

CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL,
WEST BLOCK NO.2, R.K. PURAM, NEW DELHI-110066

BENCH-DB

COURT -III

Excise Appeal No. E/1376/2012-EX [DB]

[Arising out of Order-in-Original No. 15/2012 dated 07.03.2012
passed by the Commissioner, Central Excise, Delhi-II]

M/s. ASP Metal Industries

...Appellant

Vs.

C.C.E. Delhi

...Respondent

Excise Appeal No. E/1731/2012-EX [DB]

[Arising out of Order-in-Original No. 15/2012 dated 07.03.2012
passed by the Commissioner, Central Excise, Delhi-II]

C.C.E. Delhi

...Appellant

Vs.

M/s. ASP Metal Industries

...Respondent

Appearance:

Mr. Kamal Jeet Singh, (Advocate) for the Assessee
Mr. G.R. Singh, DR for the Revenue

CORAM:

Hon'ble Mr. S.K. Mohanty, Member (Judicial)

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

Date of Hearing: 09.02.2017

Date of Decision: 08.06.2017

Final Order No.53739-53740/2017

Per S.K. Mohanty:

These appeals have been filed by the assessee M/s. ASP
Metal Industries as well as the Revenue against the Order-in-
Original No. 15/2012 dated 07.03.2012 (for short, "the

impugned order"), passed by the Id. Commissioner of Central Excise, Delhi-II, whereby a demand of Central Excise duty of Rs. 2,93,17,554/- has been confirmed against the assessee together with interest thereon. The sum of Rs. 20,62,832/- deposited by the assessee during investigation has been appropriated against the demand of such duty. Indian currency of Rs. 6,20,000/- seized from the residence of Sh. Rajinder Prasad Gupta, father of the sole proprietor of the assessee, has been confiscated and the assessee has been given the option to redeem the same on payment of redemption fine of Rs. 1,00,000/-. A penalty of Rs. 2,93,17,554/- has also been imposed on the assessee under Section 11AC *ibid*. Central Excise duty demand of Rs.1,21,42,057/- proposed in the SCN on clearance of Copper Wire Rods was dropped in the impugned order.

2. Brief facts of the case, leading to these appeals are as follows:-

2.1 The appellant – assessee is engaged in the manufacture of copper ingots, falling under Chapter – 74 of the Central Excise Tariff Act, 1985 and is registered with Central Excise Department. The unit of the appellant-assessee was searched by officers of DGCEI on 21.09.2005. The residential premises of Sh. Rajinder Prasad Gupta, father of Sh. Vinod Gupta, who is the sole proprietor of the assessee, was also searched on 21.09.2005. During the course of search of the residential premises of Sh. Rajinder Gupta, Indian currency amounting to

Rs. 6,20,000/- was recovered and the same was seized by the visiting officers. During the course of search in the factory premises of the appellant-assessee, the officers detected a shortage of 3500 kgs. of copper scrap valued at Rs. 3,85,000/-. Some records were also resumed by the officers from the factory premises of the assessee. Further, some incriminating documents were also recovered and statements of various persons were recorded.

2.2 On the basis of investigation, the Department issued the show cause notice on 20.03.06, seeking confiscation of Indian currency, on the ground that the said currency was the sale proceeds of goods cleared clandestinely.

2.3 On the basis of the documents recovered from the factory premises of the assessee and the statements recorded from various persons, the assessee was served with the show cause notice dated 28.09.2007, alleging that the assessee had been receiving substantial quantity of copper scrap without any bills/documents and was not entering the same in its statutory records; that this scrap was used for manufacturing ingots and cleared to various parties after drawing into wire rods on job work basis without accounting in any statutory records and without payment of duty. The assessee was alleged to have cleared 362515.90 kgs. of copper wire. It was further alleged that 1952267 kgs. of ingots/wire bars appear to have been manufactured as per Bhatti register and have been cleared

without payment of duty; that 3500 kgs. of scrap allegedly found short during the search was allegedly admitted to have been cleared after converting it into ingots and then to wire rods; that electricity facility was manipulated/tampered with to accommodate recorded production only. A demand of duty and Education CESS of Rs. 1,21,42,057/- was raised on alleged clearances of copper wire rod and Rs. 2,93,17,554/- on alleged clearances of copper ingots without payment of duty and of Rs. 62,832/- on the alleged shortage of copper scrap.

2.4 Both the above show cause notices were adjudicated vide the impugned order dated 07.03.2012, wherein the Id. Commissioner of Central Excise has confirmed the demand of duty on copper rods and confiscated the seized currency. He has dropped the duty on copper wire and has accepted that the assessee could not have manufactured copper wire as they did not have wire drawing facility.

2.5 Feeling aggrieved with the impugned order, both the assessee as well as the Revenue have preferred appeal before this Tribunal. The grievance of assessee are that duty demand of Rs.2,87,42,700/- along with interest on alleged clearance of copper ingots, confiscation of Indian currency and imposition of equal amount of penalty are not proper and justified. Revenue has assailed the impugned order, so far as it dropped the proposed duty demand of Rs.1,21,42,057/- on clearance of copper wire rods.

3. In response to the demand confirmed in the adjudication order, the submissions of the assessee as made in the grounds of appeal and in the written note are as follows:-

3.1 That the Central Excise Officers during the course of stock taking, did not weigh the stock of copper scrap, but have arbitrarily taken the stock to be of 12526.900 Kgs. on the basis of eye estimation only. Since such scrap comprised of odd pieces of copper and the actual weighment had not been done, duty demand cannot be fastened against the assessee on the ground that quantity of copper scrap found short was used for un-accounted manufacture of finished goods by the assessee. The assessee has relied on the decisions rendered by the judicial forums in the case of CCE Vs. Kwalitiy Tube Industries -2009 (240) ELT 20 (Guj.), CCE Vs. Kundan Castings Pvt. Ltd.- 2008 (227) ELT 465 (Tribunal), Sri Chakra Cements Ltd., Vs. CCE - 2008 (231) ELT 67 (Tribunal), Hans Metals Pvt. Ltd. Vs. CCE- 2006 (199) ELT 521 (Trib.), Shiva Steel Rolling Mills Vs. CCE - 2005 (186) ELT 326 (Trib.), Bhushan Ltd. Vs. Commr.- 2005 (185) ELT 197 (Trib.), K.L. Steels Ltd. Vs. CCE - 1998 (100) ELT 406 (Trib.), Dulichand Silk Mills (P) Ltd. Vs. CCE - 2001 (133) ELT 468 (Trib.) to state that duty demand cannot be confirmed, when physical verification carried out on the basis of eye estimation only.

3.2 Central Excise duty can be levied, when the goods are removed from the factory. However, the Department has not brought on any evidence that shortage found in stock of raw material were used for manufacture of goods, which were clandestinely removed by the assessee. The assessee has relied on the decisions in the case of Galaxy Textiles Vs. CCE - 2011 (263) ELT 604 (Trib.), CCE Vs. Prakasan Pulverisers (P) Ltd.,- 2007 (218) ELT 57 (Trib.), CCE Vs. Bajrang Castings Ltd.- 2007 (216) ELT 623 (Trib.), Atul Aluminium Indus Vs. Commr. - 2003 (162) ELT 661 (Trib.), Rishi Packers Ltd. Vs. Commr. - 2003 (159) ELT 1110 (Trib.).

3.3 The Central Excise duty demand has been confirmed based on the records maintained by Shri Girish Chand and Shri Devinder Kumar Sharma, who are not the employees of the assessee, inasmuch as, the former is a labour contractor and the later is a broker of various goods including copper scrap, rods, bars and ingots, the fact of which is evident from the salary and wages register. The spiral note book (RUD-2) belongs to Shri Girish Chand and contain the details of labour supplied by him to various farms on a particular day. It does not show the number of labourers supplied only to the appellant-assessee. The said note book has been maintained by him to make payment of wages to the labourers supplied by him to various manufacturers. Thus, on the basis of such note book, it cannot be presumed that it contains the details of date wise bhatti production of the assessee. As regards recovery of diary (RUD-

3) maintained by Shri Devinder Kumar Sharma, the assessee submits that he has recorded the particulars in the RUD/ledgers with regard to his brokerage business and that the diaries/note books do not bear the name of the assessee and also do not reflect the transaction of the assessee. With regard to RUD-6, the assessee submit that the same is a Nilgagan duplicate book, wherein only four pages contained details of some transactions, but the said pages do not bear any date. Thus, no reliance can be placed on the note book to allege clandestine removal of goods, since it is not possible to ascertain to which period, these transactions pertain to. The assessee has relied on the decisions in the case of Rama Shyama Papers Ltd. & others Vs. CCE - 2004 (168) ELT 494 (Trib.), Sakeen Alloys Pvt. Ltd. Vs. CCE - 2013 (296) ELT 392 (Trib.)- 2013 (308) ELT 655 (Guj.) - 2015 (319) ELT A117 (SC), Karnavati Synthetics Ltd. Vs. CCE - 2014 (304) ELT 696 (Trib.), Raj Sandeep Vs. Collector - 2003 (162) ELT 1028 (Trib.), Commr. Vs. Rexin Sea India Ltd. - 2003 (156) ELT 147) Trib.), CCE Vs. Chola Spinning Mills (P) Ltd.- 2009 (92) RLT 731 (Trib.) to state that demand of duty on the basis of the documents recovered from third party is not sustainable.

3.4 With regard to the reliance placed in the show cause notice on the statements of Shri Girish Chand, Shri Devinder Kumar Sharma, Shri Kishan Kumar Srivastava, Shri Rajender Prasad Gupta, Shri Vinod Kumar Gupta and Shri Anurag Jain, the assessee submitted that the said persons had retracted from the statements earlier furnished before the DGCEI Officers and also

stated that such statements were recorded under threat of arrest. Thus, the assessee submitted that since the statements recorded were retracted at the first available opportunity, no reliance can be placed on such statements. In this context, the assessee has relied on the judgment of Hon'ble Delhi High Court in the case of CCE vs. Vishnu & Co. Pvt. Ltd. – 2016 (332) E.L.T. 793 (Del.) and the decision of Tribunal in the case of Centurian Laboratories vs. CCE – 2013 (293) E.L.T. 689 (Tri.)

3.5 With regard to seizure of cash of Rs. 6,20,000/- from the residence of Shri Rajender Prasad Gupta and his wife Mrs. Ritu Gupta, the assessee submitted that out of such seized amount, an amount of Rs.6,08,000/- was the cash-in-hand of the firm of Mrs. Ritu Gupta, mother of Shri Vinod Gupta, who is the proprietor of the assessee. That the said amount has been duly reflected in the income tax return of Mrs. Ritu Gupta for the year 2005-06. With regard to the balance amount, the money was kept by Mrs. Ritu Gupta at her house for daily house hold expenditure. The assessee further submitted that since no show cause notice has been issued to Mrs. Ritu Gupta, the cash seized from her custody cannot be confiscated.

4. The Revenue has assailed the impugned order on the ground that dropping of duty demand of Rs.1,21,42,057/- is not legal and proper and accordingly, the said amount was required to be confirmed alongwith interest with imposition of equal amount of penalty. Further, the Revenue's contention is that

seized currency cannot be offered for redemption under the Central Excise Statute.

5. Heard both sides and perused the case records.

6. The case of un-accounted clearance against the appellant- assessee was sought to be supported mainly on the basis of certain documents recovered from Shri. Girish Chand and Shri. Devinder Kumar Sharma, stock verification of copper scrap and statements of certain person including these two individuals. It is contented that during the course of stock verification of raw-material (copper scrap) the officers found shortage of about 3500 Kgs. The methodology adopted for stock verification is questioned by the appellant- assessee. It is contended that the officers made only an estimation by visual survey and not by actual weighment. The Original authority recorded that since the authorized representative has signed the Panchnama admitting the shortage, the stock verification cannot be questioned. However, it is not clear as to whether actually a physical weighment has been made of the stock of raw-material. Admission of the authorized representative by signing the Panchnama is the sole reason recorded by the original authority to uphold the shortage of raw-material. Even considering that there is such shortage, that cannot be automatically converted into a charge of un-accounted manufacture and clearance of excisable final product.

7. The main reliance by the Revenue was placed on the documents and statements of Shri Girish Chand and Shri Davinder Kumar Sharma. The original authority held that these two persons are employees of the appellant - assessee. Shri Girish Chand is stated to be only a labour contractor supplying labourers to the appellant - assessee. He also supplies labourers to various other similarly placed clients. Similarly, Shri Devinder Kumar Sharma is stated to be a dealer of copper items and scrap. The appellant - assessee strongly contended that these two persons are not their employees or not in their payrolls. They relied on the salary and employees register and also further affidavits filed by these two persons. We note that this aspect have not been examined by the original authority, except stating that the affidavits were belatedly filed, only in November, 2011 and cannot be considered. Regarding statements given by these two persons and others, the appellant - assessee pleaded that these were retracted at the earliest possible time. They have submitted copies of retraction letter alongwith postal evidence for dispatch to the excise authorities.

8. We note that the fact that these two are employees of the appellant - assessee could not be established with any clear supporting evidence. In-fact, the appellant - assessee produced adequate evidence to the contrary. Further, the private records maintained by Shri Girish Chand were also relied upon by the Revenue to support the claim of un-accounted manufacture and clearance of copper ingots. The appellants - assessee contested

the claim, as factually untenable. The capacity of the only furnace with the appellant – assessee is 3.5 M.T. Each heat takes 8 to 9 hours. Even if the furnace is operated round the clock, it is not possible to have more than 3 heats in a day. The diary maintained by Shri Girish Chand indicated in some pages four bhattis against some dates. Even five bhattis are also mentioned. Apparently, such entry cannot be taken as heat, as it is not possible to have, more than three heats per day. This puts serious question mark on the reliability of record maintained by Shri Girish Chand to support the allegation of clandestine manufacture of copper ingots. The appellant – assessee indicated that the records maintained by Shri Girish Chand as a labour contractor is with reference to number of labourers working per heat in the appellant - assessee's unit. We find that these basic facts were not examined in right prospective and commented upon by the original authority. This has significantly weakened the case of Revenue.

9. We find that the case of un-accounted manufacture and clearance is built upon certain sketchy evidences as narrated above, without any concrete corroboration. While we note that the cases of clandestine removal cannot be precisely proved with 100% corroborative evidences, it is essential to have at least standard evidence which will clearly show the existence of un-accounted manufacture and clearance. In the present case, we find that whatever evidences formed basis for the case of the Revenue are falling short of minimum requirement of credible

case of clandestine removal. While no specific parameter for list/ nature of evidences could be set as a standard to establish clandestine manufacture and clearance, some of the basic criteria which are to be considered in such cases have been examined by the Tribunal in the case of Arya Fabrics Pvt. Ltd. – 2014 (311) E.L.T. 529 (Tri. Ahmd.) observed as below:-

"40. *After having very carefully considered the law laid down by this Tribunal in the matter of clandestine manufacture and clearance, and the submissions made before us, it is clear that the law is well-settled that, in cases of clandestine manufacture and clearances, certain fundamental criteria have to be established by Revenue which mainly are the following :*

(i) There should be tangible evidence of clandestine manufacture and clearance and not merely inferences or unwarranted assumptions;

(ii) Evidence in support thereof should be of :

(a) raw materials, in excess of that contained as per the statutory records;

(b) instances of actual removal of un-accounted finished goods (not inferential or assumed) from the factory without payment of duty;

(c) discovery of such finished goods outside the factory;

(d) instances of sale of such goods to identified parties;

(e) receipt of sale proceeds, whether by cheque or by cash, of such goods by the manufacturers or persons authorized by him;

(f) use of electricity far in excess of what is necessary for manufacture of goods otherwise manufactured and validly cleared on payment of duty;

(g) statements of buyers with some details of illicit manufacture and clearance;

(h) proof of actual transportation of goods, cleared without payment of duty;

(i) links between the documents recovered during the search and activities being carried on in the factory of production; etc."

10. We also note that during the course of enquiry, the officers did get some details regarding sale of copper ingots to various buyers, which was alleged to be un-accounted. No verification has been done from any of these buyers. There has been no evidence or discussion regarding excess electricity consumed and labour deployed, transport of un-accounted raw-material as well as finished goods etc. As already noted, the case of the Revenue is not supported by credible cogent evidence, which will indicate an inescapable conclusion of un-accounted manufacture and clearance. On careful consideration of the impugned order and the appeal papers, we find that the confirmation of demand for clandestine removal cannot be sustained based on the evidences now available on record. Accordingly, we set aside the impugned order. Since the case against the appellant-assessee could not be established regarding un-accounted clearances, the seizure and confiscation of Indian Currency and penal proceedings against the appellant – assessee will also fail.

11. Regarding appeal by the Revenue, we note that the main grievance is dropping of the demand for un-accounted clearance of copper wire rods. The original authority held that the appellant – assessee did not possess required machinery for converting ingots into copper wire rods. He based his finding on the facts of the facility available with the appellant – assessee. The contention of the Revenue is that the appellant – assessee has got wire rods manufactured on their account using hired labours. In this connection, we have perused the findings

recorded by the original authority at para 3 (iii) of the impugned order. It is clear that on physical verification of the premises of the appellant – assessee on 21.05.2005, no rolling mill was installing in the factory. No evidence has been placed in the proceedings before the lower authority to the effect that the appellant – assessee got wire rods manufactured by using some other's facility. As such, we find no merit in the appeal by the Revenue.

12. In view of the above discussion and analysis, we allow the appeal filed by the appellant - assessee and dismiss the appeal filed by the Revenue.

(Pronounced in the open court on 08.06.2017)

(B. RAVICHANDRAN)
MEMBER (TECHNICAL)

(S. K. MOHANTY)
MEMBER (JUDICIAL)

Anita