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

**APPEAL Nos.E/50433 & 50564/2017-EX[SM]**

(Arising out of Order-in-Appeal No. BHO-EXCUS-002-APP-260-16-17 dated 05/12/2016 passed by Commissioner of Central Excise & Customs (Appeals), Raipur)

**M/s B.P. Ispat Pvt. Ltd.** (In A. No.E/50564/2017) **&**
**Shri Sumit Agarwal** (In A. No.E/50433/2017) **Appellants**
Vs.
**Commissioner of Central Excise, Raipur** **Respondent**

Appearance:
Shri Virendra Kumar & Shri Jitendra Singh, Advocates for Appellants
Shri K. Podar, (AR), for Respondent

**CORAM:**
**Hon'ble Mr. Anil Choudhary, Member (Judicial)**

Date of Hearing : 30/11/2017
Date of Decision : 18 /05/2018

FINAL ORDER NOs-52066-52067/2018

**Per: Anil Choudhary**

As these appeals arise from common investigation and Order-in-Original, they are taken up together for disposal. The issue in these appeals is whether the appellants have resorted to suppression of production and clandestine removal of their finished goods.

2. As per the facts on record the appellants were engaged in the manufacture of MS rods, channels and angles etc. falling under Chapter 72 of the Central Excise Tariff Act. Their factory was visited by the

Central Excise officers on 20/02/2009, who conducted various checks and verifications. As a result finished goods to the extent of 6.379MTs were found in excess and raw material i.e. MS ingot to the extent of 84.295 MTs were found short. In the statement of the Director (Sumit Agarwal) accepted the said shortages and excesses.

3. Subsequently vide their letter dated 21/02/2009 the appellant disputed the difference in the stock of raw material stating that the stock of raw material in the furnace was 80MT instead of 35MT. Again on 08/05/2009, the statement of the Director was recorded where he, inter alia, stated that the raw material viz. M.S. ingots is fed in furnace in two rows. As per requirement, they also arrange the aforesaid two rows of M.S. ingots in two tiers. In case the M.S. ingots is arranged in two tiers, the capacity of furnace is 80MT; whereas in case material is arranged in one tier, the capacity of furnace comes to 35MT. However, he stated that on an average the daily production of their plant is about 30-32 MT. In the statement he also stated that all the activities in their plant i.e. from receipt of the raw material till dispatch of the finished goods to the customer are carried out by him/under his supervision and within his knowledge. As such he is responsible for all the activities being carried out in their plant. Statement dated 29/07/2009, of Shri Arun Agrawal,

Director of M/s Raja Ispat Pvt. Ltd. Silpahari, Bilaspur, was also recorded under Section 14 of the Central Excise Act, 1944.

4. Revenue got in touch with Shri Arun Agrawal, Director of M/s Raja Ispat Pvt. Ltd., who vide his statement dated 29/07/2009 deposed that it is not possible to feed M.S. ingots in furnace in two tiers as it affects the power of pusher and results in a loss.

5. A separate show cause notice dated 07/08/2009 was issued for the shortage and/or excess goods found at the time of physical verification, which culminated into passing of Order-in-Original, vide which demand of Rs.1,95,397/- along with penalty of identical amount was confirmed. Further, the excess found goods were confiscated, with option to redeem on payment of redemption fine. The said order was upheld by the Commissioner (Appeals) and the matter had travelled before this Tribunal vide Appeal No.E/155/2012–ST[SM] and vide Final Order No.51616/2014 dated 17th April, 2014 the appeal was allowed, holding that shortage or excess of raw material of finished goods does not lead to inevitable conclusion of clandestine activity or clandestine removal.

6. The brief facts, as per the show cause notice dated 18/07/2011 are that the appellant during the period 2008–09 suppressed production and removed clandestinely 1443.588 MT of MS Rod which was calculated on the basis of Dispatch Register (Private record) and other records

withdrawn from the appellant's factory premises by the preventive officers of the Department. This quantity was not accounted for in their specified records by the appellant, during the relevant period and further alleged that the said goods were removed clandestinely valued at Rs.3,42,13,036/- without issuing Central Excise invoices and without payment of duty amounting to Rs.35,23,943/- (including cess). It was also alleged that the appellants have contravened the rules by willful suppression of facts with ulterior motives and with intent to evade payment of duty. The SCN was adjudicated on contest and the proposed demands were confirmed, along with equal amount of penalty under Section 11 AC of the Act. Further, personal penalty of Rs.5 lakhs was imposed on Shri Sumit Agarwal, Director of M/s B.P. Ispat Pvt. Ltd. Being aggrieved, the appellants preferred appeal before the learned Commissioner (Appeals) who was pleased to dismiss the appeals.

7. That further facts on record are that during inspection on 20th February, 2009, the officers under panchnama resumed following records–

| **Sl. No.** | **Name of the Record** | **Pages** |
|---|---|---|
| **1.** | Computerised Stock/Sales/Purchase Statements | 01 to 37 |
| **2.** | Daily Production Register | 01 to 115 |
| **3.** | Small Note Book | 01 to 81 (15 to 45 & 49 to 63 Blank) |
| **4.** | Dispatch Register | 01 to 273 (49 to 269 Blank) |
| **5.** | Sale Invoices (Triplicate For Assessee/Office Copy) | Invoice No.01 dated 02.04.2008 to 196 dated 20.02.2009 |

8. On scrutiny of the resumed records it was observed from 'Daily Production Register' that a quantity of 2347.300 MT of MS Ingots were consumed for production of M.S. Rods, during the period from 03rd January, 2009 to 19th February, 2009 and as per the admitted ratio of 1.06 MT of MS Ingots for manufacture of 1.00 MT of M.S. Rods, the average production of M.S. Rods during the period should have been 2214.434 MT as worked out in Annexure-A to the panchnama, by the revenue. A comparison of actual production based on consumption of MS Ingots and production, as recorded in books of accounts during the above period reveals that production quantity of 1496.850 MT has been suppressed and not recorded by the appellant's company in their books, as under: –

| Period | Consumption of M.S. Ingots as per record No.2 (MT) (Daily Production Register) | Average Production of M.S. Rods (calculated on the basis of party's statement ratio 1:1.06(MT) | Production of M.S. Rods etc as per books of account during the period. (MT) | Difference (MT) (suppressed) |
|---|---|---|---|---|
| 03.01.09 to 19.02.09 | 2347.300 | 2214.434 | 717.584 | 1496.850 |

9. On scrutiny of Dispatch Register, recovered from the factory premises of the appellant company, revealed that they have recorded dispatches of 1464.588 MT of M.S. Rods of various sizes to various parties/buyers during the period from 22/01/2009 to 20/02/2009 ( till

date and time of verification). A detailed chart showing quantity of M.S. Rods dispatched during the said period, as found recorded in the dispatch register, was worked out and annexed as Annexure-B to the show cause notice. On comparing these recorded quantities with the triplicate copy of Central Excise invoice nos.01 dated 02/04/2008 to 196 dated 20/02/2009, issued by appellant company, it was found that only one Central Excise invoice, viz., 165 dated 06/02/2009 matched with the entry on page no.31 of Dispatch Register in respect of Truck No.MP-20 G-2320 dated 06/02/2009 showing dispatch of 21.00 MT (Sr. no.71 of Annexure-B to the SCN). No other Central Excise invoice was found issued by the appellant company in respect of other dispatches recorded in the Dispatch Register. Thus, it appeared that the appellant company have dispatched or cleared 1443.588 MT (1464.588-21.0) of M.S. Rods clandestinely, during the period from 22/01/2009 to 20/02/2009 without issue of invoices and without paying duty. These clandestinely clearances appeared to be corroborated with account of suppression of production (private record).

10. Being aggrieved, the appellant preferred appeal before learned Commissioner (Appeals) who was pleased to dismiss the appeal, observing that, "the adjudicating authority have rightly observed that there are sufficient corroborative evidences on record to sustain the

charge of suppression of production and its clandestine removal and his (Adjudicating authority) order confirming the demand of duty by invoking the extended period of recovery in terms of proviso to Section 11 A of the Act, is proper and correct. The imposition of penalty is also sustained". As regards cross examination being not allowed, it was observed that it is a matter of record that the appellant had not requested before the adjudicating authority for allowing cross examination of the witnesses either before submitting reply to the SCN or during the personal hearing. Further, observing that there is no absolute right for cross examination and if sufficient corroborative evidences exist, cross-examination or the statement of the deponent is not necessary. Being aggrieved, the appellants are before this Tribunal.

11. The learned Counsel for the appellant states that the observation of the learned Commissioner (Appeals) that request for cross-examination was not made is erroneous, as the request was made by the appellants in their reply to show cause notice. The denial of cross-examination is against the Principles of Natural Justice and the law settled particularly in the case of Jindal Drugs Pvt. Ltd. reported at 2016 (340) ELT 67 (P & H).

12. As regards the finding that recovery of production register and dispatch register, it was admitted by Mr. Sumit Agarwal– Director in his

statement on the date of search and also by Raju Dewangan, Production Supervisor who admitted to have made entries in the register. Subsequent denial is therefore by way of afterthought and therefore the said register belonged to the appellants and it was maintained, as per direction of the Director/Management. The learned Counsel states that the daily production register allegedly recovered from the factory and said the register to be maintained by Shri Raju Dewangan, as per the statement at the time of search, contained per hour, per day production of total pieces of rods on a particular date, and not consumption of ingots, as alleged and held. It is further evident from the statement of the Director, Shri Sumit Agarwal that neither the statement of Raju Dewangan was shown to him on the date of search nor any question in this regard or concerning to the so-called 'production register' was asked, except his signatures on some records recovered from the factory. Moreover, signature on first and last page of certain records, does not amount to admittance of the contents of the records or entries made therein. Further, the Courts below have erred in observing that Sumit Agarwal, Director in his statement dated 08th May, 2009 in reply to question no.85 admitted that entries were related to number of pieces of M.S. Ingots. The learned counsel states that from perusal of the statement dated 08/05/2009, it is evident that in reply to question no.85

it is revealed that the words in question “pieces" and "M.S. Ingots" were super scribed and moreover the entire statement being recorded subsequently, in the office by Preventive Staff, evidently was under duress and coercion. Further, in absence of any corroborative evidence, cannot be relied upon. Moreover, the Director, Sumit Agarwal was not making any entry in the said production register and Shri Raju Dewangan who had claimed to have maintained the register, clearly in reply to question no.2 stated that the said register contained the entry of daily production of Rods, kept on stand. Moreover, Shri Sumit Agarwal, Director in his reply stated that the weight of one piece of Ingots cannot be estimated, as because Ingots are placed in the stand after cutting. It was further stated that in the M.S. Ingots, piping, cut pieces or broken pieces requires cutting before keeping on stand and the cut pieces are placed with mis–roll. However, in the SCN, as well as the Courts below, considered erroneously the weight of all Ingots, placed on stand, as 1 MT, despite the clear averment by the Director. Therefore, the calculation of production and its corroboration with the dispatch register is not tenable and erroneous. Further, entire ingots are not converted into final production and the stock of unprocessed or semi-finished goods was not considered. Further, the so-called production register, appeared to be maintained by some labourer for recording the pieces of final product–

M.S. Rods, placed on stand, on the basis of which, the payment of wages was made. Further, considering the average weight of M.S. Rods, as 30Kg per Rod, the figure almost matches with the production of 704.190 MT reported in the books of account. Further, the admission of consumption of 1.06 MT of M.S. Ingots for the production of 1 MT of M.S. Bar, is not admission of clandestine removal.

13. Further, the learned Counsel states that the demand of duty has been erroneously worked out on the basis of Dispatch Register and not on the basis of production register, allegedly recovered from Weigh Bridge Section. Very few transporters were investigated and in none of the case enquiry was made from the consignee, regarding receipt of the goods and their disposal to corroborate allegation of clandestine removal. Further, the procurement of raw material was not verified to corroborate the allegation of clandestine production. Neither the trail of money transaction either for purchase of raw material or for sale of final products, was investigated. So for the finding of the Courts below, that the dispatch records recovered belong to the appellant and were maintained, as per directions of the directors/management. The learned Counsel states that the appellant director in his reply from time to time have disowned the records and entries therein. Further, the allegations based on the dispatch register recovered from weighbridge, is untenable,

firstly, being written by some unknown and unauthorised person and secondly containing some vague entries like- drawn lines (sign language), have been misconstrued to be dispatch entries of M.S. Bars. Necessary details like agreement of goods, name of the consignee, Bill number, or amount, etc. are missing and hence not admissible, as an evidence.

14. As regards the finding that 1443.588 MT of M.S. Rods worked out on the basis of dispatch register, clandestinely removed, tallied with unaccounted production of 1496.850 MT of M.S. Bars worked out from the number of pieces of Ingots, recorded and consumed during the period 22/01/2009 20/02/2009 in the production register. The learned counsel states that the said production register was for the period from 03rd January, 2009 to 20th February, 2009, did not correspond to the period in the dispatch register being 22/01/2009 to 20/02/2009. As per the statement of Raju Dewangan, the production register shows the production of 10 MM Bars only whereas the Dispatch Register as summarized (Annexure-B to SCN) shows the production of various sizes including 10 MM. So both the quantities did not tally, as alleged. Further, even considering the entry in alleged production register, as numbers of M.S. Ingots, the entire numbers of Ingots would never be converted into M.S. Rods instantly, as substantial stock of under process material obtained after rolling, but yet not attained the stage of final

product for entry in RG-1 register. This was neither verified nor accounted for while arriving at the production of M.S. Rods.

15. As regards the finding that the transporters have admitted to have transported the consignments, as recorded in the dispatch register, and one of the transporter provided copy of record maintained by him in support of the contention. The learned Counsel states that the statement recorded from the five transporters, is not reliable, as the statements have not been given freely by them. This is evident from the fact that they replied to the leading and guided questions or queries, without producing any records. They were asked whether they carried the goods from the appellant's unit on specified date and they replied in the affirmative. One of the transporter namely– Pravesh Kumar Chaturvedi declined to have carried the goods and replied that their vehicles carried the goods of M/s Prakash Industries only. Moreover, the transporters were rewarded by not making them co-noticees nor there being any proposal to impose penalty despite their so-called admission of transporting clandestinely the finished goods. The statement of one Driver Shri Shambhu Singh was recorded on 07/09/2009 who submitted some sheets of private freight record, contains only vague entries without any reference to consignor, consignee and the nature of goods transported and therefore, have got no evidentiary value. Further, statements of the transporters in absence of

their examination and cross-examination during the adjudication proceedings have got no evidentiary value, as per the provisions of Section 9D of the Act. The learned Counsel further states that the entire case of revenue is based on the two un-corroborated private scrap note books (containing some drawn lines construed to be production or dispatch entries) and statements of five transporters out of 121 alleged consignments and the adverse inference drawn on the basis of such evidence, is bad and accordingly, he prays for setting aside the impugned order and allowing the appeals. He further states that the whole case of revenue is based on presumptions and assumptions and as such no penalties are exisible.

16. The learned Counsel have placed reliance on the following rulings:–

1. *Concrete, direct and authoritative evidence required instead of unauthenticated entries by Labour- CCE Vs Ravishankar Industries Ltd. [2002 (150) ELT 1317 (Tri.-Chennai)]*
2. *Statement of few vehicle owners/ drivers not applicable to remaining others carrying goods under majority invoices that too when not produced for cross examination. 2015 (325) ELT 130 (Tri.-Mumbai).*
3. *Cross examination is integral part of principles of natural justice-Manek Chemicals Pvt. Ltd. Vs UOI [2016 (334) ELT 302 (Guj)]*
4. *Statements recorded behind back of assessee cannot be relied upon in adjudication proceedings without allowing assessee an opportunity to test evidence by cross examining makers of said statements- Jindal Drugs Pvt. Ltd. Vs UOI [2016 (340) ELT 67 (P & H)]*
5. *For establishing the factum of clandestine manufacture, the revenue is required to establish the guilt beyond doubt. The entries in the note books recovered from Shri Singh who have been denied by the Appellant to be their employee, can at the most, create a doubt against the appellant, but cannot take the place of legal evidence so as to establish charge against*

*them.- Sharma Chemical Vs CCE Calcutta [2001 (130) ELT 271 (Tri-Kolkata)].*

17. The learned A.R. for revenue relies on the impugned order. He further states that the dispatch register maintained and recovered during search/investigation contains the truck numbers. Further, some of the transporters in the follow-up investigation have admitted the fact of removal of goods, and not found recorded in the statutory books of accounts, maintained by the appellants. So far the issue of cross examination is concerned, referring to the findings in the Order-in-Original in para-16.2, it have been recorded that the noticees/appellant in their written submissions have made a specific mention that no opportunity to cross-examine any witness has been provided to them. The adjudicating authority observed– on going through the case records, I find that the noticee/appellant before submission of their written submission has not requested for cross examination of any witness. Also during the course of personal hearing the counsel for the noticee have not sought cross-examination of any witness with specific reasons for seeking cross-examination of such persons. Therefore, in the absence of any specific request being made by the noticee/appellant, I do not find any legitimate ground in their request and hence not allowed to the noticee. It is on record that all the statements recorded under Section 14 of the Act, were given voluntarily and without coercion or duress. The

principles of Natural Justice do not require cross-examination of the persons who had given information in his statement before the Central Excise Officers under Section 14 of the Act. If cross examination is allowed, as a matter of right, routinely in all the cases of clandestine transactions/dealings, witnesses and other persons involved in the transaction of the excisable goods, the very spirit of quasi judicial functions could be derailed. Further, as the demand in this case is based on material evidence on record, the cross-examination of key persons have little or no impact on the evidentiary value of the incriminating records/documents. The learned A.R. further draws my attention to the findings recorded by the learned Commissioner (Appeals) in para-10 of the impugned order– it is on record that the appellant had not requested to the adjudicating authority for allowing cross-examination of the witnesses and accordingly agreeing with the discussions, as recorded by the adjudicating authority, upheld the denial of cross-examination. Accordingly, the learned A.R. prays for dismissing the appeals.

18. Having considered the rival contentions and on perusal of the records, I hold that the statement recorded by the revenue authority from the transporters is not an admissible evidence, being in violation of the provisions of Section 9D of the Act. I find that leading questions have been asked to the transporters like from one Shri Pappal Agarwal owner

of Vehicle No.CG–13 D-1144, Question, please tell, by the said vehicle on 1st February, 2009 M.S. Rod loaded from M/s B.P. Ispat Ltd. where was it transported? Answer– on the said vehicle whether M.S. Rod was loaded on the said date from M/s B.P. Ispat, I cannot remember. I enquired from my driver who is also unable to recall. Further, one of the transporter namely Shri Pravesh Kumar Chaturvedi owner of Truck No.CG–11 AB 0361, in reply to query whether the said truck on the dates 04th, 08th and 20th February, 2009 as per record of the appellants, whether transported M.S. Rod from appellants premises to Baralar and also as regards the freight payment? In answer Mr. Chaturvedi replied that his truck only transport goods of M/s Prakash Industries. It appears that the Driver may have without his knowledge done some transporting, the freight of which have not been received by him. Further, he states that He will enquire regarding this matter from his driver.

19. Further, I find from the fact that the average daily production of the appellant plant is 30–32 MT, have not been disputed by revenue. For the disputed period under consideration from 03/01/2009 to 19th February, 2009 there are 48 working days or days multiplied by said 32 MT per day, the maximum production during the said period works out to (48x32) or 1536 MT. Thus, I find that the calculation of revenue of production of 2214.434 during the said period is erroneous and

excessive. Thus, the clandestine clearance have to be recalculated, as follows: –

Opening stock as on 03/01/2009, as per books.

Add:-Average production during the disputed period-1536 MT.

Less production of M.S. Rod (as per books of account) as found by revenue- 717.584MT.

Less:- closing stock (as on 19/02/2009) date of inspection, as per books of account.

Balance: production during the period–suppressed and clandestinely removed.

20. Further, the appellant will be entitled to set of, as regards shortage of raw material– M.S. Ingots from the excess stock of finished goods, as on the date of inspection. Accordingly, the appellant shall be liable for duty towards clandestine removal, as recalculated, as per dirdections. The penalty amount on the appellants company shall be worked out accordingly. In the facts and circumstances, the penalty imposed on the appellant-Director appears to be excessive and the same is reduced to Rs.2 lakhs. I further observe that the maintenance of the production register and the dispatch register by the staff of the appellants company, was in the knowledge of the Director/management and thus, the contents therein are reliable for drawing adverse/inference against the appellants. Further, I find that even by the rule of thumb, and the production reworked out on the basis of admitted average production, there exists element of clandestine production and removal.

21. Accordingly, the appeals are allowed in part. The adjudicating authority is directed to work out the duty payable and penalty on the Company, as directed in the order.

(Pronounced in Court on- 18/05/2018)

**(Anil Choudhary)**
**Member (Judicial)**

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