

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL
NEW DELHI**

PRINCIPAL BENCH – COURT NO. – IV

Excise Appeal No51725 of 2018 [SM]

[Arising out of Order-in-Appeal No.BHO-EXCUS-002-app-479-17-18 dated 16.02.2018 passed by the Commissioner (Appeals), Customs, Central Excise & Service Tax, Raipur]

M/s.Surya Wires Private Limited

20, Industrial Area, Bhanpuri,
Raipur (CG) – 493111.

...Appellant

VERSUS

**Commissioner of Customs,
Central Excise & Service Tax,**

Central Excise Building,
Tikrapara, Raipur (CG) - 492001

...Respondent

APPEARANCE:

Shri K.K. Menon, Advocate for the Appellant

Shri P. Gupta, Authorised Representative for the Respondent

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

DATE OF HEARING : 24.12.2019

DATE OF DECISION : 13.07.2020

FINAL ORDER No. 50714/2020

RACHNA GUPTA:

The order in appeal No.479-17-18 dated 16.02.2018 has been assailed in the impugned appeal. The appellant was issued a show cause notice No.13/P/20969 dated 23.12.2015 proposing the recovery of excise duty amounting to Rs.7,61,199/- alongwith the demand of Rs.28,48,796/-. Interest on these amounts was also proposed with the imposition of penalty upon the Director of the appellant under Rule 25 of Excise Rules, 2002 read with Rule 15 of Cenvat Credit Rules. The said show cause notice was issued after a search was conducted in the premises

of the appellant on 31.10.2012/ 01.11.2012 by the Central Excise Department and it was observed after conducting physical verification of the stock of finished goods and raw-material available in the appellant's premises that the appellants are engaged in procuring of unaccounted raw-materials for illicit manufacture of finished goods and its clandestine removal without payment of Central Excise duty. The said proposal was confirmed vide Order-in-Original bearing No.68/Adj./2016 dated 23.03.2017. The appeal thereof has been rejected vide the order under challenge. Still being aggrieved, the appellant is before this Tribunal.

2. I have heard Mr. K.K.Menon, Id. Counsel for the appellant and Mr. P. Gupta, Id. Authorised Representative for the Respondent.

3. It is submitted on behalf of the appellant that in fact, there is no shortage in the finished goods/unfinished goods or raw-materials as is alleged by the Department, based upon the documents recovered from the office and factory of the appellant alongwith two months data of weighbridge extracted from the factory. It is submitted that appellant was unable to reconcile those documents at the time of search due to which the show cause notice was issued. However, two replies have duly been given to the Department dated 30th September, 2016 and 21 March, 2017 citing major deficiencies in the investigation. It is submitted that the Department has failed to consider the said submissions and the documents submitted therewith which could have reconciled with the documents

recovered by the Department at the site of search to prove that the proposals of show cause notice are wrong and no demand is sustainable against the appellant. It is further submitted that none of the witnesses examined have admitted the existence of allegations. Rather there has been repeated deposition that the clearances from appellant's factory were made under invoice. The Adjudicating authorities have still proceeded on a wrong presumption of such statements to be the admission of clandestine removal.

4. The findings are alleged to be false on the very face of it. It is further submitted that removal of inputs as such was not established by the Revenue and the physical shortage alleged was only based on estimation of stock and stock verification and it was not based on any scientific method of recounting. There has been no investigation at the end of buyers of disputed goods. The entire amount of tax stood paid by the appellant on the date of search itself which has wrongly been taken as the admission of charges by the appellant. The decision in the case of **Raika Ispat Udyog Pvt. Ltd. vs. CCE, Raipur- 2016 (340) ELT 598** is impressed upon. Reliance in this regard has also been placed on the decision of Tribunal Delhi in the case of **CCE vs. ABS Metals Pvt. Ltd. Reported as 2016 (341) ELT 425 (Tri.), Delhi**. There is otherwise no evidence produced by the Revenue except for the presumption on their part and the payment of the duty demand by the appellant. The allegations of clandestine removal stand absolutely unproved. The onus was purely upon the Revenue, which they have failed. The shortage otherwise was merely on eye estimation basis. Same

also is not sustainable. Decision in the case of **Shri Nirmaland Steel Casting Pvt. Ltd. Vs. CCE, Raipur – 2013 (288) ELT 103 (Tri. – Del.)** has been impressed upon. The appellant had also established that it engaged Sona Wires as job worker for further processing/ refining of disputed goods. The shortage of physical quantity of the goods i.e. HB wire and wire rods at the factory of appellants was conveyed to be physically available at the said Sona Wires at the time of investigation, but the submission has totally been ignored by the adjudicating authority despite the relevant challans for sending the goods for job work and receiving the same after job work were submitted with the Department. With these submissions, appellant has prayed for the order under challenge to be set aside and the appeal to be allowed.

5. Learned D.R. on the other hand has submitted that the appellant has sufficiently accepted the duty liability and in fact had paid the total amount, as was demanded, vide their cenvat account entry. The facts of clandestine removal further stood corroborated with the admission on part of the representatives of the appellants. Admissions need not to be proved. Hence, no other evidence was required to be collected by the Revenue. The demand has rightly been confirmed. The only reason that the declaration under Notification No. 214/86-CE dated 25.03.1986 entitling exemption to Sona Wires for job work cannot be a ground to accept that the goods were lying with Sona Wires for job work. Justifying the order, appeal in hand is prayed to be dismissed.

6. After hearing both sides and perusing the record, I am of the opinion as follows:

From the findings under challenge it is observed that the demand has been confirmed on the following basis:-

- (1) That there is an admission in the statement of the Director of the appellant that removal of goods from the factory is in clandestine manner.
- (2) The Drivers/Transporters have also admitted transporting goods without invoices.
- (3) No documents relating to job work were submitted at the time of investigation. The same is, therefore, alleged as an afterthought.
- (4) The manner of stock taking was never objected but was acknowledged by the representatives of the appellant at the time of investigations.

7. From the above, it becomes clear that the stock verification on the basis of eye estimation and the statements recorded at the time of investigation are the only source of reliance for the adjudicating authority to confirm the demand. Though the documents as recovered at the time of search are also been held to be the evidence proving the clandestine removal by the appellant, but I observe that documents explaining the noticed shortage were submitted by the appellant at the very initial stage of replying the show cause notice. There is no denial about receipt of the said documents. However, same are alleged to be an afterthought. A verbal

submission can definitely be an afterthought but the documents of the previous dates, irrespective submitted later cannot be a case of afterthought unless and until so proved with the cogent evidence. It is settled law that onus is on Revenue to prove otherwise with cogent evidences that the goods have been removed by the manufacturer without the duty paying invoices as was held in the case of **Bharat Seats Ltd. Vs. CCE – 2009 (242) ELT 308 (Tri.-Delhi)**.

8. The documents as relied upon by adjudicating authority below, while confirming the demand are delivery challan, estimated invoice, outgoing sheet etc. but these documents admittedly and apparently have not been co-related with the documents submitted by the appellant. Perusal of said documents with the delivery challans recovered by the Department, as found annexed on record as well, it is abundantly clear that the delivery challans are in the name of Sona wires Pvt. Ltd. and document of appellant are proving that Sona Wire were their job worker and the shortage as noticed by the Department at the time of investigation was purely on account of the goods being given to said job worker. This perusal makes it clear that the Department has ignored the supportive documents which are sufficient enough to falsify the opinion of the Revenue formed at the time of the investigation.

9. The another ground for confirming the demand is the shortage noticed after physical verification of the goods, admittedly the goods were verified on the basis of eye estimation. Tribunal Delhi in the case of **CCE Vs. Sigma**

Castings Ltd. reported in 2012 (282) ELT 414 has held that where the shortages have been made purely on eye estimation basis without any actual weighment of the goods the demand alleging clandestine removal cannot be upheld. In another decision of **RHL Profiles Ltd. vs. CCE, Kanpur - 2013 (290) ELT 247 (Tri.-Delhi)** it was held that the shortage detected on the basis of average weight of finished goods without any other corroborative evidence to reflect upon the clandestine removal cannot lead to confirmation of demand of duty against the appellant.

10. The removal of inputs was also not taken into consideration while alleging the shortage of stock. The eye estimation of stock without any other corroborative evidence of removal of inputs cannot be the evidence for the quantity of inputs to be short or to have been clandestinely removed. Tribunal Delhi in the case of **Sanco Plastics Pvt. Ltd. vs. CCE, Delhi - 2004 (176) ELT 740** has categorically held that allegations for inputs to have been disposed of as such and to have not been used in the manufacture of duty paid finished goods have to be proved with the cogent evidences. The onus is solely of the Revenue to prove as to how much inputs have been used or disposed of. In the absence thereof no charges of clandestine removal survives. The document as relied upon by the Department is absolutely insufficient to prove the removal of inputs clandestinely. No question arises of the confirmation of the demand. The explanation given by the appellant in their reply to the show cause notices, that too twice, have totally been ignored by the adjudicating authority which otherwise

contained the sufficient explanation with supporting documents to prove the case of the appellant. Resultantly, it stands established on record that the demand has been confirmed merely on the basis of the presumption, which is absolutely not sustainable. The reliance placed on the decision of **Raj Petroleum Products vs. CCE -2005 (192) ELT 806 (Tri.-Mum.)** is accepted. I also draw support from the decision of Allahabad Tribunal in the case of **RadhaMadha Corporation Ltd. vs. CCE, Daman - 2012 (284) ELT 369** wherein it was specifically held that charge of clandestine removal is to be established on the basis of preponderance of probabilities, it cannot be merely on the basis of assumptions and presumptions. Clandestine removal has to be established beyond doubt by adducing strong, sufficient and positive evidence and the burden of proving the same is on the Department.

11. I further observe that there is no evidence of procurement of raw-material and consumption thereof. No single payment detail of clandestine sale has been discussed. Nor there is any evidence of any excessive power consumption which is otherwise required for the alleged large scale production. Nor there is any record of recruitment of workers or staff required for alleged massive production with no payment of record of salary and wages to such workers. No document in the form of receipts of any cash or kind on account of clandestine clearance and sale of goods has been seized from the parties. No evidences of removal of excisable goods or procurement of raw-materials and its consumption are on record. I rely on the

decision of Hon'ble Apex Court in the case of **Continental Foundation Joint Venture vs.CCE, Chandigarh-I - 2007 (216) ELT 177**, while hearing about decision of Allahabad High Court cited as **Continental Cement Co. Vs. Union of India reported as 2014 (309) ELT 411 (Allahabad)**, has laid down the criteria of investigation to prove the allegation of clandestine sale in following words:

Further, unless there is clinching evidence of the nature of purchase of raw materials, use of electricity, sale of final products, clandestine removals, the mode and flow back of funds, demands cannot be confirmed solely on the basis of presumptions and assumptions. Clandestine removal is a serious charge against the manufacturer, which is required to be discharged by the Revenue by production of sufficient and tangible evidence. On careful examination, it is found that with regard to alleged removals, the department has not investigated the following aspects:

- (i) To find out the excess production details.*
- (ii) To find out whether the excess raw materials have been purchased.*
- (iii) To find out the dispatch particulars from the regular transporters.*
- (iv) To find out the realization of sale proceeds.*
- (v) To find out finished product receipt details from regular dealers/buyers.*
- (vi) To find out the excess power consumptions.*

12. In the present case, I do not find any such evidence in corroboration to the presumption of the department, demand cannot be sustained.

13. Finally, I observe that demand has been confirmed invoking the extended period of limitation alleging suppression of facts on part of the appellant but it is an admitted fact that monthly E.R. Returns have regularly been filed by the appellant. It becomes clear that all the relevant facts were in knowledge of

the Department authorities since beginning. Except omission to file the declaration about job work from Sona Wires in terms of Notification No. 214/86-CE dated 25.03.1986 there is no other allegation which may amount as suppression. Law has been settled that every omission cannot be suppression. Hon'ble Apex Court in the case of **CCE, Mumbai IV vs. Damnet Chemicals Pvt. Ltd. reported in 2007 (216) ELT 3 (S.C.)** has held as follows:-

18. *In the circumstances, we find it difficult to hold that there has been conscious or deliberate withholding of information by the assessee. There has been no willful misstatement much less any deliberate and willful suppression of facts. It is settled law that in order to invoke the proviso to Section 11A(1) a mere misstatement could not be enough. The requirement in law is that such misstatement or suppression of facts must be willful. We do not propose to burden this judgment with various authoritative pronouncements except to refer the judgment of this Court in Anand Nishikawa Co. Ltd. v. CCE [2005 (188) E.L.T. 149 (S.C)] wherein this Court held :*

"We find that "suppression of facts" can have only one meaning that the correct information was not disclosed deliberately to evade payment of duty, when facts were known to both the parties, the omission by one to do what he might have done not that he must have done would not render it suppression. It is settled law that mere failure to declare does not amount to willful suppression. There must be some positive act from the side of the assessee to find willful suppression."

(emphasis supplied)

14. In another decision of **Pahwa Chemicals Pvt. Ltd. vs. CCE, Delhi reported in 2005 (189) ELT 257** Hon'ble Supreme Court has held that mere failure to declare does not amount to mis-declaration or willful suppression. There has to be some positive act on part of the assessee to establish either

willful mis-declaration or willful suppression. The failure of the appellant to provide all the relevant documents justifying the late filing of the declaration about job work cannot burden them with the fact of willful suppression specially, when all necessary details were provided at the first available opportunity of filing reply to the show cause notice. The Department, in view of the above observation, is not entitled to invoke the extended period of limitation. The entire demand being beyond the normal period is not sustainable.

15. As a result of entire above discussion, the findings of the adjudicating authority being merely on the basis of their own presumption, on the basis of wrong interpretation of the statement of the witnesses as admission and for wrongly holding the late declaration as suppression are, therefore, not sustainable. The total demand confirmed accordingly, stands unjustified. As a result, the order under challenge is hereby set aside and the appeal stands allowed.

[Order pronounced in the open Court on 13.07.2020]

(RACHNA GUPTA)
MEMBER (JUDICIAL)

Anita