CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

NEW DELHI

PRINCIPAL BENCH – COURT NO. – IV

Excise Appeal No. 50123 of 2019 [SM]

[Arising out of Order-in-Appeal No. 493-495 (SM) CE/JPR/2018 dated 27.11.2018 passed by the Commissioner (Appeals), Central Excise & CGST, Jaipur]

(1) **Shri Pawan Bansal Director of**
M/s. Shree Jagdamba Casting Pvt. Ltd. **...Appellant**
E-803, RIICO Industrial Area,
Phase-II, Bhiwadi, Distt. Alwar,
Rajasthan

VERSUS

Commissioner of Central Excise, Alwar **...Respondent**
Alwar, Rajasthan

WITH

Excise Appeal No. 50124 of 2019 [SM]

[Arising out of Order-in-Appeal No. 493-495 (SM) CE/JPR/2018 dated 27.11.2018 passed by the Commissioner (Appeals), Central Excise & CGST, Jaipur]

(2) **M/s. Shree Jagdamba Casting Pvt. Ltd.** **...Appellant**
E-803, RIICO Industrial Area,
Phase-II, Bhiwadi, Distt. Alwar,
Rajasthan

VERSUS

Commissioner of Central Excise, Alwar **...Respondent**
Alwar, Rajasthan

AND

Excise Appeal No. 50273 of 2019 [SM]

[Arising out of Order-in-Appeal No. 493-495 (SM) CE/JPR/2018 dated 27.11.2018 passed by the Commissioner (Appeals), Central Excise & CGST, Jaipur]

(3) **M/s.Bhiwadi Rolling Mills Pvt. Ltd.** **...Appellant**
C/o.Naveen Bindal, 2307/1, Sector 38-C,
Chandigarh

VERSUS

Commissioner of Central Excise, Alwar **...Respondent**
Alwar, Rajasthan

APPEARANCE:

Mr. Santhanam, Advocate for the Appellant No. 1 & 2
Ms. Jwaria Kainaat, Advocate for the Appellant No.3
Mr.K. Poddar, Authorised Representative for the Respondent

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

FINAL ORDER Nos. 51733-51735/2019

DATE OF HEARING : 13.11.2019
DATE OF DECISION: 24.12.2019

RACHNA GUPTA

1. Present order disposes of three appeals arising out of common Order-in-Appeal bearing No. 493-495 (SM) CE/JPR/2018 dated 27.11.2018 (the order under challenge). The facts leading to these appeals are as follows:-

The appellant M/s. Shree Jagdamba Casting Pvt. Ltd. was investigated who are engaged in manufacture of MS Ingots were observed to have clandestinely cleared the finished goods to M/s. Biwadi Rolling Mills (M/s.BRMPL). It was subsequently gathered by the Officers of Directorate General of Central Excise Intelligence (DGCEI) that M/s. BRMPL is also indulging in clandestine removal and sale of finished goods manufactured by them. Resultantly, a search of various premises of M/s. BRMPL was conducted by DGCEI, New Delhi. On 04.08.2015 in the premises including the factory, the residence of Shri Satish Kumar, Shri B.D. Yadav and Shri Ankit Keriwal who were manging the entire affairs of M/s. BRMPL. Statements of all these persons were also recorded.

1.1 From the various documents recovered, it was observed that the particulars of daily report were entered in the "Tally Software

Database" and a complete "Profit and Loss Account" was maintained containing the complete details of purchase, sale, receipt and payments.

1.2 The Department concluded that the appellants were carrying out activities of clandestine clearances in a pre-mediated manner with sole objective of defrauding the Government of its legitimate revenue in the form of Central Excise Duty. Shree Jagdambay Castings Pvt. Ltd. was observed to have deliberately and willfully resorted to clandestine manufacture and removal of goods without payment of Central Excise Duty who were also alleged to have suppressed the information of such manufacture and clearance from the Department and adopted all fraudulent means to clear the manufactured goods secretly and willfully.

1.3 Resultantly, a show cause notice bearing No.6034 dated 28.02.2016 to M/s. Shree Jagdambay Castings Pvt. Ltd., its Director Shri Pawan Bansal and to M/s.BRMPL proposing recovery of Central Excise Duty amounting to Rs.9,68,004/- alongwith the interest and the penalty upon M/s. Shree Jagdambay Castings Pvt. Ltd. with the simultaneous proposal of imposition of penalty on Shri Pawan Bansal, Director of M/s. Shree Jagdambay Castings Pvt. Ltd. and BRMPL was served upon three of the appellants.

1.4 The said proposal was initially confirmed by the Order-in-Original bearing No.66/08/2017 -18 dated 13.12.2017 alongwith the order of appropriation of Rs. 5,00,000/- as already were deposited by M/s. Shree Jagdambay Castings Pvt. Ltd. Penalty of the amount of excise duty confirmed i.e. Rs.9,68,004/- was imposed upon M/s. Shree Jagdambay Castings Pvt. Ltd. In addition, penalty of Rs.5,00,000/- each was imposed upon remaining two co-noticees i.e. Shri Pawan Bansal and M/s.BRMPL. Being aggrieved, three of the appellants assiled the said order. The Commissioner (Appeals) vide Order-in-Appeal No.493-495 dated 27.11.2018 has modified the aforesaid order only to the extent of reducing the penalty of BRMPL by Rs.1,00,000/- Still being aggrieved three of the appellants are before this Tribunal.

2. We have heard Mr. Santhanam & Ms. Kainaat, learned Advocates for the appellants and Mr. K. Poddar, learned Authorised Representative for the respondent.

3. It is submitted on behalf of the appellants that the order under challenge is based upon presumptions and surmises and as such is liable to be quashed. It is submitted that on the same set of allegations and on the basis of same investigation, another show cause notice was issued to the appellants. The demand propsed therein has already been confirmed alongwith order of imposition of penalty. In the given circumstances imposition of penalty by way of separate proceedings is nothing but amounts to double jeopardy. Hence penalties imposed in the present case are not sustainable. While out-rightly denying the allegations of clandestine purchase of raw material and clandestine removal of manufactured goods, the appellants have prayed even for setting aside the order confirming the demand of excise duty. The order under challenge is accordingly prayed to be set aside and the appeals are prayed to be allowed.

4. While rebutting these arguments, it is submitted on behalf of the Department, that the order under challenge has been announced based on the sufficient amount of evidence as gathered during the searches of various premises of the appellants. The first appellate authority has already extended some relief to M/s. BRMPL. There is no infirmity in the order. Appeals are, accordingly, prayed to be dismissed.

5. After hearing both the parties, I observe that the main basis for the adjudicating authority below has been the statement of Shri Pawan Bansal, Director of M/s. Shree Jagdambay Castings Pvt. Ltd. as was recorded on 29.07.2013. I simultaneously observe that the said statement got subsequently retracted by Shri Pawan Bansal. It is further apparent that though the appellants received the relied upon documents, but they have been aggrieved of those not being legible. Legible copies thereof were insisted but were never made available. Adjudicating Authority below is observed to have ignored the repeated requests of the assessees for the legible documents. Copies of documents though are on record but perusal makes it clear that many of them are not at all legible.

5.1 In addition, the request of the appellant for corss-examining the witnesses has also not been considered by the authorities below. Since beginning it has been the grievance of the appellants that all statements which had been relied upon as evidence against them were taken under coercion and duress. The denial of coss-examination in the given circumstances is therefore opined to be unfair and unjustified. The order under challenge records that, "the case is mainly based on the record of M/s.BRMPL, which is duly corroborated by the statements of directors of BRMPL and the persons who were maintaining the records". But no such record and the corroboration thereof has been specified by the adjudicating authority below.

6. The law is well settled that in respect of any allegation of clandestine removal the onus is squarely and solely on the Revenue to prove what it alleges and that onus of the revenue cannot be shifted to the assessee. The assessee cannot be called upon to prove the negative. There is no investigation whatsoever or any proof brought on record by the revenue in regard to the alleged clandestine production and unaccounted removal of excisable goods by the assessee. Mere allegation by the Revenue cannot take the place of proof. Suspicion however grave cannot be taken as the basis to confirm demand by alleging clandestine removal of excisable goods. That is why investigating officers as well as the persons from whom statements were taken ought to have been summoned and cross-examined before the Commissioner for which the appellants repeatedly asked for the cross-examination to disprove the allegations wrongly made in the show cause notice. The adjudicating authority has rejected the same by relying on certain cases which are decided along before the insertion of Section 9 D in the Central Excise Act, 1944 in 1985.

7. The adjudicating authority has not cared to be guided by the judgments of the jurisdictional High Court as well as other High Courts and the Supreme Court as also the Tribunal in various cases

wherein it has been emphatically held that cross-examination of the investigating officers as well as persons from whom statements are taken and used against the assessee must be provided to the assessee before any adjudication is made to confirm any demand failing which the orders must be vacated as being violative of natural justice and unauthorized by law. Cross-examination is also essential to take the alleged statements as evidence in record and giving opportunity to the revenue to prove the same and the assessee to rebut the same. The denial of cross-examination would disentitle the revenue to rely upon the alleged statements against the assessee in any manner whatsoever to draw any adverse inference and the entire allegation must be dropped. Failure to do so has vitiated the impugned orders which are liable to be vacated in this appeal as non-est. The adjudicating authority is held to be wrong in merely repeating the allegations made in the show cause notice without any understanding of facts and law.

8. There is no iota of evidence apparent on record specifically to the corroboration of the software data recovered during search. There is no compliance of Section 36B of Central Excise Act Sub Clauses (2) & (4) prescribes very stringent conditions for Computer Printouts to be a piece of admissible evidence. Not even Section 45A has been resorted as there is no apparent opinion of examiner of electronic evidence. The sole relied upon evidence as corroboration to the documents recovered and their connection with appellant is the statement of Mr. Pawan Bansal which stands retracted. Law is settled that admissions can be the sole basis of confirming guilt provided those are voluntarily made and have

never been retracted. Thus, the impugned order is, therefore, *pare materia* to Section 65 B of Indian Evidence Act, liable to be vacated.

9. The law is also well settled that the adjudication in a quasi-judicial proceeding must be fair and objective and the authority concerned must act correctly in accordance with law. In the present case the adjudicating authority is opined to have acted solely to confirm demands mechanically with predetermined negative mind because of his bias and prejudice and no willingness to appreciate the facts and records and apply the law correctly.

10. The impugned order is clearly unsustainable, hence is hereby set aside.

11. As the result of entire above discussion thereof, the appeals stand allowed.

[Order pronounced in the open Court on 24.12.2019]

(RACHNA GUPTA)
MEMBER (JUDICIAL)

Anita