee disputed the correctness of the statements and wanted to cross-examine, the Adjudicating Authority did not grant this opportunity to the assessee. It would be pertinent to note that in the impugned order passed by the Adjudicating Authority he has specifically mentioned that such an opportunity was sought by the assessee. However, no such opportunity was granted and the aforesaid plea is not even dealt with by the Adjudicating Authority. It is observed that both the witnesses have made several improvements in their testimony. The reliability thereupon otherwise stands diluted.

I further observe that the original adjudicating authority has recorded that no request for cross-examination was at all made whereas Commissioner (Appeals) has justified the denial on the ground that the witness who were prayed to be cross-examined, their statements were never retracted rather the proposed demand and the duty liabilities thereof stands already discharged, that too, voluntarily. Law has also been settled that payment of duty under protest does not estoppes the assessee from challenging the illegality. I, therefore, hold that the improved statements of the witnesses without them being cross-examined by the assessee cannot form the basis of confirming the demand against the assessee. Admittedly none of those witnesses are from appellant's company. The evidence otherwise becomes a third party evidence with no cogent corroboration from appellants.

(B) Now coming to the issue of lack of evidence:

The Department has alleged that appellants have fraudulently availed cenvat credit on such invoices along which there was no delivery of goods. This Tribunal in the case of **M/s. Lloyds Metal Engineering Ltd. vs. CCE, Mumbai reported in 2004 (175) ELT 132 (Tribunal)** has held that burden to prove the non-receipt of inputs is required to be discharged by Revenue by producing sufficient evidence. If there is no such evidence, credit availed on the basis of invoices issued by the Registered dealers cannot be denied on the ground that the transporters have admitted the fact of non-transportation of goods. It was followed in the case of **M/s. Shri Jagadamba Castings Pvt. Ltd. vs. CCE, Bhopal Reported in 2006 (206) ELT 695 (Tri.-Del.)**. Tribunal Bangalore in the case of **Veer-O- Metals Pvt. Ltd. vs. Commissioner of Central Excise, Bangalore-III [2016 (3312) ELT 475 (Tri.- Bang)]** has held that when Revenue has not made any enquiries from the Centre of the inputs as reflected in the invoice. On the contrary, the appellants have recorded the invoices, inputs along the available cenvat credit in their statutory records the credit cannot be denied on the sole ground that there was no corresponding GRs specially when the appellant has explained that out of huge number of invoices being received by them such non maintenance or non-availability of GRs cannot be held to be leading to the conclusive finding of non-receipt of inputs.

9. Present is not the case of ‘No GRs’ but out of 75 objected GRs, the appellant had already provided 33 GRs to the Department. Department has not raised any dispute qua those GRs. The absence of remaining GRs is not that relevant specially when the appellants have given the explanation that the delivery was at times on FOR basis and at times otherwise, that is, whenever

appellants had to make the payment they were receiving GRs whereas when the payment was made by M/s.Isha Enterprises, the receipts would have been retained by them. Admittedly, no investigation with M/s. Isha Enterprises has ever been done by the Department to this aspect, except recording the statements of both the partners thereof. The admission coming out of from both the said statements is the sole basis to adjudicate against the present appellants. I am of the opinion that the adjudicating authority has committed an error because the admission of the maker though can be used against the maker thereof but cannot be used against any other person, except after the said other person is provided an opportunity to cross-examine the maker of admission. As already discussed above, no such opportunity was provided. There seems no justification for remanding the matter to grant an opportunity to the appellants to cross-examine those witnesses because there is no other documentary evidence produced on record by the department to rebut the documents of appellants as that of invoices, GRs etc. which have presumption of correctness attached Annexure to show cause notice clarifies that the sole adjudication is based upon the oral testimonies. Thus, the order under challenge is passed under ignorance of the documents which already supports the appellant contentions and are sufficient to falsify the allegations of cenvatable invoices being received by appellant without delivery of goods.

10. In view of entire above discussion, I hold that the orders under challenge have not stand the scrutiny of settled principle of

law. Accordingly, are hereby set aside. Three of the appeals therefore, stand allowed.

[Order pronounced in the open Court on 10.10.2019]

(RACHNA GUPTA)
MEMBER (JUDICIAL)

Anita