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

Appeal No. E/1370, 1404-1406/2008-EX(DB)

[Arising out of Order-in-Appeal No. 14/2007-08 dated 31.03.2008 passed by the Commissioner of Central Excise, Delhi]

Rollex Electro Products (P) Ltd.
Shri S. P. Goel, Director,
Shri S.S. Tripathi, Manager
Shri Lalit Babbar, Managing Director, **....Appellant**

Vs.

C.C.E., Delhi II **....Respondent**

Appearance:

Sh. Naveen Mullica, Kumar Vikram Advocate for the Appellant
Sh. R.K. Manjhi, DR for the Respondent

CORAM:

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

Date of Hearing: 13.01.2017
Date of Pronouncement: 22.05.2017

FINAL ORDER NO. 53382-53385 /2017-EX[DB]

Per V. Padmanabhan:

These appeals are against the impugned order no. 14/2007-08 dated 31.03.2008. In the year 1985, under the proprietorship of Sh Lalit Babbar (Appellant No 2), the Appellant started manufacturing wires and cables. In the year 1991, it was taken over by a Private Limited Company i.e. M/s Rolex Electro Products Pvt Ltd, wherein Sh Lalit Babber has been a Director. Besides manufacturing Armoured Cables of various specifications, PVC Cables (Housing Wires), Electric Lead/Cord till the year 2002, the said Appellant also started undertaking trading in Braiding Thread since the year 1994-95, apart from using the Braiding Thread procured from the open market for manufacture of Electric Cord/Lead.

2. It is pertinent to point out that the Electric Cord/Lead having use of Braiding Thread, Rubber, Copper Wire and 3 Pin Plug, are also used with an Electric Iron. On the materials like Braiding Thread, 3 Pin Plug and Rubber, they are not availing any CENVAT Credit and there is no dispute about the same in the present proceedings.

3. For the period from 1994-95 to 04.06.2002,the Appellants purchased raw materials of a value of Rs. 75,03,61,159.36/- in total. Further the materials like Braiding Thread, Rubber and 3 Pin Plug cannot be used in the manufacture of Armoured Cables, PVC Cables (Housing Wire). In respect of the materials received along with duty paying documents, the Appellants were taking MODVAT Credit. But on Braiding Thread, Rubber and 3 Pin Plug, no MODVAT Credit was being availed.

4. The first visit of the Officers to the factory of the Appellant was on 04/05.06.2003, wherein a Panchnama was drawn. While confirming about the factory premises consisting of the Basement, Ground Floor, First and Second Floor and each floor having machinery and fixtures installed on it, it was also stated about the Officers having conducted the stock taking and thereby alleging shortage of raw materials worth Rs. 1,56,61,546/-. As per the said Panchnama, it was alleged that the Appellant should have a stock of raw materials worth Rs. 4,52,95,147/- and as per the actual stock taking, the raw materials consumed in the finished goods and semi-finished goods is were found to be worth Rs. 2,96,33,601/-.

5. The Panchnama drawn was challenged about its correctness by the Appellants through their letter dated 06.06.20O3. It was submitted that there was no basis for working out the alleged shortage of raw materials, no basis for taking into consideration 10% pre and post manufacturing expenses and the Appellants were not aware as to from which record such figures had been taken and how shortage of the respective raw materials was quantified and stock lying on machines was not considered etc.

6. Another Panchnama dated 17/18.06.2003 was drawn. Receipt of the challenge dated 06.06.2003 of the Appellants to the Panchnama dated 04/05.06.2003.In the said Panchnama, the quantity of raw materials sent out for Job-work to different

job-workers till 04.06.2003 was taken out from the quantum of alleged shortage appearing in Panchnama dated 04/05.06.2003. In this process, the appellant had the grievance that in the Panchnama dated 04/05.06.2003 and the Panchnama dated 17/18.06.2003, the following particulars were not recorded:

a. Respective description of the raw material allegedly found short.

b. Respective weight of raw material allegedly found short.

7. The shortage was allegedly worked out not by weight but by value in Rupees. The value of finished goods and value of semi-finished goods were reduced by 10% towards pre and post manufacturing expenses to work out the cost of the raw materials and also for working out the value of the shortage of the raw materials.

8. The statement of Sh. Mahender Pal Upadhyay was recorded on 04.06.2003 who was Production Incharge in the Armoured Cables section. During recording of his statement he was never enquired in respect of the contents of the Panchnama drawn.

9. The statement of Sh. Upender Mishra, Assisant Production Incharge and also looking after the Housing Wire of PVC was also recorded on 04.06.2003. He was also not confronted with the contents of the Panchnama for his explanation nor about the production of Electric Cord/Lead carried out on the Second floor

where use of Braiding Thread,3 Pin Plug, Rubber, and Copper Wire was being undertaken.

10. In his statement dated 16.06.2003 Sh Lalit Babbar, Director of the Appellant unit when confronted with the alleged shortage of materials worth Rs 1,56,61,346/- appearing in Panchnama dated 05.06.2003, stated that he would look into it and further clarified about the materials sent out for Job-work. He also referred that the Panchnama dated 05.06.2003 had been challenged through their letter dated 06.06.2003 (Page A49 of Paperbook).

11. Another statement dated 18.06.2003 of Sh Lalit Babbar, Director was recorded who confirmed about the Panchnama dated 17/18.06.2003 having been drawn in his presence. He also stated that the Appellants were undertaking trading from premises at 146-A, Vikrant Enclave, Mayapuri, New Delhi in cables of other manufacturers.

12. The last statement of Sh Lalit Babbar, Director was recorded on 29.07.2003, wherein he provided the copies of the Sale Bills in respect of trading goods and General Ledger and further undertook to file the Purchase Bills etc. He confirmed about undertaking trading in CRC Sheet, strips etc since December 2002 and also confirmed about having undertaken trading in CRC/Strips. He further clarified that he was selling the goods in small quantities. While recording the statement of Sh

Lalit Babbar on the above three dates and also of the two employees ie Sh Mahender Pal Upadhyay, Production Incharge in the Armoured Cables section and Upender Mishra, Assisant Production Incharge of Housing Wire of PVC, they were never questioned about.

a. The manufacturing capacity of the respective products manufacturing including Electric Cord/Lead (made from Braiding Thread 3 Pin Plug, Rubber and Copper Wire),

b. About manufacture and clandestine clearance of 84,32,750 number of cords / electric leads, or

c. About the alleged clandestine removal of raw materials by the Appellants.

13. The statement of one Sh Satpal Goyal, Proprietor of M/s Sanyukt Enterprise and Director of M/S Sugam Products Pvt Ltd was also recorded on 28.08.2003 and as per Para 22 of the Show Cause Notice, the same was retracted.

14. On conclusion of the investigation, the Show Cause Notice dated 14.08.2006 was issued alleging the charges as under:

a. Demand of Rs. 3,06,95,210/- was raised on the ground of the Appellants having manufactured and cleared 84,32,750 number of cords/electric leads for Electric Iron valued at Rs. 19,18,47,063/- by purchasing the raw materials such as Copper Wire, Rubber etc from the open market without any bills in cash. The period for alleged clandestine clearance was mentioned to be 2001-02.

b. It was further alleged that 1,68,655 Kgs of Braiding Thread and the raw material valued at Rs 93,52,653/- was found short and further after procuring the other raw materials like Copper Wire, Rubber, the same were used for clandestine manufacture of 84,32,750 number of cords/electric leads.

c. It was also alleged that raw materials valued at Rs 93,52,653/- (found short) had been removed for clearance involving duty of Rs 14,96,424/-.

15. After the due process of law, the adjudicating authority passed the impugned order as follows:

a. Demand of Duty of Rs.3,06,95,210/- on clandestine manufacture and clearance of 84,32,750 number of cords/electric leads valued at Rs. 19,18,47,063/- under Section 11 A of the Central Excise Act.

b. Central Excise Duty amounting to Rs.14,96,424/- confirmed for — removal of raw materials valued at Rs. 93,52,653/- during 2002-03 under Section 11A of the Central Excise Act r/w Rule 14 of CENVAT Credit Rules, 2004.

c. Interest to be charged on the above demands.

d. Equal amount of penalty imposed on the above two demands confirmed under Section 11AC of the Central Excise Act r/w Rule 25 of Central Excise Rules, 2002.

e. Imposed Penalty of Rs. 20,00,000/- on Sh Lalit Babbar under Rule 26 of Central Excise Rules.

f. Rs. 2 lakhs on Shri S.P. Goel.

g. Rs. 25000/- on Shri S.S. Tripathi, Manager.

16. The appellant's grounds of appeal are summarized below:

i) Manufacture of 84,32,750/- number of cords.

The Appellants raised preliminary objection with regard to the charge of clandestine removal of raw materials valued at Rs. 93,52,653/- and sought cross-examination of the Officers drawing the Panchnama, Panch witnesses to the Panchnama dated 05.06.2003 and 18.06.2003, Sh SS Tripathi, Sh Satpal Goel and further challenged the method by which contents of the said Panchnamas were drawn etc. However, the Adjudicating Authority did not allow any cross-examination. Therefore, appellant has contested that the contents of the Panchanama and the retracted statements of Sh SS Tripathi and Sh Satpal Goel cannot be relied. Reliance in this connection is placed on the case of ***Commissioner of Central Excise, Meerut-I vs RA Castings Pvt Ltd, 2011 (269) ELT 337 (All).***

ii) Towards demand of Rs.14,96,424/-.

It has been argued that the method applied for undertaking physical stock taking and thereby to arrive at the figure of shortage of raw material in Rupees is neither legal nor correct nor proper. The value of the materials lying at finished stage, semi-finished stage including the raw materials was arbitrarily fixed and for working out the cost of the material, the Department deducted from such value the figure of 10%. Both the Panchnama and the Show Cause Notice are silent as to from where the same was taken and considered.

iii) The Ld Commissioner's attention was also drawn to the self- contradiction in the allegation of the impugned Show Cause Notice about the demand of Rs 14,96,424/-.

Whereas Para 27 of the Show Cause Notice alleges about the alleged shortage of raw materials, as worked out through Panchnamas prepared in the year 2003, having been utilised in the clandestine manufacture of 84,32,750 number of cords/electric leads cleared in the year 2001-02, on the other hand Para 31 of the Show Cause Notice alleges about the Appellants having clandestinely removed the said raw materials.

iv) There is absolutely no evidence of the stocks of raw materials having been clandestinely removed by the Appellants, to whom they were cleared and by which transport. There was no investigation into these aspects.

v) The Appellants placed on record the value of the raw materials purchased by them for the period from 1994-95 to June 2003 , which amounted to Rs 75,03,61,159/-. If the figure of Rs 93,52,653/- allegedly shortage is considered against the total procurement of raw materials, the difference comes to be about 1.25%. Such marginal difference is usual also in the units manufacturing as there occurs various invisible processing losses, there could be marginal difference of weights of the materials when different weighing scales are used and like such factors. In the absence of there being any evidence for clandestine removal, confirmation of demand by the Ld Commissioner has no legal sanctity. The burden to prove the charge of clandestine removal is on the Department and the same is not discharged.

17. Towards Demand Of Rs 3,06,95,210/- On 84,32,750 Number Of Cords/Electric Leads, the main grounds are:

i) There has been no admission on the part of the Appellants during investigation for clandestine manufacture and clearance of the above quantity of Electric Cord/Lead. The statements recorded of Sh Lalit Babbar, Director and employees of the Appellants do not touch upon this aspect at all.

ii) The Appellants demonstrated that it would require 337.310 tonnes of Copper and 354.175 tonnes of Rubber for manufacturing the said quantity of Electric Cord/Lead. There is nothing on record to show that such a huge quantity was received There is also nothing on record as to who was the supplier of such materials, by which transport such goods were received or, mode of payment.

iii) The Department had no evidence about the allegation and it was based on presumptions and surmises about the Appellants having allegedly procured other raw materials such as Copper Wire etc from the open market without any bills and in cash. There is no basis for the same.

iv) The Appellants having been selling goods to small customers who cannot afford to buy large quantities. In any case, they have been paying Income Tax for the profits earned. It is not within the purview of Central Excise to raise objection w.r.t. to profits earned on trading activities. In any case, such bare objection of goods being sold at a higher price cannot be a ground to allege that the Braiding Thread sold by the Appellants was clandestinely used in the manufacture of Electric Cord/Leads.

v) The impugned Order passed is arbitrary and the demand confirmed by the Ld Commissioner needs to be set aside. There is also no ground for charging any interest.

vi) As regards the penalty imposed on Sh Lalit Babar of Rs. 20,00,000/-, it is further submitted that the impugned Order is totally silent in providing any finding against him. Besides the fact that the whole case has been made out on presumptions and surmises and it is legally not sustainable, it is further submitted that the penalty imposed on Sh Lalit Babbar is arbitrary and also needs to be set aside.

vii) As regards the statement ofSh Satpal Goyal, Proprietor of M/s Sanyukt Enterprise and Director of M/s Sugam Products Pvt Ltd, it is submitted that he is also trader of Iron and Steel products. In any case, the Appellants did trading with him.

18. In any case, the charge of alleged clandestine manufacture and clearance of Electric Cord/Lead (Para 27 of Show Cause Notice) is for the year 2001-02 and as against the same, the trading in Iron and Steel products by the Appellants was only started from December 2002. Therefore, the statement of Sh Satpal Goyal has no relevance as far as the demand against the Appellants stand concerned. Detailed submissions have already been placed in the Grounds of Appeal for consideration by this Hon’ble Tribunal.

19. It is prayed that the appeals may be allowed.

20. Heard both sides and perused the records.

21. The demand for Central Excise Duty has been raised mainly on two grounds. An amount of Rs 14,96,424/- has been demanded for the period 2002-2003 on the allegation that raw material valued at Rs 93,52,653/- on which Cenvat credit has been availed, was found short at the time of search of the appellants factory and stock taking. Further, Central Excise duty amounting to Rs 3,06,95,210/- has been demanded on the ground that the appellant has surreptitiously manufactured and cleared 84,32,750/- numbers of electrical cords valued at about Rs 19 crores.

22. A demand of about Rs 15 lakhs has been made on the raw materials found short at the time of stock taking. At the time of the first visit by the Departmental Officers to the assessee's factory on 05.06.2003, the officers noticed some shortage of raw materials. The total shortage was worked out and recorded in the relevant panchnama. The assessee challenged the physical stock taking, vide their letter dated 06.06.2003. Accordingly, the stock taking of raw materials was conducted all over again on 17/18-6-2003. In the revised stock taking, the officers took into account the quantity of raw materials sent out for job worker in terms of Notification no. 214/86 dated 25.03.1986. Further, the amount of raw materials contained in the work-in-progress as well as in the finished products available in stock was also taken into account and the value of shortage of raw materials was determined at Rs 93.52 lakhs. Even though it is on record that

the entire stock taking was conducted in the presence of responsible persons representing the assessee, the argument of the assessee is that the relevant panchnama drawn on 18.06.2003 has never concluded actual amount of shortage. Further, none of the persons connected with company including its Director has been confronted with the alleged shortage and their response taken. The appellant sought the cross examination of the panch witnesses as well as other persons associated with the stock taking including the Central Excise inspector and the appellant's employees but the same was not allowed by the adjudicating authority.

23. The charge of clandestine clearance of electrical has been built up on the shortage of raw materials noticed at the time of stock taking in June, 2003. The assessee has claimed that they have undertaken trading activity in braided thread. The trading activity is claimed to have been done right from 1994-95. The department estimated that approximately 20 gms of braided thread is required in the manufacture of one electrical cord. The shortage of braided thread noticed at the time of stock taking was to the extent of 1,68,655 kgs. Taking the approximate quantity of 20 g required per electrical cord, the Revenue has estimated that 8432750 numbers of electrical cords would have been manufactured out of such braided thread found short and such electrical cords cleared clandestinely. Taking the average price of about Rs 22.75 per piece, the total value of electrical

cords alleged to have been cleared clandestinely was estimated at Rs.19,18,47,063/- involving Central Excise Duty of Rs.3,06,95,210/- during the year 2001-2002.

24. By way of supporting evidence to the allegation of clandestine manufacture and clearance, Revenue has recorded the following:

i. The assessee has employed more no. of employees than what is recorded in their books.

ii. It has been alleged that the employers who were not on the rolls of the assessee were paid in cash.

iii. The Revenue officers at the time of search noticed that additional machinery were installed compared to what was received.

iv. In the trading activity of braided thread, the assessee was found to have bought such items at the rate of about Rs 160 per kg and sold the same after substantial mark up, at the rate of Rs 267/kg. It has been alleged that , such sales shown in the books were fictious sales and have been used to account the sale proceeds of clandestinely cleared electrical cords.

v. In the activity of trading of braided thread, the assessee has recorded that they have sold the goods totally valued at Rs 2.69 crores. These have been shown as sold through 4,730 sale invoices each with value less than Rs 10,000 and shown in cash sales. This has been cited to support the conclusion that no such sales actually happened of the braided thread and by implication such goods have been diverted for clandestine manufacture of electrical cords and clearances thereof.

25. The ld. Counsels representing the various appellants argued that the demand of Excise duty cannot be sustained, since the Revenue failed to produce any evidence on record supporting the clandestine manufacture and clearance of the goods. They also submitted that the adjudicating authority did not permit cross examination of any of the witnesses whose statements have been relied upon. Without cross examination, the statements cannot be admitted as evidence in support of the charges.

26. The ld. DR supported the impugned order. He argued that the trading activity said to have been done by the appellants was nothing but a cover up for clandestine manufacture and clearance of electrical cords. He also submitted that the appellant has employed more workers than is found in the muster Roll and they have also employed additional machines without including them in their books. These indicate that the appellant has indulged in the manufacture of goods of a quantity much beyond what has been accounted for Excise duty payment. Accordingly, he submitted that the impugned order maybe upheld.

27. The appellants have seriously challenged the order on the ground that the adjudicating authority has not allowed the cross

examination of various witnesses. It has been submitted that the entire case has germinated out of the shortages noted at the time of stock taking. The stock taking originally was carried out at the time of visit of officers to the factory on 4/5th June, 2003. The appellants challenged the correctness of the panchnama drawn at that time. Subsequently another stock taking was done and panchnama was drawn on 18.6.03. Even that has not been accepted by the appellants. To support their challenge that stock taking was not carried out fairly, they have sought cross examination of the Panch witnesses as well as Sh. Mahender Pal Upadhyay, Production Incharge and Shri Upender Mishra, Assistant Production Incharge. In addition, they also sought cross examination of a few other witnesses citing the same as necessary for their defence. It is also significant to note that every witness whose statement has been recorded under section 14 of the Central Excise Act has retracted the same just one or two days after such statement was recorded by Panch witnesses. It has also been argued on behalf of the appellant that Revenue cannot rely upon any of the statement of witnesses who has not been produced for cross examination.

28. The adjudicating authority has brushed aside such arguments by taking a view that not allowing of cross examination has not violated principles of natural justice. He has further cited the fact that Shri Lalit Babbar, M D has

expressed satisfaction with the way the stock taking was conducted.

29. The law regarding cross examination has been the subject matter of a lot of litigation. Hon'ble High Court of Punjab and Haryana in the case of Jindal Drugs Pvt. Ltd. vs. Union of India reported in 2016 (340) ELT 67 (P&H) has laid down the law with regard to the cross examination in connection with the adjudication of show cause notice. The relevant portion is reproduced below:-

> "***25.*** *In the light of the above, respondent no. 2 is directed to adjudicate the show cause notice issued to the writ petitioners by following the procedure contemplated by Section 9D of the Act and the law laid down by various judicial authorities in this regard, including the principles of natural justice, in the following manner :*
>
> *(i) In the event that the Revenue intends to rely on any of the statements, recorded under Section 14 of the Act and referred to in the show cause notices issued to Ambika and Jay Ambey, it would be incumbent on the Revenue to apply to Respondent No. 2 to summon the makers of the said statements, so that the Revenue would examine them in chief, before the adjudicating authority, i.e., before Respondent No. 2.*

(ii) A copy of the said record of examination-in-chief, by the Revenue, of the makers of any of the statements on which the Revenue chooses to rely, would have to be made available to the assessee, i.e., to Ambika and Jay Ambey in this case.

(iii) Statements recorded during investigation, under Section 14 of the Act, whose makers are not examined-in-chief before the adjudicating authority, i.e., before Respondent No. 2, would have to be eschewed from evidence, and it would not be permissible for Respondent No. 2 to rely on the said evidence while adjudicating the matter. Neither, needless to say, would be open to the Revenue to rely on the said statements to support the case sought to be made out in the show cause notice.

(iv) Once examination-in-chief, of the makers of the statements, on whom the Revenue seeks to rely in adjudication proceedings, takes place, and a copy thereof is made available to the assessee, it would be open to the assessee to seek permission to cross-examine the persons who have made the said statements, should it choose to do so. In case any such request is made by the assessee, it would be incumbent on the adjudicating authority, i.e., on Respondent No. 2 to allow the said request, as it is trite and well-settled position in law that statements recorded behind the back of an assessee cannot be relied upon, in

adjudication proceedings, without allowing the assessee an opportunity to test the said evidence by cross-examining the makers of the said statements. If at all authority is required for this proposition, reference may be made to the decisions of the Hon'ble Supreme Court in Arya Abhushan Bhandar v. U.O.I., 2002 (143) E.L.T. 25 (S.C.) and Swadeshi Polytex v. Collector, 2000 (122) E.L.T. 641 (S.C.)."

30. Similar views have been expressed by the Hon'ble High Court in the case of G Tech [2016 (339) ELT 209 (P&H)] . From the above case law, it is evident that before the adjudicating authority can admit the statement of any witness as evidence, the same has to be done only after summoning the makers of the statement and after examining each witness. After that the witnesses should be offered for cross examination. In the present case, we note that this is a serious lacuna in the adjudication process adopted by the learned Commissioner. The requirement of cross examination becomes even more significant in the light of the fact that every witness whose statement has been recorded has retracted them soon thereafter.

31. We also note that the adjudication proceedings leading to the demand of duty on allegation of clandestine removal is built upon the shortage noticed in various items, in particular that of

braded thread. In the light of above, we are of the view that the impugned order deserves to be set aside and the matter remanded to the adjudicating authority for offering witnesses whose statements are being relied upon, for cross examination and thereafter to readjudicate the case. The appellant is directed to furnish the list of important witnesses whom they wish to cross-examine. Since the issue is long pending, the adjudicating authority is directed to complete the denovo proceedings in time bound manner. The appellant is directed not to seek unnecessary adjournments and to co-operate in the matter for speedy disposal of this long pending case.

[Pronounced in the open court on 22.05.2017)

(Justice (Dr.) Satish Chandra) **(V. Padmanabhan)**
President **Member (Technical)**

Bhanu