

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

West Block No.2, R.K.Puram, New Delhi

COURT-IV

Date of hearing/decision: 17.05.2017

Appeal No. E/885-886/2010-[SM]

[Arising out of the Order-in-Appeal No. 52-CE/APPL/D-II/09 dated 30.10.09, passed by the Commissioner of C. Ex. Appeals), Delhi-II

M/s J.B.Metal Industries Pvt.Ltd.
Shri Rajesh Kumar

... Appellant

Vs.

C.C.E, Delhi-II

... Respondent

Appearance:

Present Shri, Jitender Singh, Advocate for the appellant
Present Shri, G.R. Singh, AR for the respondent

Coram: Hon'ble Mr. B.Ravichandran, Member (Technical)

FINAL ORDER No 53380-53381/2017

Per B.Ravichandran

1. These two appeals are against common impugned order dated 30/10/2009 of Commissioner (Appeals-II) Central Excise, New Delhi. The main appellants are engaged in the manufacture of copper wire and ingots liable to Central Excise duty. The second appellant is the Director of the first appellant company. Based on certain information received regarding possible unaccounted production and clearance of excisable goods by the main appellant, the officers of Directorate General of Central Excise Intelligence, New Delhi conducted certain verification in the premises of the appellant on 21/09/2005. Stock taking of raw

material and finished goods were conducted Indian currency of Rs.23.15 lakhs is also seized on the reasonable belief that same is sale proceeds of unaccounted clearance of finished goods.

2. On completion of investigation, proceedings were initiated against the appellants for demanding central excise duty of Rs. 14,71,692/- ,towards unaccounted clearance of excisable goods. The case was adjudicated by the Original Authority who confirmed duty demand of Rs. 8,27,043/-. He further confirmed a duty of Rs. 12,224 on refined copper wire, found short in the factory. Penalties of equal amount was imposed on the main appellant under Section 11 AC of Central Excise Act, 1944. A penalty of Rs.25,000/- was imposed on the second appellant under Rule 26 of Central Excise Rules,2002. On appeal, Original Order was upheld by the Commissioner (Appeals).
3. The Ld. Counsel for the appellants, submitted that the Indian currency of Rs. 23.15 lakhs, seized during the course of investigation, has been returned to the appellants as the Tribunal vide Final Order No. 54608-54609 of 2016 dated 28/10/2016 held that the confiscation of the said currency is not tenable. Further, in the same order, The Tribunal held the confiscation of excess copper scrap is also not tenable and the same was set aside and the case was remanded for a fresh decision after hearing the

appellant's claim. The Ld. Counsel submitted that seizure of Indian currency was one of the main basis for alleging clandestine clearance of excisable goods. Further, the Original Authority did not allow cross examination and give any finding regarding the cross- examination sought by the appellant, mainly with reference to statements of Shri. Ram Murti Sharma and the laborer who was purportedly, prepared the production slip.

4. The Ld. Counsel submitted that the whole case against the appellant is based on the chart- Annexure-B to the Panchnama dated 21/09/2005. The said chart indicated that on 20/09/2005 and on 21/09/2005, the appellants were supposed to have issued 13.596 and 13.852 metric tonnes of copper scrap for the manufacture of copper wire bars. These issues were supposed to have resulted in the manufacture of 12.916 metric tonnes and 13.158 metric tonnes of refined copper wire bars on these two days. The Ld. Counsel strongly contested the recordings in the chart. He submitted that the whole chart is prepared based on certain presumptive backward calculation with no reference to the facts. The admitted capacity of the main appellant is around 4 metric tonnes of refined copper wire bars per heat which may be covering a period of 7-8 hours. Physically, it is not possible for them to manufacture 13 metric tonnes of refined copper wire

- bars on each day of 20th and 21st September, 2005. In such situation, the demand of such calculated production is factually not sustainable. There is no investigation or evidence relating to clearance of any of the finished goods, transportation, buyer or payment received for such goods. In the absence of any corroborative evidence, clandestine manufacture or clearance cannot be sustained.
5. The Ld. AR submitted that the stock taking and the chart were prepared in the presence of the Director. The appellant's plea that there is no basis for demand is not acceptable. His statements recorded by the officers were not retreated and they are admissible as evidence. The lower Authorities examined the available evidence and concluded correctly about the duty liability of the appellant.
6. I have heard both the sides and perused the appeal records. The case is relating to central excise duty demand on account of clandestine manufacture and clearance of excisable goods. I have examined the impugned order. First of all, I note that the seizure of Indian currency for Rs. 23.15 lakhs from the premises of the main appellant was one of the main evidence for the revenue, to conclude that the appellants indulged in unaccounted clearance. The Tribunal vide final order dated 28/10/2016 held that the

confiscation of the said currency is not tenable. It was recorded that the said amount cannot be attributed to sale proceeds of excisable goods, illegally manufactured and cleared by the appellant. As such, one of the main basis on which the present demand was sustained has been held to be unsustainable.

7. Another important aspect relied upon by the Revenue is the production of excisable goods, refined copper wire bars on 20th and 21st September, 2005. I find, admittedly, the appellants had capacity of making around 4 metric tonnes of the finished goods per heat. At the time of visit of officers, the ingots were available in the various moulds in the factory. I find that the impugned order did not discuss at all, about the physical possibility of the main appellant manufacturing 13 metric tonnes of refined copper wire bar per day for two consecutive days. The appellants strongly content that the said production projected by the Revenue is way beyond their capacity. I find no discussion in the impugned order on this aspect at all.
8. It is to be noted here that reliance was placed on various handwritten slips recovered from the appellants. The author of such slips was not identified. The appellant's request for cross-examination of the person whose statement was taken to explain the production slip was not considered by the lower Authorities.

This non-consideration of appellant's request in terms of the provisions of Section 9D of Central Excise Act, 1944 puts the reliance placed by the lower authorities on such evidence, in serious jeopardy. The Hon'ble Punjab and Haryana High Court, in the case of **Ambika International 2016-TIOL-1238-AC—P&H-C** held that in the event that Revenue to rely on any of the statements recorded under Section 14 of the Act then the procedure as stipulated in Section 9D of the Act has to be strictly followed. The Hon'ble High Court observed as below

‘ There is no justification for jettisoning this procedure, statutorily prescribed by plenary parliamentary legislation for admitting, into evidence, a statement recorded before the gazetted Central Excise officer, which does not suffer from the handicaps contemplated by clause (a) of Section 9D(1) of the Act. The use of the word “shall” in Section 9D (1), makes it clear that, the provisions contemplated in the sub-Section are mandatory. Indeed, as they pertain to conferment of admissibility to oral evidence they would, even otherwise, have to be recorded as mandatory’.

9. In view of the above discussion and on perusal of the impugned order, I find that the main supporting evidences relied upon by

the Revenue to arrive at the conclusion of non-duty paid clearance are found to be either not legally tenable or on admissible evidences. As such, the Revenue failed to establish the unaccounted manufacture and clearance of excisable goods with any creditable evidences and as such the impugned order is liable to be set aside.

The appeals are allowed by setting aside the impugned order.

[Dictated and Pronounced in the open court]

B.Ravichandran

Member (Technical)

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