CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH
Court No. IV

EXCISE APPEAL NO. 50645 OF 2019

[Arising out of Order-in-Appeal No. 1112 & 1113 (CRM)/CE/JDR/2018 dated 09.10.2018 passed by the Commissioner of Central Excise & CGST, Udaipur (Raj)]

COMMISSIONER OF CENTRAL GOODS AND SERVICE TAX EXCISE & CUSTOMS, UDAIPUR	**APPELLANT**

Vs.

MITTAL PIGMENTS PVT LTD. ACC (Import), New Customs House, Near IGI Airport, New Delhi.	**RESPONDENT**

Appearance:

Shri Sanjay Kumar Singh, Authorised Representative for the Revenue
Shri Vijay Kumar, Advocate for the respondent -assessee

CORAM:

HON'BLE P. VENKATA SUBBA RAO, MEMBER(TECHNICAL)
HON'BLE DR. RACHNA GUPTA, MEMBER(JUDICIAL)

Date of Hearing : 13/10/2022
Date of Decision : 22-11-2022

FINAL ORDER No. 51098 /2022

PER DR. RACHNA GUPTA

M/s Mittal Pigments Pvt. Ltd., A-203, Indraprastha Industrial Area, Road No.5, Kota(Raj.), holder of Central Excise Registration No. AABCM1418NXM001 are engaged in manufacture of various excisable products viz. Lead & Alloy Ingot, Lead Chloride, Lead Acetate, Zinc Oxide, Zinc Alloy, Zinc Ingot, Tri Basic Lead Sulphate (TBLS), Litharge (Lead Oxide), Red Lead, Grey Oxide, Antimony Tri Oxide Antimony Triacetate, Antimony Metal, Ferrous Sulphate etc. They were availing Cenvat Credit of duty paid in terms of Cenvat Credit Rules, 2004 ((hereinafter referred as CCR)

2. Department got an information that shri Amit Gupta was operating some registered dealer companies inter-alia namely (i) M/s Brilliant Metals (P) Ltd., New Delhi (herein after referred as "M/s BMPL") (ii) M/s Unnati Alloys (P) Ltd., Jaipur (herein after referred as "M/s UAPL") (iii) M/s Moral Alloys (P) Ltd., Delhi (herein after referred as "M/s MAPL") etc. and is issuing the invoices with intent to passing on inadmissible Cenvat credit to numerous manufacturers and dealers without delivery of the goods with the invoices. The manufacturers used to procure the market scrap without bills on cash basis and did not account for the same in their books of account. To cover up such unaccounted purchases and to avail cenvat credit, they used to procure Cenvatable invoices of prime metal from the dealer companies operated by Shri Amit Gupta without being accompanied with the goods.

3. It was also gathered that the manufacturers used to make payment by cheque/RTGS to the respective companies of Shri Amit Gupta and subsequently, Shri Amit Gupta returned the cash to the manufacturers after deducting his commission. To show the fictitious transportation, he used to issue the GRs of defunct transporter namely, M/s Leo Trans & Logistic. Further, the owners whose vehicles numbers, were used to be shown for fictitious transportation by these companies, in their respective statement had categorically denied to have transported any consignment of the said dealer companies. Department alleged that by adopting the aforesaid modus operandi, Shri Amit Gupta had facilitated the cenvatable invoices to numerous manufacturers / dealers without accompanied with the goods and passed on the Cenvat credit of the duty.

5. On the basis of such information, factory premises of M/s Mittal Pigments Pvt. Ltd., A- f 203, Indraprastha Industrial Area,

Road No.5, Kota (Raj.), one of the manufacturers, were visited by the Officers of Anti Evasion Branch Central Excise Commissionerate. Searches were also conducted carried out by the DGCEI on 06.12.2012 at various places including following premises as detailed below:-

(i) Secret Office of Shri Amit Gupta, situated at A-17, First Floor, Rajan Babu Road, Near Bank of Baroda ATM, Adarsh Nagar, Delhi- 110033, was searched under panchanama dated 06.12.2012 and Indian currency of Rs. 82,00,000/- was seized from the said premises.

(ii) Undeclared godown premises of Shri Amit Gupta, situated at 5787, 5792, 5795 Basti Harphool Singh, Sadar Thana Road, Sadar Bazar, Delhi was searched under panchanama dated 06.12.2012 and Indian currency of Rs.23,00,000/- was seized.

6. Thereafter the statements of all concerned were recorded, Statements of Shri Amit Gupta, his brother Mohit Gupta were recorded on 6.12.2012 itself. Based on these statements the statement of Shri Sher Singh, Accountant of M/s. Leo Road-lines Pvt. Ltd. was recorded on 11.12.2012. Statement of proprietor of said transporter namely Shri Sanjeev Maggu was recorded on 6.09.2013. Statement of Shri Amit Gupta was once again recorded on 17.12.2012, based wherupon that the show cause notice bearing No. 4562-4571 dated 13.4.2017 was served upon the appellants along with six other co-noticees alleging that appellants have wrongly availed the Cenvat Credit of Rs. 70,72,738/- during the period from May, 2012 to September, 2014 on various invoices which were absolutely not genuine and the goods mentioned therein did not accompany with those invoices. Alleging the wrong availment of Cenvat Credit by the respondent-assessee in contravention of provisions of Rule 3, 4 and 9 of Cenvat Credit Rules, 2004; that the

aforesaid demand amount was proposed to be recovered from the appellant along with interest and proportionate penalty. The proposal was confirmed initially vide Order-in-Original No. 05/2017-18 dated 29.12.2017. However, the appeal thereof was allowed vide Order-in -Appeal No. 1112 -1113 /2018 dated 9.10.2018 allowing the appeal of the present respondent-assessee along with the co-noticee. Being aggrieved with the order of Commissioner (Appeals) department is before this Tribunal.

7. We have heard Shri Sanjay Kumar Singh, Authorised Representative for the Revenue, and learned Shri Vijay Kumar, Advocate for the respondent –assessee.

8. Learned Authorised Representative in support of Departmental appeal has submitted that the statement of Shri Amit Gupta contains the clear admission of fictitious transportation by using registration number of vehicle, of defunct transport firm, namely M/s. Leo Trans and Logistics and M/s. Leo Road Lines Pvt Ltd. The Directors thereof in their statement have denied to have transported any such consignment. The Original Adjudicating Authority, based upon the documents had rightly concluded that M/s. Mittal Pigments Pvt Ltd. have availed the Cenvat credit fraudulently in collusion with the dealer companies operated by Shri Amit Gupta with malafide intent to evade payment of duty and has also rightly held the respondent-assessee to have suppressed the material facts of non-receipt of goods, non -transportation of goods with cenvatable invoices issued by them. Learned Departmental Representative further submitted that all the dealers including M/s. Mittal Pigments Pvt Ltd. have mis-stated the facts in the said cenvatable invoices by mentioning fictitious vehicle numbers and transporter dealers with intention of passing of such Cenvat credit fraudulently without actual transportation of the goods with said invoices. The books of accounts were observed to have mis-statement about the facts

of receiving goods against the said invoices. It is further impressed upon that Commissioner (Appeals) has miserably failed to consider the admission of Shri Amit Gupta, incriminating documents recovered from the premises of the respondent-assessee and the denial of transporter for transporting any goods from Shri Amit Gupta and his company as mentioned above, to various manufacturer including M/s. Mittal Pigments Pvt Ltd. The order of Commissioner (Appeals) is therefore, liable to be set aside. The appeal is accordingly prayed to be allowed.

9. Per contra learned Counsel for the respondent-assessee has mentioned that the Original Adjudicating Authority has failed to consider the relevant documents of the respondent-assessee which have duly been considered by the Commissioner (Appeals) and have been discussed in detail in the order under challenge. Based upon those documents, i.e. copy of invoices raised by the supplier, vehicle details as were downloaded from the website of Ministry of Road Transport and Highway, supplier account statement, daily stock register and material register Form R.G.23. A part II. It has been held that documents are sufficient to show that the appellants have received material mentioned in those invoices. All the transportations, details related to inputs, purchases etc were duly recorded in the books of accounts and inventory records. All the transactions were through normal business channel and payments were from normal banking channel. It is further submitted that appellant is mainly exporter, hence they require standard raw material for manufacturing and supply of goods of specific good quality. No question arises for getting low quality raw material that too without any invoices. Otherwise also the appellant had been subject to regular audit by the department and no such allegations were ever made by the Department against the respondent-assessee. The findings of Commissioner (Appeals) have been impressed upon as legal and justified. Thus the order under challenge is prayed to be upheld.

10. Learned Counsel has further impressed upon that based upon the same set of circumstances and same searches of 06.12.2012 and the same set of statements of Shri Amit Gupta and Shri Sanjeev Maggu this Tribunal has decided various other appeals of dealers similarly placed as M/s. Mittal Pigments Pvt Ltd. viz, in Excise Appeal No. 50844 & 50857/2018 M/s. Moral Alloys Pvt. Ltd. and M/s. Unnati Alloys Pvt. Ltd. vs CCE , Udaipur [Final Order No. 52055-52056/2018(SM) dated 29.05.2018] and in Excise Appeal No.E/52844/2018 M/s. Synergy Steels Pvt. Ltd. vs CGST & CCE, Alwar [Final Order No. 50673/2019 dated 15.03.2019]. The appeal is prayed to be dismissed.

11. We have heard the rival contentions. We observe and hold as follows:

The findings of Commissioner (Appeals) with respect to the impugned issue are recorded in para 5.5 and 5.6 which reads as follows:

> "5.5 I find that the case of the department against the appellant is that only invoices were provided without supplying the goods. I find that the appellant has availed the cenvat credit on the basis of such duty paying documents and cleared the goods manufactured on payment of duty, which was accepted by the department without any objection. I find that the appellants are exporter and their clients are highly reputed like Hindustan Zinc Limited, Cable Corporation of India, Sudershan Chemical Industries Limited, KEI Industries Limited,, Balkrishna Industries Ltd., and needed standard raw material for manufacture and supply of goods. The allegation that appellant was procuring the raw materials from the open market on cash basis, is not sustainable for the reason that the appellant has to maintain higher standard of quality to make major supplies either for export or to the companies which are operating in atomic energy, power, defence, oil refining etc. In the instant case, no physical verification of stock was done. No shortage of physical stock was identified.
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> 5.6 Regarding the allegation that payment was made through banking channel and was received back in cash is not sustainable for the reason that no cash was seized from the appellants premises."

12. Commissioner (Appeals) has also appreciated that M/s. Mittal Pigments Pvt Ltd. were not afforded the opportunity to cross examine Shri Amit Gupta. We are also of the opinion that in the findings of Original Adjudicating Authority much emphasis

has been led on the statements recorded during investigation mainly on the statement of Shri Amit Gupta. But we observe that the procedure for consideration of the statements recorded during investigation to be admissible into the evidence is prescribed under section 9D of Central Excise Act. We also observe that the said procedure has not been followed by the Original Adjudicating Authority.

13. The plain reading of sub section (1) of section 9D of the Act makes it clear that clause (a) and (b) of the said section sets out circumstances in which a statement made and sanctioned by a person before Central Excise Officer of a gazetted rank during the course of inquiry or proceedings under the Act, shall be relevant for the purpose of proving the truth of the facts contained therein. Once the ambit of Section 9D(1) is thus recognized and understood, one has to turn to the circumstances referred to in the said sub-section, which are contained in clauses (a) and (b) thereof].

> Clause (a) of Section 9D(1) refers to the following circumstances :
>
> (i) when the person who made the statement is dead,
> (ii) when the person who made the statement cannot be found,
> (iii) when the person who made the statement is incapable of giving evidence,
> (iv) when the person who made the statement is kept out of the way by the adverse party, and
> (v) when the presence of the person who made the statement cannot be obtained without unreasonable delay or expense."

If none of the circumstances contemplated by said clause (a) of Section 9D(1) exists, clause (b) of Section 9D(1) comes into operation. The said clause prescribes a specific procedure to be followed before the statement can be admitted in evidence. Under this procedure, two steps are required to be followed by the adjudicating authority, under clause (b) of Section 9D(1), viz.

(i) the person who made the statement has to first be examined as a witness in the case before the adjudicating authority, and

(ii) the adjudicating authority has, thereafter, to form the opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interests of justice.

14. Hon'ble High Court of Delhi In **J.K. Cigarettes Ltd. vs. CCE** reported in **[2009 (242) ELT 189 (Del.)]** has held that if aforesaid procedure which is statutorily prescribed by plenary parliamentary legislation, is not followed, it is to be regarded, that the Revenue has given up the said witness. Hence, the reliance on the said statement has to be regarded as the said statement would not be relevant for proving the truth of the contents thereof. Hon'ble Supreme Court also in the case of **C.C. vs. Bussa Overseas Properties Ltd.** reported in **[2007 (216) ELT 659 (S.C.)]** has held that the Adjudicating Authorities are bound by the general principles of evidence. Since Commissioner (Appeals) has placed extensive reliance on the statements recorded during investigation without invoking speaking section (1) of Section 9 D of Central Excise Act, the findings of confirmation of duty demand due to alleged clandestine removal are therefore liable to be set aside.

15. In view thereof, we hold that any findings solely based upon the statements cannot be confirmed against M/s. Mittal Pigments Pvt Ltd. unless those statements have stood the test of Section 9(D) of Central Excise Act. Apparently and admittedly Shri Amit Gupta was not examined by the Adjudicating Authority. More so, for the reason that Shri Amit Gupta was not even allowed to be cross examined by the appellant and that Shri Sanjeev Maggu had retracted the statements which had been relied upon by the Original Adjudicating Authority. In view of these observations we do not find any infirmity in the order of Commissioner (Appeals) while denying the admissibility of these statements. As brought to our notice there has already been the adjudication by this Tribunal in respect of other dealer companies

named in the show cause notice Excise Appeal No. 50764-50765/2020, 50885 -50886 & 50910 of 2020 which have already been decided vide Final Order No. 52089-52093/2021 dated 22.12.2021 in respect of M/s. Unnati Alloys Pvt Ltd. and Shri Amit Gupta as named herein as well. It has been held in the said appeal as follows:-

> "9. I observe that other than statement of Mr.Amit Gupta as was recorded on 06.12.2012 there is no other document on record to corroborate the documents alleged to be incriminating, as were recovered by the Officers of DGCEI during the investigations. The apparent fact on record remains are that the said Amit Gupta was cross-examined on 10.04.2018 with respect to his said statement dated 06.12.2012. The perusal of said statement specifically answers to question No.7 & 8, makes it clear that his statement of 06.12.2012 was got recorded under threat or pressure. He was brought to the office of DGCEI in the investigating officer's vehicle and, as such, was not at all mentally alert while giving the said statements. Answer to question No.9 therein clarifies that he denied having any share holding in the business activities of Forward Mineral & Metals, M/s. Unnati Alloys Pvt. Ltd. & M/s. Moral Alloys Pvt. Ltd."

16. In the present case, Shri Amit Gupta was not even allowed to be cross examined by M/s. Mittal Pigments Pvt Ltd. But, as judicially noticed, the answers given by him while his cross examination by M/s. Unnati Alloys in the above noted appeal extend same benefits in favour of M/s. Mittal Pigments Pvt Ltd. also. It has also been observed in the said decision as follows:-

> "11. I also observed that the owner of said Leo Trans & Logistics, Shri Sanjeev Maggu was also cross-examined on 10.04.2018 itself who also denied his earlier statement dated 06.09.2013 to be his voluntary statement. He deposed that the said statement was got typed by the Officers of DGCEI and he was merely asked to sign it. He clarified that his vehicles did travel to the destinations mentioned in the builties and the builties are genuine. Mr. Maggu also clarified that operations of his Company M/s. Leo Trans & Logistics did not seize in the year 2006 are still continue. Shri Sher Singh who deposed it to seize after 2006 is denied to be the employee of M/s. Leo Trans & Logistics. In the light of the above discussed cross-examination of Shri Amit Gupta ad Shri Sanjeev Maggu, the earlier statements of Amit Gupta dated 06.12.2012 and that of Shri Sanjeev Maggu of 06.09.2013 become redundant. From

the order under challenge, it is abundantly clear that except relying upon these statements and presuming the corroboration from the statement of other persons no other evidence has been discussed by Commissioner (Appeals). He rather has wrongly recorded in para 18.1 of the order under challenge that from the cross-examination of the statements of Shri Amit Gupta and Shri Sanjeev Maggu no retraction at all is apparent. This particular observation is sufficient to set aside the order which is solely relying the statements of Examination – in – Chief of said Amit Gupta and said Sanjeev Maggu.

12. I further observe that on same investigation several cases have already been adjudicated by this Tribunal. In M/s. Arya Alloy Pvt. Ltd. (supra) it has been held that there is no evidence on record except the statement of Shri Amit Gupta and the transporter not even for proving the allegations of receiving back of cash as against the payments made through banking channels. It is rather the fact that the appellant was reflecting the receipt of inputs in their statutory records, the Revenue has not alleged that the inputs required for making the final products were procured by the appellant from any other source. There is no denial that the main appellant was manufacturing and clearing his final product. In the absence of the inputs it is not possible to manufacture final product. With these observations it has already been held by this Tribunal that there are no justifiable reasons to deny the Cenvat Credit nor to impose penalty upon the appellants. The similar order has also been passed by this Tribunal in Final Order No.51800 – 51808/2018 dated 11th May, 2018 vide which the orders passed against the appellants on similar set of facts and circumstances were set aside. In that order also it was observed by the Tribunal that Departments entire case is solely based on the statement of Amit Gupta and other transporters for which no cross-examination was provided. As already discussed above, the only differentiating fact for the present case is that both the said persons have duly been cross-examined recording a clear retraction of their earlier statements. 13. With regard to the payments by Cheque also the Tribunal has observed that the Revenue's allegation of receiving the payments back in cash is not sustainable, for want of any evidence to that effect. Though some cash was seized from the premises of Amit Gupta but there is no connecting document produced by the Department in evidence to show that the said cash pertains to the impugned three invoices. The said decisions were announced in following cases:-

(i) M/s. Moral Alloys Pvt. Ltd., M/s. Unnati Alloys Pvt. Ltd. – Final Order No. 52055-52056/2018 – SM dated 29.05.2018.

(ii) (ii) Synergy Steel Pvt. Ltd. vs. CGST & CCE, Alwar – Final Order No. 50673/2019 dated 15.03.2019;

(iii) (iii) Gian Castings Pvt. Ltd. Vs. CCE, Chandigarh – 2015 (319) ELT 339 (Tri.- Del.).

14. All these decisions are based on same set of investigations and same evidences stand referred to as are referred in the present case. The present case is at a better footing having cross-examination in the form of retraction of examination – in-chief.

15. In view of the totality of above discussion, the findings in the order under challenge are held to be nothing but presumptive. There is observed absolute ignorance of the statement in crossexamination of alleged kin-pin Shri Amit Gupta and the transporter Shri Sanjeev Maggu. There is no other relevant evidence to prove the Departments case. Rather there is statement of Shri D.P. Sharma, Senior Manager of M/s. Aggarwal Metals Pvt. Ltd. as was reorded on 24.05.2017 which is relevant w.r.t. the impugned three invoices of M/s. V.K. Enterprises. He specifically deposed that M/s. Agrawal Metals used to purchase copper scrap from V.K. Enterprises against the payments either by RTGS or by Cheques. He has outrighly denied the invoices to be 14 E / 50764, 50765, 50885, 50886 & 50910/2020 [SM] mere cenvatable without delivery of goods. He also denied receiving any cash from M/s.V.K. Enterprises of the amount sent by them through RTGS/Cheque. This deposition clearly falsifies the presumptive alleged modus-operandis. ”

17. Similar are the findings in various decisions as relied upon by the Counsel for M/s. Mittal Pigments Pvt Ltd. These decisions were also based upon same search dated 06.12.2012 and same statements of Shri Amit Gupta, his brother Shri Mohit Gupta and Shri Sanjeev Maggu, Director of transporter and Shri Sher Singh, alleged accountant of transporter. The present case is also based on same set of investigations, statements and documents. Admittedly document as would have been recovered from the premises of appellant has been discussed by the Original Authority except for the statements as mentioned above. The specific request of appellant to cross-examine Shri Amit Gupta

was rather declined. We hold that said statement cannot be considered as incriminating.

18. In view of all these findings and observations, we do not find any infirmity in the order passed by the Commissioner (Appeals). The findings therefore, are hereby confirmed. The order is accordingly upheld.

19. We also have observe that departmental investigating agencies as well as the Adjudicating Authorities have not yet started observing compliance of mandatory statutory provisions i.e. section 9D of Central Excise Act, 1944 and section 138 B of Customs Act, 1962 without which the statement recorded at the stage of inquiry / investigation will not be relevant for the purpose of proving the truth of requisite facts during prosecution. It is therefore desired that department may come with certain guidelines so that the efforts of investigating team may not be discarded for the reason of noncompliance of aforesaid provisions.

20. As a result of entire discussion, the appeal of Department is hereby dismissed.

(Pronounced in the open Court on 22-11-2022)

(P V SUBBA RAO)
MEMBER (TECHNICAL)

(DR. RACHNA GUPTA)
MEMBER (JUDICIAL)

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