IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH : NEW DELHI
COURT No.

APPEAL Nos: E/2200 – 2201/2012-EX[DB]

(Arising out of Order-in-Original No. 13/2012/CE/JPR-II/Commissioner dated 27/02/2012 passed by Commissioner of Central Excise, Jaipur-II)

M/s Peacock Industries Ltd.
(E/2200/2012-EX[DB]
& **Appellant(s)**
Mr. Shabbir Hussain, Ex-Whole Time Director
(E/2201/2012-EX[DB]
Vs.

Commissioner of Central Excise, Jaipur-II **Respondent(s)**

Appearance:

Shri Bipin Garg (Advocate) for Appellant
Shri H. C. Saini, (DR) for Respondent

CORAM:

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

Date of Hearing : 02/06/2017

Date of Pronouncement 18.10.2017

FINAL ORDER NO…57278-57279/2017

Per: Anil Choudhary

This appeal is against Order-in-Original dated 27th February, 2012 passed by the Commissioner of Central Excise, Jaipur-II disallowing the Cenvat credit on the inputs in part, along with equal amount of penalty along with order for confiscation and also penalty on the director, Rs.5 lakhs.

2. The brief facts of the case are that the appellants are engaged in manufacture of Plastic Moulded Furniture & Plastic Articles. The Anti-Evasion Wing inspected the factory

premises of the appellants at Udaipur on 16/03/1999 and carried out detailed physical stock verification and found some discrepancies in the stock of some finished goods as compared to the stock mentioned in RG-I. The details of the physical verification are as follows:-

SI.No.	Description of goods	Stock as per RG-I	Stock found on Physical Verification	Difference Nos./%
I.	Arms Chair	15086 Nos.	15813	(+) 727 Nos./7.3%
II.	Chairs without Arm	3192 Nos.	3272	(+) 80 Nos./0.8%
III.	Crates PCC	818 Nos.	1214	(+) 396 Nos./3.4%
IV.	Plastic Scrap	18450 Kg	18624 Kg	(+) 174 Kg/1.74%
V.	Baby Chairs	24732 Nos.	22260 Nos.	(-) 2472 Nos./10%

3. The goods found in excess at SI No. I-IV above valued at Rs.1,76,697/- involving duty of about Rs.28,383/- found in excess of the recorded balance in RG-I were seized on reasonable belief that these were liable for confiscation. Goods mentioned at SI. No. V of the above table, valued at Rs.96,408/- involving duty of Rs.15,425/- was found short of the recorded balance in RG-I. Statement of Shri Sanjay Bolia was recorded, Sales & Dispatch Officer and also authorized secretary, of the appellants. He could not give logical explanation for the discrepancies found during the course of physical verification. He however, stated that the discrepancies may be due to accounting mistake on their

part.

4. Accordingly show cause notice dated 9th September, 1999 was issued requiring the appellant to show cause as to why the seized quantity of goods as mentioned at SI. No. I-IV of the table hereinabove valued at Rs.1,76,697/- should not be confiscated and as regards the shortage found with respect to Baby Chairs involving duty of about Rs.15,425/- the same was proposed to be demanded with further proposal for appropriation and also proposed penalty.

5. The appellants filed reply to the show cause notice vide reply dated 12th February, 2000, wherein it was explained that the chairs etc. are manufactured in the moulding machines located at the shop floor. When the chairs come out of the mould, the same are actually either having shape of a complete chair or some chairs are manufacturing defects, which are then recycled. Even the chair after being removed from the mould which although have the shape of chair, the same have to undergo further finished by removing the extra material stuck to the edges and by further affixing a sticker of the manufacturing Company. After such process only the same are packed in lot of 12 chairs and on such completion, the goods are sent to the bonded stock room and entered in the RG-I Register. Appellant in the facts of this case averred that chairs have been counted including that at the shop floor, thereby accounting even the semi-finished goods which had not yet reached RG-I stage. Further, the RG-I Register

was written up to 15th March, 1999 and the production for the day, on 16th March, 1999 was naturally yet to be entered at the time of inspection. The normal manufacturing capacity is 1500 chairs per day and thus, the discrepancy or excess found is well explained. Further, there appears to have occurred errors in the stock verification as some baby chairs might have been wrongly entered as Chairs, which has resulted in excess stock of normal chairs and discrepancy in Baby Chairs. It was further stated that the annual production of the appellant is around 15 lakh chairs and therefore the minor variation found at the time of inspection is a normal variation in stock taking and thus calls for no adverse inference. Similarly, the excess found in plastic waste is also less than 2% of the stock and is attributable to normal error in physical verification, which was done by way of approximation and no actual weighment was done, as required under the provisions of law.

6. Another show cause notice dated 16th March, 2000 was issued, which alleges that corporate office was also searched of the appellants on 18th March 1999. During the course of visit some incriminating documents were recovered and resumed under proper Panchnama. The appellant was purchasing plastic granules (PPCP or inputs) from M/s JK Enterprises (JKE for short) a dealer of IPCL, and M/s Reliance Industries Ltd. Patalganga, Maharashtra. On scrutiny of records it appeared that the appellants have availed and

utilized Modvat credit fraudulently amounting to Rs.61,78,804/- on 810.451MT of plastic granules shown to have been received against 84 invoices, as per Annexure 'A' to SCN, during the period 30th of March, 1997 to 16th of March, 1999, as it appeared that the appellants have not received such granules in the factory. The case of the Department is that the appellant had actually not received the 810.451MT granules on such 84 invoices. During the visit to the factory on 16th March, 1999 the officers have resumed two Registers, one, namely 'Gate Entry' and the other known as 'Vahan Register.' In the Gate Entry Register entries for all the trucks by which inputs were received were made, however in Vahan Register, entries of some trucks were not made/confirmed. Two statements, of Shri Trilok Singh Chouhan (security guard) was recorded on 16th March, 1999 and on 19th March 1999, who explained that there are six guards, two in each shift of eight hours. He also explained that it is not necessary that every entry is made in Vahan Register. Statement of some other employee(s) were also recorded and none of them have stated that the appellants did not receive the inputs in question. Shri Ajay kumar Jha, the Store Officer of appellants, in his statements recorded on 16th March, 1999, 19th March, 1999 and 11th May, 1999 have stated that raw material received in the factory was unloaded in the stores after scrutiny of documents and entries were made in a register called Daily Goods Receipt Register maintained in the stores, followed by preparation of goods approval memo (G.A.M.). Further facts as per the show cause notice are that some of the vehicles, the registration of which are mentioned in the invoices/GR, are not capable of carrying the goods being non-transport vehicles. Some of the transporters have either closed their business or GR/LR was not found annexed to the invoices. In 41 invoices the bilities/GR was found not attached, payment of freight in case of 24 LR was not found recorded in the books, in certain cases transportation of goods from Vadodara to Udaipur has taken more than 3 days. It has also appeared that the appellant seems to have disposed of the inputs otherwise and deposited cash in their bank account at Mumbai.

7. Both the show cause notices were adjudicated vide the impugned Order-in-Original by the Learned Commissioner, who was pleased to confirm the proposed confiscation of the goods found either excess at the time of inspection and as the goods were provisionally released, imposed redemption fine of Rs.30,000/- in lieu of confiscation. Further penalty of Rs.30,000/- was imposed under Rule 173Q of CER 1944. Further duty of Rs.15,425/- was imposed on Baby Chairs found short during verification with interest and the amount already deposited was ordered to be appropriated. Equal amount of penalty was also imposed under Section 11 AC of the Act. Further Modvat credit of Rs.61,78,804/- was disallowed on the inputs under Rule 57 of CER 1944 and the

amount of Rs.24 lakhs already deposited was appropriated. Further equal amount of penalty was imposed under Rule 57 ibid. Further penalty was Rs.5 lakhs, was imposed on Shri Shabbir Hussain Daud, whole time Director of M/s Peacock Industries Ltd.

8. Being aggrieved the appellants are before this Tribunal. The Learned Counsel for the appellants urges that the appellants received the inputs, manufactured finished goods and cleared the same on payment of duty. That there is no evidence at all that the inputs in question were diverted and some other inputs were procured from some other source for manufacturing the finished goods, which have been cleared on payment of duty. It is further urged that all the payments were made for purchase of the inputs by cheques. That there is no evidence led by Revenue of any flow back of money to the appellants. M/s JK Enterprises (the invoices of which are undisputed) have not admitted that only invoices were issued and goods not supplied. It was further urged that the appellants have received the inputs under dispute, have maintained proper records of the receipt by entering the details in Gate Register, thereafter in the 'goods received note' and the register for inputs, have utilized the same in production of finished products which have been cleared on payment of duty. The appellants have filed regular monthly returns with complete copy of RG – 23A Part I & II and all the returns filed with Modvat register were finally assessed by the

Range Officer. Further, in the course of physical verification no discrepancy in the stock of plastic granules (raw material) was found. Prior to the inspection on 16th of March, 1999 and earlier inspection has taken place by the Central Excise officers on 1st December, 1998 at the factory, wherein all the stock of raw materials/inputs, finished goods and wastage was physically verified under Panchnama. The officers had seized a quantity of 7847kg of waste and scrap of plastic lying in the factory on the ground that this waste and scrap was not entered in the RG-I by them. However, no shortage of any input was found by the Revenue officers. It is further urged that Revenue have relied upon statement of security guards who are not the competent persons. Further it is a matter of record that the 'Vahan Register' on which reliance is being placed by the Revenue is neither a statutory register nor a register maintained under authorization by the management of the appellants. The said register was being maintained at the sweet will of the security guards, and as such no reliance can be placed on the same. Further it have come in the statement of the security guard Shri Trilok Singh Chouhan that they are 6 security guards and entries may not be made by some of the guards in the said Vahan Register, (in other shifts). Had there been any ulterior motive with a view to evasion of tax, the entry of vehicles with inputs, would not have been found also in the Gate Register maintained under the authorisation of the management. Further, none of the security guards or the officers of the company have stated that the inputs (disputed) were not received. Thus the Learned Commissioner have relying selectively on the evidence on record, leading to erroneous conclusions. Further no cross-examination was allowed of the persons whose statements are relied upon, also makes such evidence inadmissible. It is also a matter of record that all the invoices in dispute, on the basis of which inputs credit was taken, were presented to the Range Officer who defaced the same. It is further urged that some minor error in case of a few invoices, or mentioning of vehicle registration numbers, cannot lead to the conclusion of non-receipt of raw materials in view of other overwhelming evidences on record. Further, the proprietor of M/s JK Enterprises Ltd. have confirmed the supply of inputs along with invoices. He has also confirmed that the invoices which correspond to the transport documents issued by some of the carriers namely M/s Chawra Road Carrier and M/s Kalwaniya Carrying Corporation were issued by them as the inputs were supplied from their godowns. As regards 24 invoices, goods were dispatched through M/s Ankita Road Lines. It is urged that M/s Ankita Road Lines is the regular transporter through whom the supplier-M/s JK Enterprises used to send the PP granules to the appellant. This has also been corroborated in the statement of Shri Ashok Kumar, proprietor of the M/s Ankita Road Lines. Non-keeping of proper records by the transporter cannot lead to the conclusion that the goods or inputs in question were not received by the appellants. As regards the 17 number of consignments transported by M/s Kalwaniya Carrying Corporation, the proprietor is Shri Omprakash of Kalwaniya Carrying Corporation confirmed the transport of inputs to the appellants. So far the issue of payment of freight for vehicles transporting inputs is concerned, it is urged that out of 84 transactions, 24 were on freight "pay basis" and therefore this allegation is applicable to only 24, number of invoices. Other LRs were not on freight 'to pay basis'. In such cases, freight is paid by the consignor. As regards 41 consignments of inputs, where the transport documents was not found to be attached to the invoices in the records of the appellants, it is urged that the transport documents appears to be misplaced, and no adverse interference can be drawn on this score alone. As regards allegation that transportation of goods have taken a longer time than normal time of 3 days from Vadodara to Udaipur, this can only mean that after preparation of the invoice, the goods were retained by the supplier and were sent to the appellant after lapse of some time. So far the appellants are concerned, it is the date of LRs which is relevant because the movement of goods from the place of supplier commences on the date shown in the LR and the goods have been received by the appellants within the reasonable/normal time from such date. As regards the allegation that the appellants have disposed of some inputs, before the same was delivered to the factory, and have deposited cash in its bank account at Mumbai, relying on some note prepared by Shri R.C. Mathur. Shri R.C. Mathur - General Manager (purchase and personnel) of the appellants, in his statement had stated that for purchase of raw material from IPCL, purchase orders were placed with JKE and the materials were transported on the vehicles arranged by the consignor. That freight for transportation of raw materials in respect of bilities "to pay" was paid by their accounts section. Further Shri Mathur have expired on 03/02/2000 and he was not available for cross-examination of his statement/explanation. Therefore, the meaning of the documents written by him has to be inferred on the basis of the literal meaning thereof, derived in the background of the statement tendered by him during investigation. The Department have relied upon the said statements and notes selectively, leading to erroneous conclusions. The note only shows that the appellants had chosen to send 108.324 MT per month and get the filler manufactured. The last line (we must work on it very fast), clearly shows that the whole program was tentative and was yet to be executed. Thus, whatever the said note shown was just a suggestion of various alternatives. The amounts deposited in the bank accounts at Mumbai, wherein fact out of sale proceeds of the finished goods. Further, there is no case of the Revenue that such amounts deposited in the bank have not been accounted in the books of accounts maintained in the ordinary course of business. The deposits in the bank account confirms the legitimacy of such deposits or the transactions. The Learned counsel also relies upon the following rulings in support of its contentions:-

(I) *UKB Electronics Pvt. Ltd. V/s C.C.E., F.O. No. A/55931-55395/2016-EX [DB], dated 20/12/2016 passed by CESTAT New Delhi.*

(II) *Hiren Aluminium Ltd. V/s C.C.E., [2009 (245) E.L.T. 386 (Tri. – Ahmd.)].*

(III) *C.C.E. V/s Parmatma Singh Jatinder Singh Alloys P. Ltd., [2012 (25) S.T.R. 281 (Tri. – Del.)].*

(IV) *Commissioner of C. EX., Raigad V/s Jay Iron & Steel Industries Ltd., [2015 (325) E.L.T. 130 (Tri. – Mumbai)].*

(V) *Motabhai Iron & Steel Industries V/s Commr. of C. EX., Ahmedabad-II, [2014 (302) E.L.T. 69 (Tri. – Ahmd.)].*

(VI) *Commr. of C. EX., Jalandhar V/s Bhawani Shankar Casting Ltd., [2006 (200) E.L.T. 540 (Tri. – Del.)].*

(VII) *B. M. A. Zinc Pvt. Ltd. V/s C.C.E., [2005 (191) E.L.T. 792 (Tri. –Del.)].*

(VIII) *Modern Ex-Servicemen Engg. Co. P. Ltd. V/s Commr. of C. EX., Panchkula [2014 (304) E.L.T. 298 (Tri. – Del.)].*

(IX) *C.C.E., Chandigarh V/s Neepaz Steels Ltd. [2008 (230) E.L.T. 218 (P & H)].*

(X) Hisar Pipes Pvt. Ltd. V/s Commissioner of C. Ex., Rohtak [2015 (317) E.L.T. 136 (Tri. – Del.)].

9. The Learned AR for the Revenue have relied upon the findings in the impugned order.

10. Having considered the rival contentions we find that the Learned Commissioner have erred in selectively relying on the evidence on record, leading to erroneous conclusion. We find that no discrepancy was found in the stock of raw materials on physical verification. Further, the variation found in the stock of armchair is only 7.3%. Chairs without arm is only 0.8%, PCC crates differences 3.4%, plastic scrap differences 1.74%. Thus, these variations are very small and are attributable to the normal variation in physical stock taking calling for no adverse inference. Further, the variation in respect of baby chairs is 10%. The appellant gave a cogent explanation that during inspection, when the physical verification of stock was done, the same was done at a hurried pace leading to error in counting. That chairs with and without arms in total are about 8% more. Whereas baby chairs are less by 10%. Thus, there being equivalence in the difference, ipso facto explains the error in physical stock taking. Further, the averment of the appellants that semi-finished goods were also counted for physical verification, have not been disputed by the Revenue. Appellants had also explained that after the chairs are moulded, some chairs have manufacturing defects, which have to be discarded and are

recycled. Even the chairs otherwise good, have to undergo further finishing. It is only after the finishing work is done and the chairs stickered, they are transferred to the bonded store room and entered in the RG–1 Register. This is also evident as the appellants have an average production of about 1500 chairs per day, which are in semi processed condition. Moreover the appellants have got an annual production of about 15 lakhs chairs and in this view of the matter, the discrepancy found at the time of physical verification is negligible calling for no adverse inference.

11. So far the dispute as regards receipt of inputs is concerned, we find that the appellants have made payment for such inputs through the banking channel. Further, other than bald allegation. There is no evidence of diversion of the raw materials. The reliance placed on the statement of the security guard is also misplaced as he had categorically stated that the 'Vahan Register' was being maintained by them at their sweet will and also there was no proper system of recording. Other security guards during the other shifts may not have always recorded the entry of trucks in the said Vahan Register. Further for all the invoices in dispute, proper entries have been found in the Gate Register, Goods Receipt Register (wherein entries were made after acceptance of the goods) with respect to all the transactions in dispute. Further, the stores officer of the appellant Mr. Jha, have also stated that the inputs/raw materials have always been received

which are being disputed by the Revenue. We also find that the Learned Counsel have demonstrated during the course of argument that the goods have been received within normal time required for transport of the goods, in almost all case, which is evident from the lorry receipts or G. R.'s. Further, we hold that Revenue have disputed 84 invoices/transactions and have disputed the vehicle numbers with respect to 3 - 4 vehicles/invoices. We hold that such minor error cannot lead to drawing of adverse inference under the fact that the Learned Commissioner have not disputed the production of finished goods and the clearance on payment of duty. Further we find that there is no allegation in the show cause notice that the appellants have acquired raw material – PP granules from some other source. We further find that there is no finding as to flow back of cash to the appellants. Further, the cogent explanation given by the appellants that the cash deposited in the bank account was out of sale proceeds of finished goods, have not been found to be untrue. We further hold that the statements recorded in the course of investigation, reliance on which have been placed by the Learned Commissioner, are not reliable in view of non-observation of the condition precedent in Section 9D of the Central Excise Act. We further find that the transporters have also supported delivery of the inputs in question to the factory of the appellants. Further, the supplier of raw material, namely, the proprietor of M/s JK Enterprises have also supported the delivery of the raw material being disputed by Revenue. We further hold that discrepancy, if any found in the records maintained by the transporter cannot lead to adverse inference against the appellant – manufacturer. We also hold that the statement/explanation given by Shri R.C. Mathur (General Manager purchase & personnel) also called for no adverse inference.

12. That in view of our aforementioned findings, we allow these appeals and set aside the impugned order. The appellants will be entitled to consequential benefits in accordance with law.

(Pronounced in Court on 18.10.2017)

(B. Ravichandran)
Member (Technical)

(Anil Choudhary)
Member (Judicial)

Lks