IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI
PRINCIPAL BENCH, COURT NO. I

Appeal No. E/2713/2009-CU [DB]
[E/Misc./51632/2016]

[Arising out of Orders in Appeal No. 19/2009 dated 30.03.2009, passed by the Commissioner, Customs, Central Excise & S.T., New Delhi]

For approval and signature:

Hon'ble Mr. Justice (Dr.) Satish Chandra, President
Hon'ble Mr. V. Padmanabhan, Member (Technical)

Ashutosh Metal Industries ….Appellant

Vs.

Commissioner of Central Excise & S.T., Delhi ….Respondent

Appearance:

Shri J.P. Kaushik, Advocate for the Appellant
Shri G.R. Singh, Advocate for the Respondent

CORAM:
Hon'ble Mr. Justice (Dr.) Satish Chandra, President
Hon'ble Mr. V. Padmanabhan, Member (Technical)

Date of Hearing: 09.01.2017

Date of Pronouncement: 25.01.2017

FINAL ORDER NO 50477 / 2017- CU [DB]

Per V. Padmanabhan

The present appeal is directed against the Order-in-Original No. 19/2009 dated 30.03.2009, passed by Commissioner of Central Excise, New Delhi.

2. Brief facts of the case are that by the impugned order, the Commissioner has held that the charge of clandestine removal of the goods against the appellants has been established as under:-

S. No	Acco-unt	Period	Cum-duty sale value shown in the printouts recovered and from the calculations from kachhi parchi (Rs.)	Assessable value on which duty is payable	Central Excise duty @ of 16% (Rs.)	Education Cess on Excise Duty @ 2% (Rs.)	Total Duty Recoverable (Rs.)
1	ATM	2.3.05 to 06.5.05	18,22,35,303.30	15,66,67,214	2,50,66,754.22	5,01,335.08	2,55,68,089.30
2	SHIVA	07.5.05 to 16.9.05	35,02,87,889.00	30,11,41,582.70	4,81,82,653.23	9,63,653.07	4.91,46,306.30
3	ATM	17.9.05 to 21.9.05	77,80,242.00	66,88,653.71	10,70,184.59	21,403.70	10,91,588.29
4	ATM	22.9.05 to 12.11.05	5,16,58, 179.00	4,44,10,401. 47	71,05,664.25	1,42,113.28	72,47,777.53
TOTAL			59,19,61,613.30	50,89,07,851.88	8,14,25,256.29	16,28,505.13	8,30,53,761.42

Consequently the duty demand of Rs. 8,30,53,761/- has been confirmed for the period 02.3.2005 to 12.11.2005 against the appellants along with interest and equal amount of penalty. The appellant has sought to assail the impugned order on various grounds including that the findings arrived at by the authorities below are not on the basis of any corroborative evidences. It has been urged that the authorities failed to offer all the witnesses for cross examination by the appellants, and to that extent there was serious infraction of principles of natural justice rendering the order to be bad in law. It has also been contended that the authority could not have relied upon the documents recovered from the possession of the third party namely, Smt. Janaki Sharma, who is nowhere concerned with the business of the appellants. Her statement dated 18.11.2005 was retracted immediately on the day following the day on which statement was recorded. And in that connection, attention was drawn to copy of her letter dated 19.11.2005.

As per the show cause notice itself the total daily production from the appellant's factory was 5 tonnes and the factory was running in a single shift and working for about 10 – 15 days in a month. Considering the same, the calculations regarding the production in the appellants factory as disclosed in the above quoted chart, is totally fanciful and without any basis. They relied upon a number of decisions in support of his contention including the decision in the matters of *Galaxi Indio Fab Limited vs. CCE, Lucknow as reported in [2010 (258) ELT 254 (Tri-Del)], Donear Décor Pvt. Limited vs. CCE, Rohtak as reported in [2010 (259) ELT 437(Tri-Del)], Hilton Tobaccos Limited vs. CCE Hyderabad –I - [2005 (183) ELT 378 (Tri-Bang)], T.G.L. Poshak Corpn. vs. CCE Hyderabad - [2002 (140) ELT 187 (Tri-Chennai)] and P V Verghese vs. CEGAT 2008 (232) ELT 420.*

3. With the above background, we have heard Shri J.P. Kaushik, ld. Counsel appearing for the appellant and Shri G.R. Singh, ld. DR for the Revenue.

4. Ld. Counsel for the appellant argued the case elaborately and prayed that the appeal may be allowed with consequential relief by setting aside the impugned order. The main arguments are listed below:-

(a) RUD- 1, 2 and 3 were not admissible evidence and the ld. Commissioner ought not to have relied upon them

RUD- 1 and 2 are computer printouts. The computer printouts are admissible in evidence only when the provisions of section 36B of Central Excise Act, 1944 are satisfied. Conditions of sub-section (2) of Section 36B have not been satisfied and the certificate as stipulated in sub-section 4 of section 36B has not been produced. RUD- 8 and 9 are extracts of RUD-1 and 2 and this plea equally applies to RUD -8 and 9. Reliance in this regard is placed on the judgments in Shivani Steel Corporation – 2016 (339) ELT 310 (Tri. Kol.) and Jindal Nickel & Alloys Limited - 2012 (279) ELT 134 (Tri. Del.).

(b) Computer hard disk and pen drive were seized on 18.11.2005 from residence of Smt. Janski Sharma. Printouts were taken on 18.11.2005. But at page 131 of RUD-1 (page 490 of Appeal) there is entry dated 28.02.2006. How could entry be made on 28.02.2006 when the computer hard disk, pen-drive and printouts had been under seizure with the department since 18.11.2005. It creates doubts about the authenticity of RUDs.

(c) Smt. Janki Sharma in her statement dated 18.11.2005 (RUD-4) has stated that she did not make entries in RUD-1 and 2. In her cross-examination she deposed that there was no printer in her house on 18.11.2005. in absence of printer, how the printouts could be taken on 18.11.2005? Moreover, Shri J.K. Aggarwal in his statement dated 20.07.2006 had stated that the appellants had no connection with RUD-1, 2 and 3. It appears that the computer printouts were prepared/ forged by the investigating officer at a later stage and not at the time of search as Smt. Janki Sharma had no printer at her residence. The printouts were also not taken in the presence of Smt. Janki Sharma or in presence of Shri. J.K. Aggarwal.

(d) The Ld. Commissioner in Para 41 of his Order-in-Original (page 127 of Appeal) has found that the appellants could only produce 600MT of ingots during the period from March 2005 to November, 2005. As per RUD-1 and 2 the sale value of ingots is Rs. 25,23,192.30 (page 52 of Appeal). Taking the sale price of Rs. 1,70,000/- per MT the quantity of ingots produced as per RUD-1 and 2 comes to 3132MT as against the production of 600MT as per the production capacity found by the ld. Commissioner. It is, therefore, obvious that RUD-1 and 2 did not belong to the appellants as also stated by Shri J.K. Aggarwal in his statements dated 20.07.2007 and ought not to have been admitted as evidence against the appellants.

(e) The Ld. Commissioner has accepted in Para 41 of the order the facts mentioned in Para 2 of the show cause notice i.e. the appellants could produce 5MT of ingots in a day and worked 10 to 15 days in a month. For the period from 17.09.2005 to 12.11.2005 covered by RUD-3 the production as per the production capacity would work out to 135MT. On the basis of the sale value of Rs. 5,94,38,421/- as shown in RUD-3 for this period, the quantity of ingots produced would work out to 350MT. It could not be correct considering the accepted production capacity. This shows that RUD-3 is also not reliable and does not pertain to the appellants as stated by Shri J.K. Aggarwal.

(f) RUD-1, 2 and 3 mentioned names of buyers of ingots/ rods and suppliers of scrap. Correctness of the contents of RUD-1, 2 and 3 could be easily verified by locating them and by making investigation at their end. No such effort was made by the investigating officer and as such the contents of RUD-1, 2 and 3 remained uncorroborated with independent evidence and rendered them inadmissible in evidence.

(g) Not only the alleged production of such huge quantity of ingots, wire rods and wires allegedly sold by the appellants, is impossible keeping in view of the production capacity, but also is not corroborated by any positive and concrete evidence as mentioned below:-

(i) During the search of the factory and the residence of the proprietor, no incriminating documents or cash were found. The stock of the raw materials and the finished goods tallied with the recorded balance.

(ii) There is no evidence of physical receipt of raw materials required for production of such huge quantity of finished goods, in the form of (a) statement of drivers, transporters, GRs or vehicle numbers engaged in transporting the raw material to the factory; (b) statements of the appellants' staff which would have received the raw material or issued it for manufacture; (c) statements of employees who have used such raw material in the production of the finished goods; (d) statement of the alleged suppliers of raw materials; (e) evidence of payment of purchase price to the suppliers of raw material and receipt of purchase price by the suppliers.

(iii) Similarly in respect of sale of the alleged production of the finished goods, there is no evidence about the transportation, statements of the appellants' employees engaged in the alleged production and sale of the finished products, statements of the buyers, receipt of payment from the buyers and excess consumption of the power.

(iv) Reliance in this regard is placed on the Hon'ble Tribunals' judgment in the case of Essvee Polymers (P) Limited vs. CCE – 2004 (165) ELT 291 (Tri.) and Hon'ble Allahabad High Court judgment in the case of Continental Cement Co. – 2014 (309) ELT 411 (All.).

The statements of Smt. Janki Sharma and others ought not to have been relied upon by the ld. Commissioner for the following reasons:-

(i) Smt. Janki Sharma retracted her statement dated 18.11.2005 vide her letter dated 19.11.2005 to Addl. Director General, DGCEI.

(ii) During her cross-examination on 10.02.2009 (page 133-137 of Appeal) she deposed that search on 18.11.2005 was not conducted properly, there was no recovery of RUD-1, 2 and 3, she did not work for the appellants, she was working for the other parties on part-time basis, her statements were recorded in the office as dictated by the officer etc.

(iii) Shri J.K. Aggarwal, Proprietor in his statement dated 20.07.2006 (RUD-12) stated that Smt. Janki Sharma had never worked with the appellants and no computer was given to her.

(iv) Reliance on Smt. Janki Sharma's retracted statements without any independent corroboration and rejection of her deposition during cross-examination as an afterthought by the ld. Commissioner are misplaced and not proper. He ought to have kept her statements which were retracted and contradicted during cross-examination, out of the consideration.

(v) The impugned order also relied on the statements of and S/Sh. Hrishikesh Dubey, Kashiram Puri, R.S. Aggarwal and Manish Sethi. The appellants had requested for their cross-examination vide letter dated 13.10.2008 (page 168 of Appeal). No reasons are given for not offering S/Sh. Manish Sethi, Hrishikesh Dubey and Kashiram Puri for cross-examinatiion. Only Smt. Janki Sharma was cross-examined on 10.02.2009. The ld. Commissioner's reliance on their statement without offering them for cross-examination is not legal and proper and is in violation of the provisions of section 9D of the Central Excise Act, 1944. The ld. Commissioner ought to have ignored their statements. Reliance in this regard is placed on the judgment in the case of G. Tech Industries vs. UOI – 2016 (339) ELT 209 (P&H).

(vi) Shri Manish Sethi also retracted his statement dated 18.01.2006 vide his letter dated 02.02.2006. His retracted statement could not have been relied upon by the ld. Commissioner.

(vii) It is well settled legal position that the department has to establish clandestine removal by bringing on record positive and concrete evidence and the charge cannot be based on suspicion, assumptions and presumptions. In this case, the department has not been able to produce positive and concrete evidence to establish clandestine manufacture and removal of the goods. The impugned order is based on inadmissible evidence, assumptions and presumptions and is not, therefore, sustainable. Reliance in this regard is placed on the judgments in Oudh Sugar Mills Ltd – 1978 (2) ELT (J172) (SC) and Universal Polythene Inds. – 2001 (130) ELT 228 (Tri.).

(viii) Since the demand of duty is not sustainable the interest and penalty are also not leviable.

5. The ld. DR on the other hand, submitted that the appellants in fact did not seek to cross examine all the witnesses but they wanted to cross examine only two witnesses and that is apparent from their letter dated 01.11.2008. He further submitted that the appellants have sought for cross examination of Smt. Janaki Sharma and Shri R.S. Aggarwal as referred to in letter from the appellant as confirmed by two of the employees of the appellants themselves namely, Hrishikesh Dubey, Accountant and Manish Sethi, part time accountant of the appellants. The fact that Smt. Janaki Sharma was the employee of the appellants was clearly confirmed by the said witnesses besides the same is also apparent from the letter dated 30.7.06 by the appellants themselves.

6. Heard both sides and perused the records. The DGCEI officers searched the factory and residence of the proprietor Shri J.K. Aggarwal and connected premises on 21.09.2005, no discrepancy in the physical stock of inputs as well as finished products viz-a-viz, the recorded balance in the statutory records was found. After about two months on 18.11.2005, the officers searched the residence of one Smt. Janki Sharma said to be an employee of M/s. Kaycee Electricals and following was recovered at the time of search:-

(i) Several loose slips were found which were placed in a file and marked '1-56' – (RUD-I)

(ii) One pen-drive of Kingston brand of 512MB, one Hard disk drive, Seagat brand of 80GB capacity. Printouts were taken of the contents from the above equipments. The data generated from the pen drive pertain to account of sale pertaining to "ATM" (RUD-1) and "SHIVA"(RUD-2). In her statement on the date of search i.e. 18.11.2005, Smt. Janki Sharma stated that data generated under the heads of 'ATM' and 'SHIVA' from the above, pertains to unaccounted and clandestine sales made by the appellant. The 'ATM' account showed value of sales of about Rs. 18.22 Crores whereas 'SHIVA' account showed sales to the extent of Rs. 35.02 Crores. The statement of Smt. Janki Sharma was further corroborated by the statements of Shri R.S. Aggarwal and Shri Manish Sethi. On the basis of the above details, the demand of Central Excise duty was proposed in the show cause notice to Rs. 9,66,08,135/-, which was finally confirmed in the impugned order to the extent of Rs. 8,30,53,761/-, after extending the benefit of cum-duty price. Such demand of Central Excise was confirmed and has been assailed in the present appeal.

7. The first ground on which the evidence has been assailed is that RUD-1 and 2 which are computer printouts, and which are the basis for confirming the demand, are not admissible since the conditions specified in section 36B of the Central Excise Act, 1944 have not been satisfied. The conditions specified under section 36B for admissibility of computer printouts are as follows:-

> **"Section 36B(2)** - The conditions referred to in sub-section (1) in respect of a computer print out shall be the following, namely:—
>
> (a) the computer print out containing the statement was produced by the computer during the period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period by the person having lawful control over the use of the computer;
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> (b) during the said period, there was regular supply to the computer in the ordinary course of the said activities, information of the kind contained in the statement or of the kind from which the information so contained is derived;
>
> (c) throughout the material part of the said period, the computer was operating properly or, if not, then any respect in which it was not operating properly or was out of operation during that part of period was not such as to affect the production of the document or the accuracy of the contents; and
>
> (d) the information contained in the statement reproduces or is derived from information supplied to the computer in the ordinary course of the said activities."

The computer printouts have been taken out as RUD-1 and 2 are in the form of prints taken out from the pen-drive as well as from the hard-disk recovered at the residence of Smt. Janki Sharma. Smt. Janki Sharma in her initial statement dated 18.11.2005, at the time of search, admitted that these printouts are out of Kachchi Parchis given to her by proprietor Shri J.K. Aggarwal and are related to sale of goods made by the appellant clandestinely. However, it is on record that she has retracted her statement immediately thereafter on the next day. At the time of search at her residence, it is recorded that Smt. Janki Sharma is employee of the appellant and that the details culled out as RUD-1 and 2, did not belong to them and hence ought not to be admitted as evidences. In the appeal, it has further been explained that RUD-1 contains entries up to 28.02.2006 and the printouts were taken out on 18.11.2005 from the pen-drive and hard disk seized. This creates serious doubt about the authenticity of the RUDs. Smt. Janki Sharma during her cross-examination before the adjudicating authority has further disowned the printouts and has also submitted that there was no printer at her house at the time of search. This also raises serious doubt how the printouts were taken in the presence of Smt. Janki Sharma and Shri J.K. Aggarwal, proprietor. In the light of the above, it clearly emerges that the conditions under Section 36B(2) have not been satisfied for the admissibility of evidence in the form of computer printouts, in RUD-1 and 2.

8. The impugned order has also been assailed on the ground of demand being impracticable and unreasonable, in relation to production capacity available in the appellant’s factory. The ld. Commissioner in Para 41 of the impugned order has observed that the appellants had capacity to produce about 600MT during the period in dispute, March 2005 to November 2005. This has been estimated by him by considering the appellant to have capacity to manufacture about 50-75 MT per month. Taking the sale price of Rs. 1,70,000/- per MT for ingots and considering the sale value of invoices as per RUD-1 and 2, i.e. Rs.

25,23,192/-, the quantity of ingots involved works out to 3132MTs. In the light of the production capacity estimated by the Commissioner as 600MT, the quantum of ingots for which the demand has been raised at 3132MTs appears to be inflated and unreasonable. On the same lines, for the period 17.09.2005 to 12.11.2005, covered by RUD-3, the production capacity was worked out as 135MTs whereas, the projected quantity of ingots for which duty demand has been raised is to the extent of 350MTs, which clearly seems to be inflated and unreasonable.

9. The appellant also raised the issue of infraction of principles of natural justice on the part of the adjudicating authority by not permitting cross-examination of some of the witnesses sought by the appellant. The cross-examination of Smt. Janki Sharma was permitted by the adjudicating authority and held on 10.02.2009. The claim of the appellant is that the impugned order also relied on the statement of Shri Hrishikesh Dubey, Shri Kashiram Puri, Shri R.S. Aggarwal and Shri Manish Sethi. Though they had requested to the adjudicating authority for cross-examination of all these witnesses vide their letter dated 13.10.2008, the adjudicating authority has not made these witnesses available for cross-examination. The appellant has submitted that ld. Commissioner could not rely on the statements of these witnesses without providing them for cross-examination. The view of the appellant finds support in the form of decision of the Hon'ble P&H High Court in the case of *G. Tech Industries vs. UOI – 2016 (339) ELT 209 (P&H).*

10. The entire allegation of clandestine removal made by Revenue is based on the statements of witnesses as well as computer printouts

containing certain details of alleged clandestine clearances recovered from Smt. Janki Sharma. The status of Smt. Janki Sharma that she was an employee of the appellant's company has not been established. She has also retracted her statement given at the time of search, promptly. The computer printouts also did not satisfy the conditions prescribed under Section 36B of the Central Excise Act, 1944. Such computer printouts are not eligible to be used as evidence.

11. It is settled law that documents recovered from a third party can be used against the manufacturer to prove clandestine removal only when these are supported with corroborative evidences. The Revenue has alleged that huge quantity of finished products have been manufactured and cleared clandestinely without payment of Central Excise duty. The computer printout of data recovered from the house of Smt. Janki Sharma, no doubt, gives rise to suspicion that these are details relating to clandestine clearance of the goods. However, clandestine manufacture and clearance alleged against the appellant is a very serious charge which needs to be proved by Revenue by producing tangible and reliable evidences. For clandestine clearance of such huge quantities of finished products, corresponding quantity of raw-materials ought to have been procured by the appellant. The finished products allegedly have been cleared to various customers. In fact, in the computer printouts recovered, names of several buyers have been indicated. However, we note that Revenue has failed to undertake proper investigation even for the procurement of raw materials without entering in their books, nor carried out any investigation on the buyers who are alleged to have purchased these

finished goods, in cash without payment of duty. From the records recovered from the factory, there is no evidence of any physical receipt of raw materials used in production of such a huge quantity of finished goods. In fact on the date of search, no discrepancy was recorded in respect of stock of raw materials and finished goods vis-a-vis that recorded in statutory records. The Revenue has also not bothered to investigate about the transportation of raw materials as well as finished products. The total quantum of alleged clandestine production and clearance also show an over estimation, keeping in view the production capacity estimated by the Commissioner himself in the impugned order.

12. It is true that the evidence which is required to be produced in quasi judicial proceedings should be such that the charges get established on the basis of preponderance of probability. The standard of evidences need not be as high as in criminal proceedings, where the charges are required to be established beyond reasonable doubts. But in the present case, we are of the view that the allegation of clandestine manufacture and clearance has not been substantiated by any tangible evidences. The only evidence unearthed by Revenue in the form of computer, from the residence of a third party cannot be considered as sufficient proof to support such allegation. This is particularly so since the authenticity of the evidence has been questioned. The Revenue has failed to produce any corroborative evidence in the form of purchase of raw materials, clearance of finished products or even the capacity to manufacture such a huge quantity of finished products alleged to have been cleared. The evidence, at best, raises suspicion

in the minds but is not sufficient to prove the charges of clandestine removal.

13. The appellant has placed reliance on the Tribunal judgment in the case of *Essvee Polymers (P) Limited vs. CCE, Chennai – 2004 (165) ELT 291 (Tri. Chennai.)* and Hon'ble Allahabad High Court decision in the case of *Continental Cement Company vs. UOI – 2014 (309) ELT 411 (All.).* We have gone through the above case laws which support the arguments of the appellant.

14. In view of the discussions in above paragraphs, we find that the evidences produced by the Revenue for sustaining the duty demand has not been corroborated by detailed investigation. The allegation of clandestine manufacture and clearance cannot be sustained on the basis of such flimsy evidences. Accordingly, the impugned order is set-aside and the appeal is allowed. Miscellaneous application also disposed of.

[Pronounced in the open Court on 25.01.2017]

(Justice Dr. Satish Chandra)
President

(V. Padmanabhan)
Member (Technical)

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